STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARQUISE LOVE ROBINSON,

APPELLANT

APPELLATE CASE NO. 2025-000699

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred by denying Appellant's motion for directed verdict when the evidence established that Appellant did not personally commit the alleged offenses, and the state presented no evidence of mutual combat or accomplice liability?

II. Whether the trial court erred by charging the jury on mutual combat or accomplice liability when the state presented no evidence of either theory?

III. Whether, under the distinct circumstances of this case, the trial court should have declared a mistrial when the jury's verdict was internally inconsistent and demonstrated a fundamental misunderstanding of the law?

STATEMENT OF THE CASE

At its July 8, 2024 term, the Lexington County grand jury indicted Appellant for the offenses of attempted murder and nine (9) counts of assault and battery of a high and aggravated nature (ABHAN). R.* (Indictments). The case was tried from November 4, 2024 to November 14, 2024, before the Honorable Walton J. McLeod, IV, and a jury. Tr. 1. Retained counsels Shaun Kent, Alexandria Benevento, and Jack Furse represented Appellant. Tr. 1. Solicitor S. Richard Hubbard, III, and Suzzane Mays represented the state. Tr. 1. The jury acquitted Appellant of attempted murder but convicted him of the nine ABHAN counts. Tr. 984-87. Judge McLeod sentenced Appellant to an aggregate prison term of thirty (30) years. S. Tr. 40[1].

This appeal follows.

[1] In the initial brief of appellant, references to the sentencing transcript from April 3, 2025 are cited to as "S. Tr."

STATEMENT OF FACTS

In 2018, Amon Rice, a close friend of Appellant, was murdered. Tr. 453, ll. 3-7. Rice's murder was most likely perpetrated by Jewayne Price, who along with his mother and sister, were arrested and charged in Richland County for the death. Tr. 455, ll. 1-18. Rice and Price met to engage in a fight; guns were drawn, and Rice was killed. Tr. 454, ll. 7-25. However, for reasons that are not clear in the record, the Richland solicitor entered *nolle prosequi* dispositions for Price's charges. Tr. 455, ll. 1-18.[2]

On Easter weekend 2022, Appellant, Amari Smith, Christian Davis, and Marquise Mosely went to the Columbiana Mall for the purpose of shopping. Tr. 257, ll. 2-7; 258, ll. 20-25. At the same time, Jewayne Price was shopping at the mall with his girlfriend. Tr. 263, ll. 18-23. The two groups noticed each other while walking through the mall. Upon noticing Appellant's group, Price and his girlfriend turned in the opposite direction to begin walking toward Appellant's group. Tr. 276, ll. 9-21. At the same time, Price moved the bag he was holding into his non-dominant hand, and his girlfriend began separating from him. Tr. 276, ll. 9-21. When close enough for Appellant's group to hear, Price said "smoking on Amon," an insult aimed at Appellant's deceased friend, Amon Rice. Tr. 458, ll. 3-13, 583, ll. 20-23.[3]

Price drew a gun from his waistband. Tr. 281, ll. 8-21. Shortly thereafter, Appellant began to draw a gun from his own waistband. Tr. 284, ll. 2-10. Price fired the first shot of the encounter before Appellant had raised his gun to aim at anything. Tr. 755, ll. 12-23. Appellant

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[2] Appellant was not involved in this incident, and no evidence was presented of the same. Tr. 463, ll. 15-19.

[3] This insult is derived from the slang phrase "smoking that [name] pack," which is used to insult the memory of a decedent. INDX, *Smoking that * pack*, Urban Dictionary (Nov. 6, 2020), https://www.urbandictionary.com/define.php?term=smoking+that+%2A+pack (last accessed May 18, 2026).

would only raise his gun to an approximate forty-five-degree (45°) angle before Price began shooting. Tr. 759, ll. 11-13. After Price began shooting, Appellant ducked behind a mall kiosk and did not move from that location until the shooting concluded. Tr. 332, ll. 14-16; 334, ll. 21-14. Appellant never aimed his gun at any person. Tr. 338, ll. 1-15; *see also* Tr. 779, ll. 15-17 (Appellant raising his gun cannot be attributed to him aiming at any specific person). In total, Smith and Price shot seventeen (17) times at each other. Eleven (11) of those shots were fired by Price. Tr. 706, ll. 7-16. Nine (9) people were struck by gunfire and injured. Only thirty (30) seconds elapsed from the time Price and Appellant noticed each other to the end of the shooting. Tr. 301, ll. 3-9.

Trial

Appellant was charged with the attempted murder of Price and nine (9) counts of ABHAN. The state's theory at trial was accomplice liability and mutual combat. His case was tried over seven (7) days before the Honorable Walton J. McLeod, IV, and a jury. Tr. 1. Before trial, Appellant moved for a change in venue, due to the pre-trial publicity generated by the shooting, and the trials of Price and Smith which had occurred recently before Appellant's trial. Tr. 35, ll. 8-11.[4] The trial court denied the motion. Tr. 37, l. 7.

The state called Brian Zwolack, who was qualified as an expert in "violent crime intelligence." Tr. 442, ll. 7-16. Prior to Zwolack's testimony, defense counsel moved to exclude several of the state's exhibits depicting Appellant paying tribute to Rice on the grounds that it would potentially associate Appellant with criminal or gang activity. Tr. 434, ll. 1-19. The trial

[4] Smith pleaded guilty; Price was convicted at trial. Price's direct appeal to this Court was dismissed under Rule 207, SCACR. *State v. Jewayne Marquise Price*, App. Case No. 2025-000748 (Ct. App.).

court overruled the objection due to the state's position that Appellant's "tributes" were important to its theory of mutual combat. Tr. 436, ll. 8-12.

Zwolack testified that violence is a "culture" which Price, Appellant, and Smith were enmeshed in. Tr. 449, ll. 10-24. In the "violent culture," it is common to use certain verbiage associated with the loss of friends, such as in Appellant's Facebook post which read "#AmonWorld" and "L-L-M-O-N" or "long live Mon." Tr. 450, ll. 12-20. After recounting details of Rice's murder, Zwolack testified that, generally, it was likely that the death of a friend—at least within the "violent culture"—would be met with more violence. Tr. 456, ll. 19-24. Appellant and Price were "ops," and Price was unafraid of confrontation. Tr. 460, ll. 2-7, 10-12. Zwolack further testified that firearm usage was very common within the "culture of violence," and those within the culture arm themselves because violence is "inevitable." Tr. 461, ll. 2-6, 12-19. Further, a particular place banning concealed weapons would not stop anyone from the "culture of violence" from carrying a gun because they are not concerned with the law; if anything, bans on concealed carry make these people more likely to carry concealed guns. Tr. 462, ll. 3-9. On cross-examination, it was revealed that Zwolack never spoke to Appellant, Rice, Price, or Smith, does not live in their community, and was drawing his conclusions solely from social media "as well as incidents that occurred." Tr. 463, ll. 1-20.

Investigator Chauncey Duckett testified that he took a statement from Appellant after his arrest. Tr. 519, ll. 18-23; State's Exhibit 179 (CD)(on file with this Court). In the statement, Appellant stated that he and Price pulled their guns out at "damn near the same time." Tr. 581, ll. 12-16.[5] Appellant told Duckett that he knew Price had a gun. Tr. 582, ll. 10-14. Price insulted

[5] Appellant's exact words here were: "Damn near same time…Like damn near when he whipped out, I damn near was just pulling my shit out." *See* State's Exhibit 179 (CD) at 45:54 – 46:20 (on

Rice to Appellant and had previously been "talking slick" about Rice on social media. Tr. 583, ll. 20-23; 585, ll. 4-10.

Thomas Smith was qualified as an expert in crime scene investigation and reconstruction and firearm examination. Tr. 734, ll. 13-17. He testified that by combining the security camera footage from the mall with other forensic evidence, they were able to determine who had fired what shots. Tr. 735, ll. 22-24. The first person to shoot during the encounter was Price, who shot at Appellant. Tr. 764, ll. 4-6. Appellant's gun was determined to be jammed, and thus inoperable. Smith testified that, in his opinion, Appellant had attempted to fire the gun while in the mall, but Smith could not determine how or when, other than to give three theories. Tr. 782, ll. 16-20. First, Smith opined that Appellant could have fired in the mall, but due to "limp-wristing" or improper handling of the gun, it jammed. Tr. 783, l. 21 – 784, l. 23. In this situation, the startle of Price's gunshot could have caused an inadvertent "sympathetic discharge," if Appellant's finger was already on the trigger. Tr. 788, ll. 17-24. The second possibility is that Appellant's gun fired when he dropped to the ground after Price had started shooting, causing a misfire. Tr. 790, l. 18 – 791, l. 2. The third possibility is that Appellant fired the weapon at a previous time, jammed it, and then took it to the mall already jammed. Tr. 793, l. 23 – 794, l. 4. During cross-examination, defense counsel pointed out that a "limp-wristed" shot would have sounded like a normal gunshot, and no one around Appellant can be seen reacting in the video. Tr. 811, ll. 7-17, 815-16.

At the close of evidence, defense counsel moved for directed verdict. Tr. 830. Appellant asserted that there was no evidence supporting accomplice liability. Tr. 862, ll. 19-22. He further asserted that the evidence only supported that Appellant and his friends were at the mall to shop, and they happened upon Price a mere thirty (30) seconds before the shooting. Tr. 863, ll. 17-21.

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file with this Court). Appellant later clarified that the guns were not drawn at the exact same time; rather, Price already had his gun out. *See* State's Exhibit 179 at 49:30 – 50:00.

Defense counsel asserted that this meant there was no evidence of any sort of agreement or mutual intent. Tr. 863, ll. 17-21. Further, defense counsel asserted that the state was asking the court to extend the doctrine of mutual combat beyond existing case law. First, he asserted that in every case where the appellate courts found mutual combat existed, the defendant himself had used deadly force. Here, however, Appellant did not use deadly force. Tr. 867, l. 22 – 869, l. 21. Second, mutual combat had never been applied to an ABHAN charge, which Appellant asserted was another improper extension of the doctrine. *Id.* The law requires that Appellant engage in combat, which he did not. Tr. 870, ll. 16-21. And, in any event, by hiding behind the kiosk until the end of the shooting, Appellant had withdrawn from the mutual combat. Tr. 871, l. 24 – 872, l. 2. The trial court denied the motion. Tr. 877, ll. 23-25.

During the charge conference, the trial court expressed its intention to charge the jury on mutual combat and accomplice liability. Tr. 879, ll. 15-17. Defense counsel objected to both, on the same grounds as he articulated during his directed verdict motion. Tr. 880, ll. 2-15; 880, l. 21 – 881, l. 16.[6] The state filed a written memorandum in favor of its requested charge on accomplice liability. R.*(State's Memo in Support). In its memorandum, the state suggested that Appellant's argument (or at least a strawman thereof) that "Smith and [Appellant] engaged Price in a gunfight at precisely the same time through mere happenstance, without any prior coordination with one another, would defy all logic and reason." R.*(Memo at 5).[7] The state

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[6] Defense counsel specified that his objection to the accomplice liability charge was under *State v. Sellers*, 442 S.C. 140, 898 S.E.2d 116 (2024).

[7] *But see* Tr. 461, ll. 20-25 ("Q- And very often – now, we mentioned the Amon Rice fair [sic], that was a planned event, but based on your experience, are most of these confrontations planned or are they just happenstance? A- *I would say a lot of them end up being happenstance....*" (emphasis added)).

further asserted that the evidence was "clear" that a violent confrontation was intended. *Id.* The trial court charged both mutual combat and accomplice liability.

During closing arguments, the solicitor drew extensively on Zwolack's "culture of violence" testimony. For example, the solicitor made arguments such as:

- "The reason for guns is to kill. That may not be for the rest of the community, but for this violent culture, it is. It's warfare. You die, I live or I die you live. That's it." Tr. 900, ll. 7-10.
- "Why does he carry [the gun]? Because unlike the rest of us, they don't care, just to protect themselves from the unknown. They have known enemies. And they foster it. They foster it on social media." Tr. 906, ll. 5-9.
- "That's the only reason you pull a gun in this world. Murder." Tr. 914, ll. 4-6.
- "Now this is not about self-defense. The Judge isn't charging it, [Appellant] isn't claiming it. So Mr. Foreman, ladies, and gentlemen of the jury, that's not an issue for you. Self-defense is off the table. Why does he have a gun? Why? Why does he have a gun? Because he intends to use it. That is why he has a gun." Tr. 914, ll. 17-23.
- "A guy like [Appellant] who every day has to wake up and say, is there going to be a confrontation? That gun is his lifeline. Without it, he can die. It's almost like an insulin pump." Tr. 920, ll. 14-17.
- "Now, during questioning, defense counsel said, you know [Appellant] doesn't seem to be too bright. I'll tell you folks. He's got a street IQ higher than anybody in this court. It's a survival IQ. He may not speak your language and my language or anyone else's language, but it's a survival language. And when questioned he lies to protect himself.... It's shameless. That's part of the street." Tr. 921, ll. 3-13.

After the state's argument, defense counsel objected to several statements made by the solicitor. Specifically, Appellant asserted that the solicitor's "this is our community" argument was akin to a golden-rule argument. Tr. 925, l. 24 – 926, l. 5. He further objected to the solicitor's comments about the court not charging self-defense. Tr. 926, ll. 6-13. Finally, he objected to the solicitor's comments that "referred to Mr. Robinson as a bad man." Tr. 926, ll. 14-18. Defense counsel requested that the trial court give a curative instruction. Tr. 926, ll. 19-20. The trial court overruled the objections. Tr. 928, l. 14.

The trial court charged the jury on both mutual combat and accomplice liability. Tr. 975, l. 7 – 976, l. 23; 976, l. 17 – 979, l. 23. Appellant renewed his objection to those charges but had no other objections to the jury charge. Tr. 983.

The jury returned a split verdict. On the sole count of attempted murder, the jury found Appellant not guilty. Tr. 984, ll. 22-25. However, the jury convicted appellant of the remaining nine (9) counts of ABHAN. Tr. 985, l. 1 – 987, l. 6. On eight (8) of the convictions, Judge McLeod sentenced Appellant to twenty (20) year terms of incarceration, all to run concurrently. S. Tr. 40. However, on indictment 2024-GS-32-00974, Judge McLeod sentenced Appellant to a ten (10) year term of incarceration, to run consecutively to the others, resulting in a total, aggregate term of thirty (30) years. S. Tr. 40.

After trial, Appellant filed a written motion for a new trial. In that motion, he asserted, *inter alia*, that the trial court should have granted his motion for directed verdict because no evidence supported either mutual combat or accomplice liability. R.*(Motion for New Trial). He also asserted that the trial court should have granted a mistrial based on the jury's "inconsistent verdicts." R.*(Motion for New Trial). The trial court denied the motion. R.*(Order)

This appeal follows.

STANDARDS OF REVIEW

As to Issue I: "In reviewing the denial of a motion for a directed verdict, the Court must view the evidence in a light most favorable to the state." *State v. Harry*, 420 S.C. 290, 298, 803 S.E.2d 272, 276 (2017). This Court reviews the existence or non-existence of evidence, not the weight of the evidence. *Id.* "When the evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because suspicion implies a belief of guilt based on facts or circumstances which do not amount to proof." *Id.*

As to Issue II: "An appellate court will not reverse the trial [court's] decision regarding a jury charge absent an abuse of discretion." *State v. Commander*, 396 S.C. 254, 270, 721 S.E.2d 413, 421-22 (2011) (*quoting State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)). "To reverse a criminal conviction on the basis of an erroneous jury instruction, we must find the error was a prejudicial error." *State v. Bowers*, 436 S.C. 640, 646, 875 S.E.2d 608, 611 (2022).

As to Issue III: "A jury's verdict should be upheld when possible to ascertain and give effect to the jury's intent. However, a verdict which is internally inconsistent will be reversed and a new trial will be ordered." *Hundley ex rel. Hundley v. Rite Aid of South Carolina, Inc.*, 339 S.C. 285, 312, 529 S.E.2d 45, 59-60 (Ct. App. 2000). Whether a jury's verdict is inconsistent should be reviewed *de novo* as a question of law. *Cf. State v. Frasier*, 437 S.C. 625, 633-34, 879 S.E.2d 762, 766 (2022) (holding constitutional criminal procedure questions of law are reviewed de novo); *State v. Miller*, 441 S.C. 106, 119, 893 S.E.2d 306, 313 (2023) (extending *Frasier* to voluntariness of a confession); *cf. Powell v. Keel*, 433 S.C. 457, 462, 860 S.E.2d 344, 346 (2021) (interpretation of a statute is reviewed *de novo*).

ARGUMENTS

I.

The trial court erred by denying Appellant's motion for directed verdict when the evidence established that Appellant did not personally commit the alleged offenses, and the state presented no evidence of mutual combat or accomplice liability.

Even under the state's theory of the case, Appellant never fired a single shot.[8] The state's own evidence conclusively established that Appellant did not personally commit any of the nine ABHANs that he was convicted of. Further, the state did not present evidence sufficient to prove mutual combat or accomplice liability, on which its convictions are wholly contingent. This Court should reverse.

At the outset, it is important to note why the evidence establishes that Appellant did not personally commit any of the nine ABHANs. A person commits the offense of ABHAN when he "unlawfully *injures* another person, and (1) great bodily injury to another person results; or (b) the act is accomplished by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600(B)(1) (emphasis added). Unlike attempted murder and the other degrees of assault and battery, a person cannot commit ABHAN if the alleged victim suffers no injury. *See id.* Here, the evidence conclusively established that Appellant either did not fire his gun at all or that he did, and the gun jammed. Because Appellant did not personally injure anyone, he may only be

[8] Tr. 898, ll. 13-15 ("Now, one question you may have, and you may have had it for days, weeks now, can a man who didn't shoot anybody be held accountable?").

convicted of ABHAN if the state presented evidence of another theory of liability, such as mutual combat or accomplice liability. For the reasons that follow, the state did neither.[9]

A. The state presented no evidence of mutual combat.

The mutual combat doctrine is by no means new; it "has existed in South Carolina since at least 1843 but has fallen out of common use in recent years." *State v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003). Mutual combat requires "mutual intent and willingness to fight." *Id.* (*citing State v. Graham*, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973)). This can be evidenced 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 (*citing* 40 C.J.S., *Homicide* § 122). For example, "if two men, each having threatened the other, both go to the point where they know the other is going to be or have reason to believe the other is going to be, and a fight ensues…he cannot set up self-defense." *State v. Jones*, 113 S.C. 134, 134, 101 S.E. 647, 647 (1919); *see also, State v. Mathis*, 174 S.C. 344, 177 S.E. 318 (1934) (mutual combat charge was warranted where evidence showed that defendant and victim were on the lookout for each other, both were armed anticipating meeting one another, and each shot their pistol at the other). If two people engage in mutual combat, and one dies, the survivor is guilty of murder if the killing was "maliciously done," and voluntary manslaughter if the killing was done in the sudden heat of passion. *State v. Andrews*, 73 S.C. 257, 53 S.E. 423, 424 (1906). While mutual combat is most commonly used to negate self-defense, it can also form the basis for criminal liability. *State v. Young*, 429 S.C. 155, 160, 838 S.E.2d 516, 518 (2020).

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[9] It should be noted that the jury returned an acquittal on the one indictment that Appellant could have been convicted of without the mutual combat or accomplice liability doctrines: the attempted murder of Price.

In essence, mutual combat has four elements: (1) pre-existing ill-will between the combatants; (2) an "antecedent agreement to fight;" (3) mutual willingness to engage in an armed encounter; and (4) both parties knew that the other was armed. *Taylor*, 356 S.C. at 232-35, 589 S.E.2d at 4-5. The failure of proof of one of these elements is fatal to a mutual combat case. Further, "the existence of mutual combat is not wholly dispositive of criminal liability." *Young*, 429 S.C. at 161, 838 S.E.2d at 519. "A combatant may withdraw from mutual combat if he 'endeavors in good faith to decline further conflict, and, either by word or act, makes that fact known to his adversary.'" *Id.* (*quoting Graham*, 260 S.C. at 451, 196 S.E.2d at 496).

In this case, the state's failure to present any evidence of an antecedent agreement to fight between Appellant and Price is fatal to its mutual combat theory.

"Although we have a limited number of cases in our jurisprudence on the law of mutual combat, that case law unequivocally indicates that it is essential there is evidence of a pre-existing ill-will between the parties...." *State v. Bowers*, 428 S.C. 21, 34, 832 S.E.2d 623, 630 (Ct. App. 2019), *aff'd* 436 S.C. 640, 875 S.E.2d 608 (2022). "The agreement to fight [must] be entered into prior to the beginning of combat." *Id.* at 32, 832 S.E.2d at 629 (internal quotation marks and citations omitted); *see also, Taylor*, 356 S.C. at 233, 589 S.E.2d at 4 (mutual combat must arise from an "antecedent agreement to fight") (*citing, inter alia, Eckhardt v. People*, 247 P.2d 673 (Colo. 1952); *Lujan v. State*, 430 S.W.2d 513, 514 (Tex. Crim. App. 1968)).

In *Taylor*, the Supreme Court analyzed a case where the trial court had charged mutual combat in a self-defense case. *See generally* 356 S.C. 227, 589 S.E.2d 1. The defendant in that case went to the home of an acquaintance with several other people. *Id.* at 229, 589 S.E.2d at 2. One of them, Carter, was heavily intoxicated and shoved a woman into a counter. *Id.* The defendant intervened in the fight which led to him and Carter engaging in a violent, physical

altercation. *Id.* At the request of the homeowner, they took the fight outside, where the *Taylor* defendant would ultimately stab Carter fifteen times in the chest, killing him. *Id.* at 231, 589 S.E.2d at 2. The trial court charged the jury on mutual combat, and Taylor was convicted of murder. *Id.* at 230, 589 S.E.2d at 3. The Supreme Court reversed. *Id.* It held that there was no evidence to support the mutual combat charge because there was no evidence of preexisting ill-will between Taylor and Carter. *Id.* at 234, 589 S.E.2d at 5. Importantly, the violent confrontation between Taylor and Carter did not serve to satisfy the requirement of an antecedent agreement to fight. *See generally id.*

The two out-of-state cases that the *Taylor* court relied upon to adopt the "antecedent agreement" element of mutual combat also involved physical confrontations briefly preceding a fatal encounter. In *Eckardt*, the decedent accosted the defendant in a bar and the two had a physical encounter. 247 P.2d at 674. After the bartender instructed both men to take their fight outside, both men removed their coats, went outside, and fought again, resulting in the death of the decedent. *Id.* at 674-75. The Colorado Supreme Court held that these facts were insufficient to prove a "definite agreement" to fight, despite the fact that "[t]here [was] an indication of a mental resolve to that end when they both took off their coats." *Id.* at 677. Similarly, in *Lujan*, the defendant and decedent were arguing inside a bar, when defendant was yanked outside by the decedent. 430 S.W.2d at 514. Again, despite the fact of a physical encounter that was earlier in time than the combat, the Texas Court of Criminal Appeals held that this evidence was insufficient to establish an antecedent agreement to fight. *Id.*[10]

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10 At first glance, these holdings would seem to conflict with *State v. Brown*, 108 S.C. 490, 95 S.E. 61 (1918). In that case, the Supreme Court stated:

> "That, to constitute mutual combat, it is not necessary that there should be a positive agreement between the participating parties to

Here, the state presented no evidence of an antecedent agreement to fight that existed between Appellant and Price. Appellant went to the Columbiana Mall for the purpose of shopping with his friends, not unlike any other patron of the mall that day. While it is true that Appellant committed the minor misdemeanor offense of unlawful carrying of a handgun by bringing a concealed weapon into the mall, *see* S.C. Code Ann. §§ 16-23-20, 50[11], that fact alone creates no evidentiary presumption of a preexisting agreement to fight with a specific person. Therefore, evidence that Appellant had an antecedent agreement to fight with Price must come from other sources. However, the purported sources of this evidence do not support such a proposition.

First, the state presented evidence that Appellant's close friend, Amon Rice, was likely either murdered by Price or with Price's involvement. This murder occurred four years prior to the shooting at issue in this case. Apart from evidence that Price was "talking slick" on social media, there is no evidence in the record that Appellant and Price previously had any encounters or "ill-will" with one another before Price made a disrespectful comment less than thirty seconds

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> enter the combat; it is sufficient if they willfully enter into the conflict, upon the impulse of the moment. If one comes to the assistance of his friend or relative and takes part in a difficulty in which such friend or relative is engaged, he entered the combat upon the same footing of the person to whose assistance he comes, and under the same legal status."

Id. at 63 (*quoting State v. Cook*, 78 S.C. 253, 59 S.E. 862 (1906)). This language is not controlling. *Brown* was decided eighty-five years before *Taylor*, and the *Taylor* Court placed express limitations on the doctrine of mutual combat; including, specifically, the requirement of an "antecedent agreement to fight," and that "the evidence of agreement to fight be *plain*." *Taylor*, 356 S.C. at 233, 589 S.E.2d at 4 ("We believe the *restrictions* placed on the applicability of mutual combat...are warranted." (emphases added)). *Taylor*, being the more recent case, controls. *Cf., e.g., State v. Brown*, 317 S.C. 55, 58, 451 S.E.2d 888, 891 (1994) (when there is conflict between two statutes, the more recent statute controls).

[11] *See infra* at 20.

before the shooting. The state's evidence, essentially, created an inference that Price had ill-will with a *group* of which Appellant is a member but not that Price had ill-will with Appellant himself. This is not sufficient to create an antecedent agreement to fight.[12]

An illustrative example is this Court's decision in *Bowers*. In that case, this Court reviewed the propriety of a mutual combat instruction in a self-defense case. 428 S.C. 21, 832 S.E.2d 623. The *Bowers* defendant and two of his friends went to a club together. Once inside the club, one of the defendant's friends, Bailey, engaged in an argument with Chaplin and a group of men. *Id.* at 25, 832 S.E.2d at 625. After guns were flashed, the defendant's group decided to leave. *Id.* After they walked out of the club, a different, unrelated argument, between two different men began. *Id.* That second argument resulted in one of the men firing a flare gun, which led to a shootout. *Id.* Bailey was shot, and there was evidence that the defendant picked up Bailey's firearm and began shooting, though this was contested. *Id.* at 26, 832 S.E.2d at 626. Bailey died, and the defendant was charged with two murders and two attempted murders. *Id.* He raised self-defense, and the trial court charged the jury on mutual combat, leading to his conviction for voluntary manslaughter and ABHAN. *Id.* at 27, 832 S.E.2d at 627. This Court reversed. *Id.* Although the first altercation involved men that the defendant was with, and there was evidence that firearms were flashed, this Court held that there was no evidence of an antecedent agreement to fight *or* preexisting ill-will between the defendant and any of the men. *Id.* at 34, 832 S.E.2d at 630. Even though the defendant was associated with people who were involved in the preexisting ill-will, and the defendant presumably picked up Bailey's weapon in defense of those people, defendant himself was not involved in the altercation; thus, there was no evidence of an antecedent agreement. *See id.*

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[12] *Contra Alston v. State*, 662 A.2d 247 (Md. 1995) (mutual combat when defendant's group went to a location with the express purpose of engaging in gun battle).

This reasoning tracks with the purpose of mutual combat. The quintessential example of mutual combat is parties "that had threatened each other and...armed themselves to settle their differences at gun point." *Graham*, 260 S.C. at 452, 196 S.E.2d at 496. Logically, mutual combatants must have animus *with each other*. Mutual combat is not present every time two parties square-off—even at gun point. It is present only when two parties, with preexisting ill-will, having made a previous agreement to fight, do so. *See, e.g., Taylor*, 356 S.C. at 233-34, 589 S.E.2d at 5; *see People v. Ross*, 155 Cal.App.4th 1033, 1047, 66 Cal.Rptr.3d 438, 449 (2007) ("there must be evidence from which the jury could reasonably find that both combatants actually consented or intended to fight before the claimed occasion....) (emphasis deleted)). By contrast, the only evidence of ill-will between Price and Appellant in this case was that four years ago, Price may have been involved in Appellant's friend's murder. That is not sufficient under South Carolina's mutual combat jurisprudence.

Second, the state presented the testimony of an expert in "violent crime intelligence" who testified, at a high level of generality, that those involved in violent culture carry guns to protect themselves from their "ops." This too fails to create proof of an antecedent agreement to fight. If anything, the expert testimony supports the presumption that the shooting happened by mere "happenstance," which defeats mutual combat.

Mutual combat requires "pre-existing ill-will *between the parties*." *Bowers*, 428 S.C. at 34, 832 S.E.2d at 630 (emphasis added). It is not sufficient that Appellant is a member of a certain friend group or "culture;" the evidence must show that Appellant and Price had ill-will *personally*.

An illustrative example of how a person might become a mutual combatant, even when he was not originally part of the "ill-will," is *State v. Abraham*, 854 A.2d 89 (Conn. Ct. App.

2004).[13] In that case, the defendant's friends were involved in the violent theft of the decedent's cellphone—an altercation which did not involve defendant. *Id.* at 92. The next day, the decedent threatened defendant's friend and told the friend to "come to the park." *Id.* The defendant went with his friend to the park, and on the way, he stopped to pick up a firearm. *Id.* In the ensuing violent altercation between the defendant's friend and the decedent, the defendant used that firearm to shoot and kill the decedent. *Id.* Under these circumstances, the Connecticut Court of Appeals found that a mutual combat jury instruction was warranted. *Id.* at 95. The defendant "was aware" of the previous altercation, went with his friend to an event which was sure to result in violence, and armed himself for the encounter. *Id.* In other words, with full knowledge of ill-will between his friend and the decedent, while on the way to a confrontation which the defendant knew would be violent, the defendant "armed [himself] to settle their differences at gun point." *Compare id. and Graham*, 260 S.C. at 452, 196 S.E.2d at 496.

In this case, however, there is no evidence whatsoever that Appellant was carrying his firearm for the express purpose of using it to engage in combat with Price. While Appellant, like the *Abraham* defendant, was aware of hostilities between some of his friends and Price, the state's proof is missing the crucial puzzle piece that Appellant armed himself "*for* the mutual combat." *Young*, 429 S.C. at 160, 838 S.E.2d at 519 (emphasis added). Accordingly, the state did not present evidence of two crucial elements of mutual combat, and this theory of criminal liability fails.

B. The state did not present any evidence supporting accomplice liability.

Accomplice liability is premised on the theory that, generally, "the hand of one is the hand of all." 23 S.C. Jur., *Homicide* § 22.1 (2014). To be guilty as a principal under the theory of

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[13] *See Campbell v. State*, 441 S.C. 361, 369, 893 S.E.2d 492, 496 (Ct. App. 2023) (citing *Abraham* with approval).

accomplice liability, "a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act." *State v. Campbell*, 443 S.C. 182, 193, 904 S.E.2d 441, 446-47 (2024). "One who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002) (citing *State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999)). The "state must present evidence the participant knew of the principal's criminal conduct." *State v. Reid*, 408 S.C. 461, 473, 758 S.E.2d 904, 910 (2014) (*citing State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)). Accomplice liability requires proof of "pre-arrangement," which may be proven by either direct or circumstantial evidence. *See State v. Gibson*, 390 S.C. 347, 355, 701 S.E.2d 766, 770 (Ct. App. 2010); *State v. Hill*, 268 S.C. 390, 395-96, 234 S.E.2d 219, 221 (1977) ("presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt" as a principal).

The threshold inquiry is "whether there is any evidence the defendant had a mutual plan or agreement with another person to commit an initial crime." *State v. Sellers*, 442 S.C. 140, 149, 898 S.E.2d 116, 121 (2024). Next, the question is whether the unplanned crime was a "natural and probable consequence" of the first crime. *Butler v. State*, 435 S.C. 96, 98, 866 S.E.2d 347, 348 (2021); *see also State v. Harry*, 420 S.C. 290, 302-03, 803 S.E.2d 272, 278-79 (2017) (Hearn, J., dissenting (explaining that "accomplice liability is most frequently utilized in the context of burglary or robbery cases....")).

In this case, Price's actions cannot be imputed onto Appellant because the two were not acting in concert. As to Armari Smith's actions, there is no evidence that Appellant and Smith

went to the Columbiana Mall to do anything other than shop; nor is there any evidence that Appellant and Smith knew Price would be present at the mall. Therefore, the most favorable interpretation of the evidence that *was* presented suggests that Appellant and Smith agreed to illegally carry concealed firearms into the mall, despite several "no concealed weapons" signs at the various entrances. Accepting this interpretation of the evidence, the "initial crime" that Appellant and Smith "planned" to commit was unlawful carrying of a handgun which at the time was a misdemeanor punishable by a maximum of one year's imprisonment or a $1,000 fine. *See* S.C. Code Ann. §§ 16-23-20, 50 (2023).[14] The classic example of accomplice liability is one accomplice, without prior planning, shoots and kills the victim of a planned robbery, burglary, or other *violent* crime. *Harry*, 420 S.C. at 302-03, 803 S.E.2d at 278-79 (Hearn, J., dissenting). By contrast, unlawful carrying of a pistol is not defined as a violent crime, does not contain any element requiring the use of force against another person, nor does it even require forfeiture of the pistol. There can be no serious argument that a shootout is a "natural and probable consequence" of a crime this minor.[15, 16]

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[14] It is worth noting that the exact same conduct today would constitute only the offense of trespassing which is a summary court misdemeanor. *See* S.C. Code Ann. § 16-23-20(11) (2024) ("A person who violates a provision of this item, whether the violation is willful or not, only may be charged with a violation of Section 16-11-620 and must not be charged with or penalized for a violation of this subsection"); *id.* § 16-11-620 (defining offense of trespass after warning and establishing maximum penalties of thirty days' imprisonment or a $200 fine).

[15] Further, at the time, the offense of unlawful carrying of a pistol was also committed by such benign misdeeds as placing an otherwise legal firearm anywhere in a vehicle except the glove box, center console, or trunk. S.C. Code Ann. § 16-23-20(9) (2023).

[16] At trial, the state seemed to suggest that Appellant's possession of a gun in and of itself was sufficient evidence of some sort of pre-arrangement. Tr. 914, ll. 17-23 ("Why does he have a gun? Why? Why does he have a gun? Because he intends to use it. That is why he has a gun."). To the extent that the solicitor intended to suggest that gun possession *itself* was evidence of anything, that reasoning is both highly concerning and wholly inconsistent with the public policy of the state, as determined by the General Assembly, which is to protect the right of South

In support of its theory, the state asserted that the present case was analogous to two other cases, *State v. Davis-Kocsis*, 443 S.C. 127, 903 S.E.2d 491 (2024), and *Campbell*, 443 S.C. 182, 193, 904 S.E.2d 441. R.*(State's Memo pp. 4-5). Neither case is remotely analogous to this one.

In *Davis-Kocsis*, the Supreme Court analyzed a case where a decedent previously stole cash and a motorcycle from the defendant. 443 S.C. at 131, 903 S.E.2d at 493. The defendant there, after offering a bounty of seven grams of methamphetamine in exchange for information about the decedent's whereabouts, broke into the decedent's house. *Id.* After the burglary, one of the members of the defendant's group held a gun to the forehead of one of the occupants; another shot and killed the decedent upon finding him. *Id.* The Supreme Court explained that the case presented "the classic factual scenario to illustrate how the theory [of accomplice liability] works." *Id.* at 132 n. 1, 903 S.E.2d at 493 n. 1. The entire group "mutually agreed to *burglarize* [the] house...but there is no indication any of them initially intended to murder or kidnap anyone." *Id.* (emphasis added). The difference here is that Appellant, if anything, agreed to commit a minor misdemeanor offense related to carrying a concealed weapon into an improper area. There is *no* evidence to support that Appellant conspired with anyone to commit a violent crime such as burglary.

The state cited to *Campbell* while asserting "the evidence...clearly demonstrates [Appellant] and Armari Smith were acting in concert towards an illegal purpose when they simultaneously turned around and changed their course of direction to follow Price with deadly weapons...." R.*(State's Memo at 5). In *Campbell*, the Supreme Court found there was sufficient circumstantial evidence to support an accomplice liability instruction when the

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Carolinians to carry guns. *Cf., e.g.,* S.C. Code Ann. § 23-31-245 (2024) ("A person openly carrying a weapon in accordance with this article does not give a law enforcement officer reasonable suspicion or probable cause to search, detain, or arrest the person.").

defendant arrived shortly after a car carrying other shooters, carried an AR-15 rifle, made several calls to other shooters, and fourteen shots were fired into an apartment building. 443 S.C. at 187, 904 S.E.2d at 443. By contrast, the evidence in this case showed Appellant and Smith shopping normally at the mall before seeing Price at which time they confronted him for insulting them. They then engaged in a spur-of-the-moment, "happenstance" shootout.[17] Contrary to the state's assertions, the fact that Appellant and Smith "turned direction" at the same time is not explained by "prior coordination;" it is explained by both Appellant and Smith hearing Price's insult, which is the event that started the confrontation. *See* Tr. 458, ll. 3-13, 583, ll. 20-23.

For these reasons, the state presented no evidence of accomplice liability for the actions of Price. Moreover, accomplice liability would not attach to Smith's actions due to a failure of proof as to any underlying criminal action of Armari Smith and Appellant. Thus, for the reasons stated above, the state presented no evidence of mutual combat. Because Appellant's convictions are necessarily predicated on the application of one of these doctrines, the trial court erred in denying Appellant's motion for directed verdict. Accordingly, this Court should reverse.

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[17] The state asserted: "To suggest that Smith and Robinson engaged Price in a gunfight at precisely the same time through mere happenstance, without any prior coordination with one another, would defy all logic and reason." R.*(State's Memo at 5). The state's assertion is directly contradicted by its own evidence. "Q- And very often – now, we mentioned the Amon Rice fair [sic], that was a planned event, but based on your experience, are most of these confrontations planned or are they just happenstance? A- *I would say a lot of them end up being happenstance*...." Tr. 461, ll. 20-25 (emphasis added). The state and its witness even used the same word: "happenstance." The state relied upon the expert who testified that this confrontation was "happenstance" to prove large portions of its case, while simultaneously decrying parts of his testimony as "defy[ing] all logic and reason."

II.

The trial court erred by charging the jury on mutual combat or accomplice liability when the state presented no evidence of either theory.

For the reasons stated above, the state presented no evidence of mutual combat or accomplice liability. Therefore, the trial court reversibly erred by charging both to the jury.

"The law to be charged must be determined from the evidence presented at trial." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016). The trial court should only give a particular jury charge if there is evidence to support it. *See State v. Brandt*, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011) ("If there is any evidence to support a charge, the trial court should grant the request"). "A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial." *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (*citing State v. Washington*, 338 S.C. 392, 400, 526 S.E.2d 709, 713 (2000)).

Here, there was no evidence supporting mutual combat or accomplice liability. There was no evidence that Appellant had prior bad blood with Price or armed himself for mutual combat. Further, there was no evidence that Appellant went to the mall with the intention to commit any offense that could naturally result in a shootout. Therefore, the trial court instructed the jury on two "irrelevant and inapplicable principles" which constitutes reversible error.

Further, the error was not harmless. "To warrant reversal, a trial judge's...jury charge must be both erroneous and prejudicial to the defendant." *State v. Adkins*, 353 S.C. 312, 319, 577 S.E.2d 460, 464 (Ct. App. 2003). Here, the trial court's error in charging mutual combat and accomplice liability was enormously prejudicial—without the instructions, the jury could not have rendered a guilty verdict. The uncontested evidence is that Appellant did not shoot anyone.

As a matter of law, therefore, he did not commit the offense of ABHAN, as a principal. S.C. Code Ann. § 16-3-600(B)(1) (A person commits the offense of ABHAN when he "unlawfully *injures* another person, and (1) great bodily injury to another person results; or (b) the act is accomplished by means likely to produce death or great bodily injury." (emphasis added)). The only way the jury *could* have convicted him is if they found his guilt under a different theory of liability, such as mutual combat or accomplice liability. Because Appellant would have been entitled to acquittal as a matter of law in the absence of the erroneous jury charge, the charge was prejudicial.

III.

Under the distinct circumstances of this case, the trial court should have declared a mistrial when the jury's verdict was internally inconsistent and demonstrated a fundamental misunderstanding of the law.

The jury returned a verdict of not guilty as to the attempted murder of Price, yet returned guilty verdicts against Appellant for nine counts of ABHAN. Because all ten charges are inextricably connected, that verdict defies logic. In a civil case, this Court would set aside the verdict on the grounds that the jury's verdict was internally inconsistent. There is no reason to depart from that standard in this case.

"A jury's verdict should be upheld when possible to ascertain and give effect to the jury's intent. However, a verdict which is internally inconsistent will be reversed and a new trial will be ordered." *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 312, 529 S.E.2d 45, 59-60 (Ct. App. 2000) (internal citations omitted). "[W]hen a verdict is so confused that the jury's intent is unclear, the safest and best course is to order a new trial." *Johnson v. Parker*, 279 S.C. 132, 135, 303 S.E.2d 95, 97 (1983). For example, a jury verdict finding a defendant liable for a plaintiff's medical expenses but not liable for their injuries cannot be sustained, and a new trial must be ordered. *See generally Prego v. Hobart*, 287 S.C. 116, 336 S.E.2d 725 (1985). Or when a jury finds a defendant liable but imposes no damages. *Longshore v. Saber Sec. Svs., Inc.*, 365 S.C. 554, 562, 619 S.E.2d 5, 10 (Ct. App. 2005).

Of course, all of the foregoing citations are to civil cases, not criminal cases. An analysis of inconsistent verdicts in criminal cases requires review of the historical record.

A. Historical background

1. Common law and early American authorities.

"At common law inconsistent verdicts were invalid and no judgment of conviction could be entered thereon." Comment, *Inconsistent Verdicts in a Federal Criminal Trial*, 60 COLUMBIA L. REV. 999, 1001 (1960). For example, an acquittal for the offense of riot invalidated a conviction for riotously assembling and assaulting. *Id.* at 1001 n. 12 (*citing Rex v. Heaps*, 81 Eng. Rep. 502 (K.B. 1697)). It was also a rule that an accomplice could not be convicted of an offense that the principal had been acquitted. 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 184 (1642); *United States v. Crane*, 25 Fed. Cas. 691, 691, No. 14,188 (C.C. Ohio 1847) (If the principal be acquitted, the accessory must be discharged); *Commonwealth v. Andrews*, 3 Mass. 126 (1807). Another rule prohibited the conviction of one conspirator after the acquittal of another. *People v. Olcott*, 2 Johns. Cas. 301, 302 (N.Y. Sup. Ct. 1801).

That common law rule remained mostly unchanged—though entirely rejected by some jurisdictions—until the 1930s. Note, *Criminal Law: Validity of Inconsistent Verdicts*, 1961 DUKE L. J. 134, 134 n.2 (1961) (collecting cases); *see Speiller v. United States*, 31 F.2d 682, 684 (3d Cir. 1929) (holding that inconsistent verdicts must be vacated if the government relies upon the same evidence in both counts, since an acquittal on one count is, as a matter of law, the jury declaring that those facts do not exist). The rule, as it existed in the early twentieth century, was grounded in the Double Jeopardy Clause. *See, e.g., Pankratz Lumber Co. v. United States*, 50 F.2d 174, 174 (9th Cir. 1931) ("The theory of opposing inconsistent verdicts is no doubt former acquittal").

However, in 1932, the United States Supreme Court decided *Dunn v. United States*, 284 U.S. 390 (1932). In that case, a defendant was convicted of keeping intoxicating liquor for sale

but was acquitted of unlawful possession of intoxicating liquor. *Id.* at 391. The Supreme Court analyzed whether the apparent inconsistency of these verdicts required vacatur of the conviction. *Id.* That Court held that consistency in criminal verdicts was not required. *Id.* at 393. First, the *Dunn* Court held that "if separate indictments had been presented against the defendant...and had been separately tried...an acquittal on one could not be pleaded as *res judicata* of the other." *Id.* This first rationale, however, is no longer legally sound. *See Ashe v. Swenson*, 397 U.S. 436 (1970); *United States v. Powell*, 469 U.S. 57, 64 (1984) (recognizing that *Ashe* abrogated the first *Dunn* rationale, and questioning whether that rationale was even correct at the time it was decided). That leaves the second rationale, leniency. According to the *Dunn* Court, when juries render inconsistent verdicts "the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt," rather, the jury merely "assum[ed] a power which they had no right to exercise, but to which they were disposed through lenity." *Id.* (*quoting Streckler v. United States*, 7 F.2d 59 (2d Cir. 1925) (Hand, J.).[18]

The leniency rationale was explained in detail by the Second Circuit Court of Appeals, who stated:

> The very fact that the jury may have acquitted of one or more counts in a multicount indictment because of a belief that the counts on which it was (has, sic) convicted will provide sufficient punishment forbids allowing the acquittal to upset or even to affect the simultaneous conviction.... It is true, as both Judge Hand and Mr. Justice Holmes recognized, that allowing inconsistent verdicts in criminal trials runs the risk that an occasional conviction may have been the result of compromise. But the advantage of leaving the jury free to exercise its historic power of lenity has been correctly thought to outweigh that danger.

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[18] It must be noted that even after *Dunn*, numerous states including South Carolina retained the inconsistent verdict rules they had created under state law. *See infra*; *see also, e.g., Herwig v. State*, 138 S.W.2d 549 (Tex. Crim. App. 1940).

United States v. Carbone, 378 F.2d 420, 422-23 (2d Cir. 1967). The United States Supreme Court would expand on this in *Powell*, stating: "Given [the] uncertainty" of who benefits from an inconsistent verdict, "and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course." 469 U.S. at 65. Therefore, the assumption is that the jury, in rendering an inconsistent verdict, gave "the defendant the benefit of any break any single jury may wish him to have." Alexander M. Bickel, *Judge and Jury—Inconsistent Verdicts in the Federal Courts*, 63 HARV. L. REV. 649, 653 (1950).[19] Of course, this assumption is exactly that: an assumption. And even a member of the *Dunn* Court found that assumption intolerable. *Dunn*, 284 U.S. at 407 (Butler, J., dissenting) ("The inference that the jury, seeking rightly to discharge its duty, made a mistake, is to be preferred over the suggestion that it found for a defendant upon assumption of power it may not lawfully exert.").[20]

2. Inconsistent verdict rule in South Carolina

South Carolina originally followed the common law rule. In one case, two co-defendants were tried together, and on the same evidence, the jury convicted one of grand larceny and the other of petit larceny. *State v. Larumbo*, 16 S.C.L. 183, 183 (1824). Due to the "apparent inconsistency" in the verdict, a new trial was ordered for the grand larceny co-defendant. *Id.*; *see also State v. Major*, 48 S.C.L. 76, 84 (1866) ("if two are indicted together for stealing the same

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[19] Ironically, the *Dunn* Court rejected the suggestion that the inconsistent verdicts in that case may have been the result of compromise or mistake because "verdicts cannot be upset by *speculation*." *Dunn*, 284 U.S. at 394 (emphasis added).

[20] Further, the idea of leniency by a jury certainly existed at English common law, which still prohibited inconsistent verdicts. For example, a first-time felon at common law could claim the benefit of clergy; where a jury of ecclesiastical clerks, rather than a jury of laymen, would try them, resulting in punishments such as branding rather than execution. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 360-61 (1769).

goods...if guilty at all, they must both be guilty of the same grade of offense."); *and see State v. Rush*, 129 S.C. 43, 123 S.E. 765, 766 (1924) (denying the existence of a general rule requiring vacatur in *all* cases where co-defendants are tried together and the jury returns split verdicts, but recognizing the trial court's discretion to grant new trials when a verdict is "so capricious as to indicate or involve a miscarriage of justice.").

The "test" for determining whether verdicts were inconsistent eventually evolved into the following: "If the essential elements of the count of which the defendant is acquitted are identical and necessary to prove the count of which the defendant is convicted, then the verdicts are inconsistent." *State v. Mercado*, 263 S.C. 304, 307-08, 210 S.E.2d 459, 460 (1974); *accord, State v. Amerson*, 244 S.C. 374, 137 S.E.2d 284 (1964). If the jury "could logically acquit on one count and convict on the other by believing part of the evidence and disbelieving other parts," then the verdicts were not inconsistent. *Mercado*, 263 S.C. at 308, 210 S.E.2d at 460 (defendant found not guilty of murder but guilty of grand larceny was not entitled to new trial because verdicts were not inconsistent). Our Supreme Court applied this rule[21] in several cases, ultimately concluding in each that the verdict was not inconsistent. *See generally, e.g., id.*; *State v. McFadden*, 259 S.C. 616, 193 S.E.2d 536 (1972); *State v. Gore*, 257 S.C. 330, 336, 185 S.E.2d 826, 830 (1971). In one case, the Supreme Court found that a verdict was inconsistent but did not

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21 In *Mercado*, the Supreme Court suggested that the rule was established in *Amerson*. 263 S.C. at 307-08, 210 S.E.2d at 460. However, analysis of older South Carolina cases establishes that this is inaccurate. *See generally Larumbo, supra*; *State v. Duck*, 210 S.C. 94, 99, 41 S.E.2d 628, 630 (1947). In fact, the test used in *Mercado* and *Amerson* comes from a California case, which the Supreme Court first cited and analyzed in 1943. *See State v. Williams*, 202 S.C. 408, 25 S.E.2d 288, 289 (1943) (*quoting People v. Hickman*, 87 P.2d 80, 83 (Cal. Ct. App. 1939)).

reverse because the defendant suffered no prejudice from the inconsistency. *State v. Hall*, 268 S.C. 524, 528, 235 S.E.2d 112, 114 (1977).[22]

In 1991, however, the Supreme Court abolished the "rule prohibiting inconsistent verdicts in this state." *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991).[23] In that case, the defendant was charged with armed robbery, kidnapping, and criminal sexual conduct in the first degree, and was ultimately convicted of kidnapping and criminal sexual conduct in the third degree. *Id.* at 378, 401 S.E.2d at 147. The victim in that case testified that the defendant approached her from behind, held a knife to her throat, and forced her to a deserted road where he then raped her. *Id.* By contrast, the defendant testified that the victim went with him to the area willingly and was going to have sex with him in exchange for $50. *Id.* at 379, 401 S.E.2d at 147. The defendant argued that the jury rendered inconsistent verdicts, because by convicting him of CSC Third, the jury acquitted him of CSC First, one alternate element of which is a sexual battery accompanied by kidnapping. *Id.* at 382, 401 S.E.2d at 149.[24]

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[22] In *Hall*, the defendant was convicted of both murder and armed robbery but acquitted of murder while in the commission of an armed robbery. 268 S.C. at 528, 235 S.E.2d at 114. These verdicts were "obviously inconsistent," but the inconsistency could only have benefitted the defendant; thus, there was no prejudice by which to grant a new trial. *Id.*

[23] For the reasons that follow, Appellant submits that this case presents a different factual scenario, and therefore is not controlled by *Alexander*. However, to the extent that this Court finds it is bound by *Alexander*, Appellant respectfully submits that *Alexander* was wrongly decided and should be overruled.

[24] The *Alexander* Court appeared to assume without deciding that the verdicts were inconsistent. *Id.* at 383, 401 S.E.2d at 150. However, under the standard that Appellant urges this Court to adopt, the *Alexander* verdicts were not inconsistent. CSC First is committed if the victim submits to a sexual battery "under circumstances where the victim is also the victim of...kidnapping". S.C. Code Ann. § 16-3-652(1)(b). The jury could have credited the first part of victim's testimony, that defendant had forced her to travel to another area, while simultaneously crediting defendant's testimony that the victim was willing to accept $50 in exchange for sexual intercourse. There was also testimony that the victim was in possession of cocaine, which the defendant took from her, hence the armed robbery charge. *See Alexander*, 303 S.C. at 379, 401

The Supreme Court stated that the rule "has been under tremendous attack." *Id.* at 383, 401 S.E.2d at 149. It recognized that the United States Supreme Court had held that consistent verdicts were not required in federal cases. *Id.* (*citing, inter alia, Dunn*, 284 U.S. 390). It further recognized that Georgia had recently abolished its inconsistent verdict rule. *Id. (citing Milam v. State*, 341 S.E.2d 216 (Ga. 1986)).[25]

Problematically, the *Alexander* Court seemed to doubt whether an inconsistent verdict had ever been vacated by a South Carolina appellate court. *See id.* ("Alexander has cited no case, and we can locate none, in which we have applied a rule prohibiting inconsistent verdicts to grant a criminal defendant a new trial."); *but see, Larumbo*, 16 S.C.L. at 183 (doing essentially that). As a result, the *Alexander* Court did not define the rule it was abolishing or state whether there were any remaining exceptions to the rule. In fact, the Court went on to apply the very rule it stated it was abolishing. *Id.* ("Assuming the verdicts here were inconsistent, we hold that Alexander has suffered no prejudice from such."). Therefore, it is somewhat unclear whether South Carolina law ever requires the vacatur of a criminal verdict on the ground that it is legally

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S.E.2d at 148. The jury could have believed that victim was a victim of a kidnapping but that the defendant had kidnapped her in an effort to obtain her cocaine, and the victim ultimately agreed to sex not because of the kidnapping, but because she wanted to earn $50. While perhaps asinine, there does exist a hypothetical "logical reason" for reconciling the verdicts. *Rhodes v. Winn-Dixie Greenville, Inc.*, 249 S.C. 526, 530, 155 S.E.2d 308, 310 (1967).

[25] However, this ignores that Georgia retained, and still retains to this day, its "repugnancy" doctrine which requires the vacatur of verdicts if a jury returns affirmative findings that cannot logically or legally coexist. *See, e.g., McElrath v. State*, 839 S.E.2d 573, 574-75 (Ga. 2020), *rev'd sub nom., McElrath v. Georgia*, 601 U.S. 87 (2023) (repugnancy doctrine cannot be invoked to vacate an acquittal). This "repugnancy" doctrine, which was unaffected by the *Milam* case, is significantly closer to what Appellant argues *infra*.

or logically inconsistent in *any* case, such as when the verdicts are so inconsistent as to be legally impossible or mutually exclusive.[26]

B. Problems with the *Dunn* Rule

The rule announced in *Dunn* is far from without criticism. Typically, the criticism rests upon the similar issues identified by Justice Butler in his *Dunn* dissent. *See Dunn*, 284 U.S. at 407 (Butler, J., dissenting) ("The inference that the jury, seeking rightly to discharge its duty, made a mistake, is to be preferred over the suggestion that it found for a defendant upon assumption of power it may not lawfully exert."). By assuming that the jury returned its inconsistent verdict intentionally, in an effort to be lenient to the defendant, courts engage in the same sort of speculation that the *Dunn* Court professed to disclaim. *See id.* at 384. "The truth is simply that we do not know, nor do we have any way of telling, how many inconsistent verdicts are attributable to feelings of leniency, to compromise, or, for that matter, to outright confusion on the part of the jury." *DeSacia v. State*, 469 P.2d 369, 377 (Alaska 1970). "It is equally possible that an inconsistent verdict is the product of animus toward the defendant rather than lenity." *State v. Halstead*, 791 N.W.2d 805, 814 (Iowa 2010).

For that reason, several states have rejected the federal rule allowing inconsistent criminal verdicts to stand. For example, the Florida Supreme Court was presented with a case where a defendant was convicted of first degree murder and petit theft. *Brown v. State*, 959 So.2d 218, 219 (Fla. 2007). The defendant's first degree murder count was predicated on Florida's felony murder rule, and the defendant was charged with both first degree murder and armed robbery. *Id.* The jury convicted the defendant of first degree murder but found him guilty only of

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[26] However, nothing in *Alexander* seems to call into question the rule that a trial judge has discretion to order a new trial after the jury returns a capricious verdict. *Rush*, 129 S.C. 43, 123 S.E. at 766.

the lesser-included offense of petit theft, which is not a felony sufficient to form the basis of a first-degree murder conviction. *Id.* The Florida Supreme Court vacated the first degree murder conviction. *Id.* It first recognized that "[a]s a general rule, inconsistent jury verdicts are permitted in Florida." *Id.* at 220 (*citing, inter alia, Eaton v. State*, 438 So.2d 822 (Fla. 1983)). However, the case presented two possibilities: (1) the jury could have believed the defendant was guilty of *attempted* armed robbery, which was not submitted to them as an option; or (2) the jury's verdict was truly irreconcilable. *Id.* at 222. Since the resultant ambiguity meant it was possible that the defendant was wrongfully convicted of felony murder, "the possibility of a wrongful conviction...outweigh[ed] the rationale for allowing verdicts to stand." *Id.* (*quoting State v. Powell*, 674 So.2d 731, 733 (Fla. 1996)).

Likewise, the New York Court of Appeals established a rule that holds a conviction "will be reversed...in those instances where acquittal on one crime as charged to the jury is conclusive as to a necessary element of the other crime, as charged, for which the guilty verdict was rendered." *People v. Tucker*, 431 N.E.2d 617, 619 (N.Y. 1981) ("The critical concern is that an individual not be convicted for a crime on which the jury has actually found that the defendant did not commit an essential element, whether it be one element or all. Allowing such a verdict to stand is not merely inconsistent with justice, but is repugnant to it."). Rhode Island applies a rule identical to the rule previously applied by this State. *State v. Arroyo*, 844 A.2d 163, 171 (R.I. 2004) (*citing, inter alia, Mercado*, 263 S.C. 304, 210 S.E.2d at 460). Several other states also abide by similar rules which vacate convictions under certain scenarios when jury verdicts are inconsistent. *Halstead*, 791 N.W.2d at 815 (verdicts should be set aside when they "are truly inconsistent or irreconcilable"); *Hammonds v. State*, 7 So.3d 1055, 1060 (Ala. 2008) ("mutually exclusive" verdicts are not permissible); *Pleasant Grove City v. Terry*, 478 P.3d 1026, 1030

(Utah 2020) ("legally impossible" verdicts are invalid). The states that have retained the inconsistent verdict rule have identified myriad reasons why the *Dunn* Court's dismissal of the same was problematic.

First, inconsistent jury verdicts lessen the state's burden of proof. A basic requirement of due process is that a defendant in a criminal case shall not be convicted unless the state proves his guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). However, when a jury returns an inconsistent verdict, a legal error has occurred. "There is a substantial possibility that the jury has simply made an error, engaged in compromise, or engaged in some other process that is inconsistent with the notion of guilt beyond a reasonable doubt." *Halstead*, 791 N.W.2d at 815; *Brown*, 959 So.2d at 222 ("the possibility of a wrongful conviction...outweigh[ed] the rationale for allowing verdicts to stand."). "The message of *Dunn* seems to be: Better that ten innocent defendants be convicted than that ten guilty defendants be denied the boon of unlawful jury nullification...." Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 280 (1996); *see* 4 BLACKSTONE, *supra* at 352 ("It is better than ten guilty persons escape than one innocent suffer."). The view that "the jury's freedom takes precedence" over the presumption of innocence cannot be squared with any number of foundational principles of the criminal justice system. *See id.*

Second, the assumption that inconsistent verdicts are always the result of lenity is illogical. A jury reaching an inconsistent verdict could just have easily reached its result out of "hostility, bias, or some other improper animus" for the defendant. Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 834 (1998). Even outside of animus, the inconsistent verdicts could have been the result of compromise or outright confusion. *DeSacia*, 469 P.2d at 377. Without any way to know what the

jury actually thought, *see* Rule 606(b), SCRE, it is equally possible that a jury wished to *convict* the defendant of *something*—whether motivated by harshness, racism, or the fear of defendant as a "bad person" who is probably guilty of something else—than a jury wished to *acquit* the defendant of *something* merely as a sign of mercy. Furthermore, an inconsistent verdict in a civil case may just as well be indicative of the jury showing leniency, but such a verdict would not be tolerated under the law. *Price v. State*, 949 A.2d 619, 628-29 (Md. 2008). Instead, assuming that all juries who render inconsistent verdicts are just being merciful ignores a much larger problem: the return of illogical verdicts undermines confidence in the criminal justice system as a whole. *Halstead*, 791 N.W.2d at 815 ("We are not playing legal horseshoes where close enough is sufficient. It is difficult to understand why we have a detailed trial procedure, where the forum is elaborate and carefully regulated, and then simply give up when the jury confounds us.").

Third, inconsistent verdicts may implicate constitutional double jeopardy protections. "The theory opposing inconsistent verdicts is no doubt former acquittal." *Pankratz Lumber Co.*, 50 F.2d at 174. As a matter of constitutional law, if a jury returns an acquittal that conclusively determines "[t]he single rationally conceivable issue in dispute before" it, then double jeopardy will bar re-prosecution on charges arising from the same facts, even when the offenses are different for double jeopardy purposes. *Ashe*, 397 U.S. at 445 (applying civil doctrine of collateral estoppel in double jeopardy context). Due to the jury's acquittal on the attempted murder charge in this case, it necessarily decided issues essential to the ABHAN charges. Had the jury not reached a verdict on the ABHAN charges and only rendered an acquittal on the attempted murder charge, it is substantially likely that retrial on the ABHAN charges would be barred by double jeopardy. *See Yeager v. United States*, 557 U.S. 110, 122 (2009) (holding that an acquittal by a jury forecloses retrial on any count which the acquittal forecloses a necessary

element of, even if the jury was hung on the remaining counts). Just because the jury reached a verdict on something does not mean that the same double jeopardy concerns are not present here. It would be fundamentally unfair to Appellant to rescue a legally erroneous and impossible verdict merely because twelve people agreed to it. *See State v. Mills*, 281 S.C. 60, 62, 314 S.E.2d 324, 326 (1984) ("The law of double jeopardy and collateral estoppel is applied because of what we often refer to as 'fundamental fairness.'").[27]

Fourth, it makes very little sense to have a rule against inconsistent verdicts in civil cases but not criminal cases. Defenders of the *Dunn* rule often characterize reviewing inconsistent verdicts as "encroachments on the jury's province." Bickel, *supra*, 63 HARV. L. REV. at 651. The historical sanctity of a jury is, of course, not to be taken lightly. But juries in civil cases are just as historically important. *See Price*, 949 A.2d at 628 (collecting cases); FEDERALIST NO. 83 (Hamilton) (stating there is an "inseparable connection between the existence of liberty and the trial by jury" when discussing civil juries); U.S. Const. amend. VII (guaranteeing jury in civil case where amount in controversy exceeds $20 and prohibiting reexamination of facts found by the jury). Moreover, defendants in a criminal trial are entitled to substantially more procedural protections than the parties in a civil trial. *Price*, 949 A.2d at 629. "Consequently, if there is to be a difference, there should be less toleration of inconsistent jury verdicts in criminal cases than in civil cases." *Id.*; *Halstead*, 791 N.W.2d at 815 ("It is also difficult to justify that we would afford less protection in a criminal matter than in a civil matter involving money damages."). This

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[27] Further demonstrating that inconsistent verdicts present double jeopardy concerns is the fact that the common law, which prohibited inconsistent verdicts, *see* Comment, 60 COLUMBIA L. REV. at 1001, did not recognize issue preclusion under the plea of *auterfois acquit*. "'[A] man acquitted for stealing [a] horse' could be later 'arraigned and convict[ed] for stealing the saddle, tho both were done at the same time.'" *Yeager*, 557 U.S. at 128 (Scalia, J., dissenting) (*quoting* 2 MATTHEW HALE, PLEAS OF THE CROWN 246 (1736)). Thus, the Double Jeopardy Clause is generally more protective than the common law, not less. It is illogical that it would provide less protection in this one specific instance.

Court's constitutional prerogative is to correct legal errors. *See, e.g., State v. Finley*, 427 S.C. 419, 423, 832 S.E.2d 158, 160 (Ct. App. 2019) ("the appellate court's standard of review extends only to the correction of errors of law"). A jury that returns an inconsistent verdict has made a legal error; there is no difference between correcting the legal errors of a judge and a jury. *Terry*, 478 P.3d at 1034. In fact, appellate courts routinely reverse jury verdicts of guilty when "the evidence merely raises a suspicion that the accused is guilty." *See, e.g., State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009) (vacating conviction for trafficking marijuana when evidence was insufficient to establish an element of that offense).

While the jury is the ultimate fact finder in criminal cases, it violates that duty when it "decide[s] a criminal case" other than "according to established rules of law." *Price*, 949 A.2d at 627. When a jury returns an inconsistent verdict, it renders a verdict that is contrary to law. And while courts must respect the jury's prerogative as the finder of fact, that respect must not extend so far as to tolerate "the possibility of a wrongful conviction." *Brown*, 959 So.2d at 222.

C. The jury rendered inconsistent verdicts in this case

Appellant's convictions for ABHAN cannot be squared with his acquittal for attempted murder under the particular circumstances of this case. Because the jury rendered inconsistent verdicts, this Court should reverse.

Again, ABHAN can only be committed by actually injuring another person. S.C. Code Ann. § 16-3-600(B)(1). Attempted murder is committed when a person (1) with the specific intent to kill another person; (2) attempts to kill that person. *See State v. King*, 422 S.C. 47, 55, 810 S.E.2d 18, 22 (2017). The "attempt" is completed when the person pulls the trigger, anything that occurs after that point is immaterial to whether the person has committed the offense of attempted murder. *See State v. Geter*, 445 S.C. 139, 149, 912 S.E.2d 255, 260 (2025).

Here, the evidence conclusively established that Appellant did not shoot anyone. Therefore, Appellant can only have been convicted because the jury found that he was guilty under the theories of accomplice liability or mutual combat.[28] Price and Armari Smith fired a total of seventeen shots, and nine bystanders were injured. Each injured bystander accounted for one of the nine ABHAN charges. But the evidence also proved that Price and Smith fired seventeen shots *intending to hit each other*. And there is no evidence in the record by which it could have been inferred that Price and Smith were not trying to kill each other.[29, 30]

Since there was no evidence that Price and Smith were not trying to kill each other, the evidence can only point to one of three conclusions: either (1) Appellant is not a mutual combatant or accessory, and is thus not guilty on all counts; (2) Appellant is not a mutual combatant but is an accessory, and is thus guilty of the ABHANs personally committed by Smith *and* the attempted murder of Price, but is not guilty on the remaining counts; or (3) Appellant was a mutual combatant, and is thus guilty on all counts. There is not, however, any legally or logically sound view of the evidence presented to this jury that would explain the verdict it rendered. If Appellant is not guilty of Price's attempted murder, even though the evidence

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[28] Because the jury convicted Appellant of all nine ABHAN counts, including the ones personally committed by Price, it could only have convicted him under the theory of mutual combat since he was not Price's accomplice. *Compare State v. Johnson*, 444 S.C. 42, 449, 908 S.E.2d 102, 106 (2024) ("if two people plan or agree to commit the murder, and both of them are present at the scene of the crime, but only one of them actually shoots and kills the victim, both participants in the plan or agreement are nevertheless guilty...."); *with Young*, 429 S.C. at 165, 838 S.E.2d at 521 ("we extend our mutual combat jurisprudence to permit finding all mutual combatants criminally liable in situations where an innocent bystander is killed by one of the *combatants*." (emphasis added)).

[29] It should be noted that the jury was not charged on ABHAN as a lesser-included offense of attempted murder.

[30] Price was convicted of two counts of attempted murder. *See State v. Jewayne Marquise Price*, App. Case No. 2025-000748 (Ct. App.).

indisputably proves that Smith committed attempted murder against Price, then Appellant cannot be guilty of the remaining offenses. The only way for the jury to render that verdict is that it affirmatively found that Appellant is not a mutual combatant or an accomplice of Smith. There is no other conclusion that finds any basis in law or logic.

However, the jury charted a middle path. If it found that Appellant was not Smith's accomplice or a mutual combatant as to the attempted murder of Price, it certainly was not authorized to find that Appellant was a mutual combatant or accomplice as to the remaining charges. The nine ABHANs and the attempted murder were all proven by the exact same evidence.

Even when seemingly inconsistent, verdicts will be upheld if there is any "logical reason for reconciling them." *Rhodes v. Winn-Dixie Greenville, Inc.*, 249 S.C. 526, 530, 155 S.E.2d 308, 310 (1967). No such reason exists in this case. The evidence presented to the jury conclusively established that Appellant did not personally commit any of the offenses he was charged with. Further, all of the charges occurred in one single course of conduct, spurred by the same act, over the course of less than one minute. Therefore, there was no legal or logical basis for the jury to find that Appellant was an accomplice or combatant for some of the crimes but not others. As a matter of law, it was all or nothing. Thus, an acquittal on one charge and conviction on the others is a verdict that is "truly inconsistent" and "irreconcilable." *Halstead*, 791 N.W.2d at 815. "There is simply no exit from this air-tight conundrum." *Id.* at 816.

The inconsistency of the verdicts in this case create a substantial probability that the jury reached its decision based on improper factors. Without any logical basis to explain the jury's decision, it is entirely possible that it was unconvinced that the state met its burden of proof on any of the charged offenses but were motivated by the desire to punish Appellant for *something*,

since they disapproved of the actions that he took. While such a desire might be understandable to a layperson, it is the General Assembly that gets to create criminal offenses, not twelve lay citizens of Lexington County. It is also entirely possible that the jury reached its verdict out of pure confusion. This case involved accomplice liability and mutual combat, two abnormally complex areas of law. *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.2 (3d ed. 2024) (courts have experienced "considerable difficulty" in deciding accomplice liability cases). The jury could have also reached the verdict out of compromise; another improper basis for a verdict. At the same time, considering the jury convicted Appellant of nine out of ten serious felony offenses, it seems unlikely that the jury was attempting to show him any leniency.

Regardless, to try to determine which of these possibilities is most accurate would be an exercise in speculation. "The truth is simply that we do not know, or do we have any way of telling," whether this "inconsistent verdict[] [was] attributable to feelings of leniency, to compromise, or, for that matter, outright confusion on the part of the jury." *DeSacia*, 469 P.2d at 377. And therein lies the problem. The jury's actual rationale will never be known by anyone other than the members of the jury. But its verdict is so illogical that it creates an unacceptably high "possibility of a wrongful conviction." *Brown*, 959 So.2d at 222.

Because Appellant should not be subjected to thirty years in prison when there exists such a substantial likelihood that he was wrongfully convicted, this Court should reverse.

CONCLUSION

For the foregoing reasons, Appellant's convictions and sentences should be reversed. In the alternative, Appellant's convictions and sentences should be reversed and remanded for a new trial.

W. Chandler Norville
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of May, 2026.