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RE: The State v. Curtis Simms
Appellate Case No. 2013-001219

Dear Counsel:

I am enclosing two (2) copies of the Brief of Respondent, along with proof of service, in the above-referenced case.

Sincerely,

Salley W. Elliot
Senior Assistant Deputy Attorney General

SWE/ab

Cc: The Honorable Daniel Shearouse
Victim Services

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County
Honorable Diane S. Goodstein, Circuit Court Judge
Appellate Case No. 2031-001219

THE STATE,

Respondent,

vs.

CURTIS SIMMS,

Appellant.

BRIEF OF RESPONDENT

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III.

THE SENTENCING RANGE IN S.C. CODE ANN. § 22-3-560 DOES NOT APPLY TO BOPHAN; S.C. CODE ANN. § 22-5-150 DID NOT REPEAL § 22-3-560; HAIR V. STATE DOES NOT APPLY TO §§ 22-3-560 AND 22-5-150; AND JUDGE GOODSTEIN DID NOT ABUSE HER DISCRETION IN SENTENCING APPELLANT TO THE STATUTORY MAXIMUM FOR BOPHAN

STATEMENT OF THE CASE

On February 9, 2011, the Richland County Grand Jury indicted Curtis James Simms ("Appellant") with one count of Involuntary Manslaughter (2011-GS-40-0831) and one count of Breach of Peace of a High and Aggravated Nature (2011-GS-40-0829) ("BOPHAN"). The matter was called for trial before the Honorable Diane S. Goodstein on January 28, 2013. The jury found Appellant guilty of BOPHAN and not guilty of involuntary manslaughter. Judge Goodstein sentenced Appellant on February 5, 2013, to ten years imprisonment suspended, upon the service of five years in prison and three years of probation. R. 1192.

On February 15, 2013, Appellant filed a motion to set aside or reduce sentence, claiming S.C. Code Ann. § 22-3-560 limited a court's sentencing power for BOPHAN to a maximum of 30 days in prison, R. 1423, and the State filed a written response on March 13, 2013. R. 1458. On March 12, 2013, Judge Goodstein held a hearing on the motions. R. 1308. On April 25, 2013, Judge Goodstein granted the motion to reduce sentence and denied the motion to set aside the sentence. R. 1452. Judge Goodstein reduced Appellant's sentence to ten years imprisonment suspended upon the service of three years, followed by three years of probation. R. 1455. Appellant filed and served notice of appeal.

On August 1, 2013, Appellant filed a petition for writ of habeas corpus in this Court's original jurisdiction. The State filed its return on September 3, 2013. On September 13, 2013, Appellant filed a reply brief to the State's return. On November 20, 2013, this Court issued an order denying Appellant's habeas motion and certifying the pending appeal under Rule 204(b), SCACR. Appellant filed his brief on December 27, 2013. This Brief of Respondent follows.

STATEMENT OF FACTS

The State will set out facts as relevant in each argument section.

ARGUMENTS

I:
JUDGE GOODSTEIN PROPERLY EXCLUDED ALAN JAMES' TESTIMONY THAT MARTIN GASQUE BEHAVED RUDELY SOME TIME PRIOR TO THE INCIDENT BECAUSE IT WAS IRRELEVANT.

FACTS

On October 10, 2010, Adam Paxton and Martin Gasque drove to Columbia, South Carolina, to watch the University of South Carolina Gamecock football team prevail the No. 1-ranked Alabama Crimson Tide. R. 508. The two had been friends for several years. Id. Rather than attending the game in person, the two friends tailgated with several others outside the stadium, watching the game on satellite television. R. 509. After the game, the two—both avid Gamecock fans—were very excited that their team won. R. 511; 525; 531. After dropping the other tailgaters off at a location two miles outbound from the stadium, Paxton and Gasque decided to return to their hotel. R. 511; 525; 531. Paxton was navigating through typical congested, stop and go, post-game traffic on Shop Road when the driver of vehicle in which Appellant was riding blew the horn because Paxton did not allow him to merge onto Shop Road from a parking area. R. 514. Gasque threw up his hands in response. R. 514. Appellant threw his door open aggressively, exited his vehicle, and charged Paxton's pickup. R. 205 – 07; 277; 309; 344; 356; 374; 445-46; 410; 514; 549; 819; 873; 884; 891; 910; 921; 1001. The driver of Appellant's vehicle also got out. R. 514 – 515. Appellant punched and wrestled with Gasque through the window of the truck in which Gasque was traveling. R. 205; 208; 232; 277; 286; 295; 309-311; 356-357; 370. The truck was located in the lane of travel on Shop Road. R. 209; 276; 279; 281; 345; 405; 445; 747; 875; 878. As Gasque exited the pickup, Appellant began punching Gasque in the face, knocking him to the ground unconscious in the middle of traffic and in the lane designated for vehicular travel on Shop Road. R. 183-84; 188; 209; 279; 309;

311; 322; 345; 353; 3741 380; 385; 410; 1001-1002. Tragically, Paxton did not see his friend Gasque underneath his truck and, attempting to do something, slowly pulled forward to get off of Shop Road. Paxton's truck rolled over Gasque who had fallen under the truck. R. Id.; R. 280; 517- 518; 552.

On direct examination, Paxton testified that Gasque was celebrating for the Gamecocks while Paxton drove.

> SOLICITOR CAMPBELL: While y'all were going down the road, what were y'all doing?
> PAXTON: Martin was celebrating for the Gamecocks, you know telling people, you know, congratulations to the Gamecocks. And that was it. He was talking on the phone and I was just sitting in traffic.
> CAMPBELL: So when you said Martin was talking to people, what kind of people was he talking to from the truck?
> PAXTON: Carolina fans, people that would walk by.
> CAMPBELL: And what was he saying to them?
> PAXTON: You know, go Gamecock, congratulations, Woohoo.

R. 513. During cross-examination, Appellant's counsel attacked Paxton's recollection in several ways. He asked for explanations as the presence of beer in Paxton's truck and whether Paxton had noticed changes in his Gasque's behavior as he consumed alcohol throughout the day, and Paxton responded that, other than being excited, he observed no change. R. 523; 527-528.

Paxton acknowledged that he traveled for several miles and for some period of time in congested traffic. Then, counsel asked: "Now, isn't it true Mr. Paxton, that prior to -- prior -- on occasions, prior to even getting within a couple hundred yards or even a half mile of where this incident occurred . . . . R. 533. The State objected and a bench conference was held outside of both the jury and the witness's presence. Id.

The information counsel wanted to discuss was not information Paxton had presented, but, rather, from another witness counsel planned to call, Alan James. R. 534. Alan James

claimed he saw Gasque, at some point prior to the incident, step out of the truck and urinate in a bush on Shop Road. R. 1466-A. He also reported that "they were nice to Gamecock fans but no Alabama fans and had Alabama fans and "flipping them off" and cussing at them. Id. He described that "they" were loud, revving the engine, and driving aggressively. Id.

The State argued that specific prior acts of conduct are not admissible under State v. Day, 314 S.C. 410, 535 S.E.2d 119 (2000) and 608(b): "Your Honor, I do not know how whether or not this victim stepped out of the vehicle and urinated on the side of the road sometime prior is any indicator of his tendency towards violence." R. 535. The State agreed that the victim's blood alcohol level was .23 when he died, and noted that Paxton had already admitted he had seen Gasque drinking. R. 535. The State did not dispute that Gasque was intoxicated when he died. The State asserted the evidence was not relevant to intoxication and improperly impugned Gasque's character. R. 535.

Judge Goodstein indicated she understood the arguments, but wanted the State to address impeachment, which she felt was a stronger argument. R. 536. The State again argued 608(b), does not allow extrinsic evidence or specific instances of conduct to attack a witness' credibility and that the information sought was not probative of truthfulness. R. 537. Counsel argued the evidence was admissible on cross-examination for two reasons: (1) it went to the Appellant's state of mind at the time of the crime, and (2) he planned to use the information to impeach Paxton's testimony. R. 537-539. Counsel further argued that the State opened the door to the testimony by asking Paxton what he and Gasque were doing in the congested traffic. However, the record reflects this information was volunteered by Paxton but not sought by the prosecutor. R. 539.

The Court ruled the evidence was admissible to impeach Paxton's testimony that he did not see any change in Gasque's behavior as a result of intoxication. R. 540. All parties agreed

that Appellant could not present or make reference to Alan James' statement at this time. R. 540-542.

When cross-examination resumed, the following colloquy occurred:

> COUNSEL: But do you recall a period of time -- at some point of time when you were stationary when Mr. Gasque actually got out of the car?
> PAXTON: No.
> COUNSEL: You don't remember him getting out of the truck?
> PAXTON: No, he did not get out of the truck.
> COUNSEL: So you deny he got out of the truck and relieved himself on the side of the road?
> PAXTON: He did not do that.
> COUNSEL: And isn't it true, Mr. Paxton, at times Mr. Gasque was using profanity with the Alabama fans that were walking by; isn't that true?
> PAXTON: No, not at all.
> COUNSEL: You deny that from this witness stand?
> PAXTON: That's not true.

R. 543-544.

After the close of the State's case, but before Appellant called his first witness, the State objected to Alan James' planned testimony concerning Gasque's behavior. R. 766. The State noted that defense counsel planned to elicit testimony from James about Gasque's purported behavior a mile down the road prior to the actual incident between Appellant and Gasque. In his sworn affidavit, James declared that, **at some time prior to a mile before the incident**, "they" were flipping people off and cursing at them. R. 1466-A. He also stated that, at one point, Gasque got out and urinated. R. 1466-A. James also declared he saw Paxton cutting off drivers and revving his engine. R. 1467-A.

The State argued that such evidence was extrinsic evidence, and as such, it was not admissible under either Rule 608 or Mizell v. Glover, 351 S.C. 392, 570 S.E.2d, 176 (2002). R. 767. Defense counsel replied that the testimony was not extrinsic because it was not divorced in time from the event, and that the events leading up to the incident were intrinsic and admissible because they formed the fabric of this case. R. 769-772.

Judge Goodstein that held that James' proffer was inadmissible because it went to the character of the victim. R. 774. Judge Goodstein held that the only rule under which it could possibly be admitted was Rule 405(b), SCRE. R. 774- 777; 780. She originally believed the purpose of the evidence would be specific instances of conduct regarding who was the first aggressor in the altercation between Appellant and Gasque, but the proffered testimony was irrelevant to that issue. R. 775. Judge Goodstein also noted she originally allowed the testimony under impeachment theory because it went to Paxton's credibility. R. 775. She then specifically declined to allow Alan James' testimony based on the previous impeachment. R. 775.

After the ruling, Appellant proffered the testimony. R. 781-789. James testified that Paxton and Gasque were being loud, obnoxious and rude to Alabama fans. R. 784. He stated that Paxton was cutting people off. R. 785. He observed that individuals almost got into fights with "them" and that Gasque was "flipping people off," cussing and yelling. R. 785 – 786. However he admitted he did not hear the words spoken. R. 786. The State noted that the entire purpose of the testimony was to attack the character of the victim, and did not describe aggressive behavior that went to Appellant's state of mind at the time of the crime. R. 789-91. Judge Goodstein affirmed her previous ruling, and noted the evidence of urination and cursing was irrelevant because it was rude but not aggressive behavior. R. 791. Judge Goodstein also notes that James had difficulty distinguishing between the conduct of Gasque and that of Paxton and ultimately could not say profane language was used because he could not hear what said. R. 791. It was also revealed that James knew the Lindsey twins who were roommates and good friends with Appellant. The Lindsey twins were present during the incident and one, in fact, was the driver of the vehicle in which Appellant was riding and stepped from the vehicle when Appellant exited. R. 671.

DISCUSSION

Admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004).

A. Judge Goodstein did not abuse her discretion because the testimony was not relevant to the charges or Appellant's claim of self-defense.

Appellant states in his brief: "the decedent's state of mind at the time of the encounter with appellant was highly relevant." Brief of Appellant 31. Gasque's prior actions are irrelevant to the elements of BOPHAN, and Judge Goodstein properly held that the Allan James proffer was not relevant to his claim of self-defense.

Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. Rule 401, SCRE. If evidence is not relevant, it is generally not admissible. Rule 402, SCRE. Relevancy of evidence is an issue within the trial judge's discretion. State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007).

At trial, Appellant claimed self-defense. R. 1083. The relevant element of self-defense is that the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984).

Appellant asserts the proffer went to the victim's state of mind at the time, which could tend to show Gasque's propensity for violence. Brief of Appellant 31. "[W]ords accompanied by hostile acts may, depending on the circumstances, establish a plea of self-defense." State v.

Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989) (quoting State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951)).

However, Judge Goodstein found the proffered evidence went to Gasque's rudeness, not his aggressiveness or peacefulness. R. 791. While cursing, urinating, and making obscene gestures is rude, it is not physically aggressive behavior. State v. Day, 341 S.C. 410, 535 S.E2d 431 (2000) (Evidence of prior act of **violence** is admissible to prove defendant had a reasonable apprehension of violence from the victim). It does not support Appellant's claim that he had a reasonable apprehension Gasque was going to imminently attack him. Even assuming *arguendo* Gasque's behavior, as seen by Appellant, was aggressive; no evidence was presented indicating Appellant knew of Gasque's previous actions. The conduct described by James occurred at a point and time away from the scene and out of Appellant's presence. The first time Appellant encountered Gasque was seconds before Gasque was killed. Therefore, the proffered testimony cannot show whether Appellant believed he was in imminent danger of losing his life, because he never witnessed Gasque's previous behavior. There was simply no connection in time or circumstance between Gasque's purported earlier conduct unrelated to and unknown by Appellant and the later occurrence of BOPHAN. See State v. Sobers, 404 S.C. 263, 744 S.E.2d 588 (Ct.App. 2013)(stating victim's gang membership was not relevant where defendant failed to establish knowledge of fear of victim's gang membership).

Even if this Court finds that the evidence has some relevance to the charge or defense, the State submits the prejudice outweighs the probative value of this evidence. Rule 403, SCRE. The introduction of character evidence about the deceased victim would distract the jury from the legal issues in the case, creating trial within a trial on the victim's character. Allowing the jury to make the decision of Appellant's guilt based on the Gasque's character would be improper.

Thus, Judge Goodstein did not abuse her discretion in properly denying the admission of irrelevant testimony. Accordingly, her ruling should be affirmed.

B. The fact that Gasque, thirty minutes before the encounter, purportedly urinated in public, cursed at Alabama fans, and made obscene gestures would not assist the jury in forming a complete picture of the crime because Appellant was unaware of the behavior.

In the alternative, Appellant contends he is entitled, under State v. Dickerson, 341 S.C. 391, 535 S.E.2d 119 (2000), to present a complete picture of the crime under *res gestae*, and that this complete picture includes the information in the James proffer. He does not explain how or why the testimony forms a complete picture of the crime.

Appellant uses State v. Dickerson primarily for its reference to State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). Adams held that "the temporal proximity of the cocaine use to the robbery and murder is so close that one cannot deny that the cocaine use was so much a part of the 'environment' of the crime that omitting the evidence of it would unnecessarily fragmentize the State's case." 322 S.C. at 122, 470 S.E.2d at 371.

Under the theory of *res gestae*, evidence of other crimes is admissible where it is intimately connected with the pending offense, is necessary to provide a complete story or explanation of the pending offense, or where it provides a portion of the content of the pending offenses. See State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991); State v. Bolden, 303 S.C. 41, 398 S.E.2d 494 (1990); State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); See U.S. v. Masters, 622 F.2d 83 (4th Cir. 1980). See also dissent in State v. Smith, 309 S.C. 442, 424 S.E.2d 496 (1992).

The evidence of Appellant wished to offer was not related solely to the victim and was not an integral part of the crime charged. The purpose of the testimony was to reflect unfavorable on the Gasque's bad character on matters unconnected in time and context to the crime charged.

State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990) (the reference to and evidence of Respondent's crack cocaine use was not directly related to the commission of the offense charged).

Appellant's reliance on Dickerson and Adams is misplaced because none of the concerns that existed in Adams exist here. As discussed above, Appellant presented no evidence that he knew of Gasque's prior conduct, which inevitably means the prior **conduct** cannot be probative of Appellant's state of mind. The evidence proffered was not necessary to establish a complete story of the criminal enterprise and was not so linked with the offense that it explained necessary context to the jury. The proffer did not pertain to matters contemporaneous to the crime and did not present any facts that played an integral role in the commission of the crime. State v. Hough, 325 S.C. 88, 480 S.E.2d 77 (1997).

Further, any probative value was far outweighed by unfair prejudice that would be created in admission of this evidence. Introduction of the evidence would needlessly confuse the jury, muddying their deliberations with character evidence unrelated to the charges. See State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (2008) (Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one). Again, Appellant was not entitled to a trial within a trial about Gasque's character. Juries should not acquit a defendant merely because they disliked a victim. Instead, they should focus their attentions on the elements of the charge and any defenses the accused may raise.

C. The proffered evidence was extrinsic character evidence regarding the deceased victim's behavior, and as such, it was not admissible to impeach Paxton.

Appellant also contends he had a right to impeach Paxton with Alan James' testimony. This is not supported by the record. As stated above, counsel questioned Paxton. Judge Goodstein initially allowed Appellant to ask Paxton questions regarding the substance of Allen

James' allegations, because it related to Paxton's credibility. However, Judge Goodstein refused to admit the testimony through Allen James because it related to collateral matters involving character, which are not admissible under any of the rules. R. 775.

Appellant argues that the correct focus and analysis of the James proffer was impeachment and contradiction. Brief of Appellant 30. Appellant was allowed to question Adam Paxton about the urination and vulgar gestures for the limited purpose of impeachment. However, the parties disagree about whether the judge properly excluded extrinsic evidence of Gasque's behavior as part of the defense's case-in-chief to impeach Paxton on an irrelevant factual contradiction.

The scope of impeachment is within judicial discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001) (stating that admission or exclusion of evidence is left to the sound discretion of the trial judge.) Here, the State argued—and Judge Goodstein agreed—that the James proffer went to the character of the victim. The only significant purpose the James proffer served was to damage the deceased victim's character before the jury.

Judge Goodstein properly held that the only rule of evidence which could possibly apply was Rule 405(b), SCRE, and the evidence did not go to an essential element of a charge, claim or defense, as discussed above. Since the evidence could not be admissible as an essential element of the crime, Judge Goodstein properly held that Appellant could not present the proffer merely to impeach Paxton. This decision was well within her discretion.

Appellant argues Paxton's negative response to the cross-examination question opened the door to Alan James' testimony. Brief of Appellant 29. Judge Goodstein addresses this argument. She specifically made a finding that the evidence would be extrinsic at this point, and that she would not allow it on that basis. R. 775. Judge Goodstein stated she would revisit the issue if the State opened the door later. R. 792. Because Judge Goodstein properly exercised her

discretion to determine which matters were intrinsic and which were extrinsic to the litigation, her ruling should be affirmed...

In the alternative, the State submits Alan James' testimony was properly excluded because the matter was collateral to the litigation. To prevent confusion of the issues and unfair surprise, impeachment of a witness's credibility by asking questions not relevant to the case in chief so as to obtain contradictory or inconsistent statements, is limited to cross-examination of the witness sought to be impeached. State v. Mizell, 332 S.C. 273, 504 S.E.2d 338 (Ct. App. 1998), reh'g denied, (Sept. 18, 1998) and cert. denied, (Apr. 12, 1999). See also Roger Park and Tom Lininger, The New Wigmore, A Treatise on Evidence: Impeachment and Rehabilitation §§ 4.1-4.3 (2012). Impeachment does not allow a party to put another witness on the stand to contradict the witness as to such collateral matters. Thus, when a witness denies an act involving matters collateral to the case in chief, the inquiring party is not permitted to introduce contradictory evidence to impeach the witness. State v. Gore, 299 S.C. 368, 384 S.E.2d 750 (1989).

Moreover, any error was harmless in light of the overwhelming evidence of Appellant's guilt and admission of other similar evidence from other witnesses. State v. Gore, 299 S.C. at 378, 384 S.E.2d at 750. Marque Hall testified that he heard the truck approach with kids yelling and "hazing" people as they traveled Shop Road. Hall testified that he could hear them coming because they were so loud and that Gasque and Appellant started having "little back and forth" because Appellant wore an Alabama shirt. R. 992-993.

In conclusion, the testimony proffered by Appellant merely goes to the character of Gasque rather than any relevant element of the offense or a defense. It is not relevant evidence, it does not form a complete picture of the crime, and, while Appellant had the opportunity to impeach, the scope of impeachment was properly limited to prevent Appellant from confusing

the jury. This Court should affirm.

II.

ALL OF APPELLANT'S ARGUMENTS BUT THOSE RELATING TO CIRCUMSTANCES OF AGGRAVATION ARE NOT PRESERVED FOR REVIEW BECAUSE APPELLANT DID NOT MAKE THEM BEFORE THE TRIAL COURT, AND THE TRIAL COURT PROPERLY DENIED THE MOTION FOR DIRECTED VERDICT BECAUSE THE STATE PRESENTED DIRECT TESTIMONY THAT, VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, REASONABLY TENDS TO PROVE THAT APPELLANT BREACHED THE PEACE IN A HIGH AND AGGRAVATED NATURE.

Perplexingly, Appellant claims that Judge Goodstein erred in denying his motion for directed verdict, despite the fact that the State presented multiple eyewitnesses who testified that Appellant's behavior breached the peace in a high and aggravated nature, and the evidence was more than sufficient to submit the case to the jury.

FACTS

It is undisputed that at the time of the incident on October 9, 2010, traffic outside the University of South Carolina ("USC") football stadium was bumper to bumper, as it was on most game nights. R. 149; 159; 203; 272. The USC Gamecock football team beat the No. 1 ranked Alabama Crimson Tide that night, and cars and pedestrians congested the streets as they tried to leave the Stadium. In the midst of that congestion, multiple witnesses on Shop Road testified that they saw Appellant aggressively throw open the door of the vehicle in which he was sitting in a parking lot on the side of Shop Road, charge into the lane of traffic on Shop Road to a GMC pickup driven by Adam Paxton, with Martin Gasque in the passenger seat. R. 205; 207; 277; 309; 344; 356; 374; 445-46; 410; 514; 549; 819; 873; 884;891; 910; 921; 1001. Witnesses also testified that the much larger and heavier Appellant punched and wrestled with Gasque though the window of Gasque's truck. R. 205; 218; 232; 276 -77; 295 - 96; 286; 308-311; 334- 45; 356-

57; 370; 374; 841. Witnesses stated that as Gasque exited the pickup, Appellant continued punching Gasque, immediately knocking Gasque to the ground unconscious. R. 165;192, 196; 209; 277-79; 296; 310-311; 344-370; 374; 385; 445; 403; 414; 547; 516-17; 552; 819. Multiple witnesses testified that the altercation occurred in the lane of travel on Shop Road intended for vehicular use and that Gasque fell unconscious under the truck on the lane of Shop Road intended for vehicular use. R. 183-84; 188; 209; 276; 279; 281; 309-311; 322; 345; 353; 374; 380; 385; 405; 410; 445; 747; 875; 878; 1001-1002. The witnesses stated that Gasque did not punch Appellant at any time. R. 210; 277; 311; 334; 344; 370; 374; 385; 413; 673. Paxton, unaware of Gasque's predicament, edged the pickup forward. R. 211, 280-281, 311, 374, 386. Tragically, the rear passenger-side wheel rolled over Gasque's abdomen, chest, and head, mortally wounding him. Id. The ensuing chaos is well-documented.

Paxton testified that he saw Gasque get out, heard a loud punch, and then veered his car slightly because he felt he needed to do something. R. 516-518. Paxton realized he ran over something. R. 517; 552. He testified that he did not try to run Gasque over, and would never have done so if he had known. R. 521, 572.

After he saw the injury, James Martin, who was driving behind Paxton and Gasque, testified that he pulled over, exited his vehicle and yelled for his father, who was a physician in the car behind him. R. 212. Others helped as well, including a man with military training and a nurse. R. 213. Cassie Redford, an investigator with the Richland County Sheriff's Department, testified that Appellant ran up to her and told her someone needed help before running away. R. 165. As she approached, Redford saw Gasque lying in the area close to the white line which separated the road of travel from the pedestrian walking avenue. R. 184, 188. Stephen Taylor, a Richland County Sheriff's Department deputy, testified that he cordoned off both roadways to deal with the accident. R. 153. James Heyward, a City of Columbia Police Department officer,

testified that there was a large crowd around Gasque and that Appellant admitted to Heyward that he struck Gasque and knocked him to the pavement. R. 192. James Adams, who was with James Martin and also saw the incident, testified that while traffic was bumper-to-bumper before the incident, the Gasque's death just added to the traffic. R. 313.

Travis Holdorf, an investigator with Richland County Sheriff's Department, testified that traffic was backed up because of the incident. R. 641. He testified that Appellant gave him a statement where he admitted that he punched Gasque in the face and that Gasque fell to the ground. R. 655.

Dan Robinson, a sergeant with the investigative division of Richland County Sheriff's Department, testified that the crime scene was very chaotic. He testified:

> You can't get through the traffic. Everything was stopped. Pedestrians were everywhere. Crowds of people agitated with the traffic problems, so it was very difficult. There were numerous officers there trying to maintain control....We were just constantly being berated by people coming and telling us what was going on and it was kind of a little difficult for a while trying to get it all organized and settled.

R. 588-89. Major Stan Smith, from the Richland County Sheriff's Department, happened to be at the game with his family. R. 744. He testified that they were trapped by emergency vehicles for two hours. R. 745. Nothing was moving because of the accident. R. 750. Lauren Coggin, a friend of Appellant, testified that she was sick in the bathroom for several hour, and was very upset. R. 441. Former Gamecock football player Mike Davis also became sick to his stomach and was forced to walk away to gain composure. R. 916. In fact, all of the witnesses testified that they were shocked or upset by what they observed. R. 212; 326; 428; 441; 631; 702; 752; 833; 841; 917; 998; 916 – 17. One witness described Appellant as "out of control" and was frightened by what she witnessed. R. 282; 346; 370; 663. Two children were present at the scene. R. 383; 388.

At the close of the State's case, Appellant made the following motion for directed verdict:

> COUNSEL: If you'll give me one moment, I have a couple of thoughts with Counsel as to that motion, please.
> COURT: It's high and aggravated would be a place to start.
> COUNSEL: That's kind of where I was looking to go. But thank you.
> (WHEREUPON there was a pause in the proceedings.)
> COUNSEL: Thank you we would start off with where the Court has suggested again, the -- Your Honor, but we would ask for the judgment from the Court to have conduct that would support the aggravated breach of peace. But Judge, it just dawned on me and Counsel and I talked about this last week that you can make this charge in every occasion involving any -- any circumstances where first responders show up and the fact that it's not a suggestion that there has to be some aggravated factor that would allow the State to bring a citizen in and try it in general sessions court for this.
> We just don't have it here. We -- other than one, two if I accept some of the testimony I think that's been disputed by their own witnesses, but even if you accept the closest person to it that there was one punch or even two punches. I just don't think that rises to the level suggested by our legislature for this charge to go forward as to this charge.

R. 760-761. The Court denied the motion, noting that there was evidence of each element. R. 761-762. Appellant renewed his motion after the close of his case, which motion was denied. R. 1034.

DISCUSSION

A. All of Appellant's arguments but those relating to circumstances of aggravation are unpreserved for review because Appellant did not make them before the trial court

The only argument preserved is the argument Appellant made at trial: that the punches did not arise to the level of aggravation. R. 760-761. All other directed verdict arguments Appellant raises in his brief are alternative arguments that were never raised before the Judge Goodstein. This includes: (1) the State failed to prove the four elements of the indictment (Brief of Appellant 34), (2) the State failed to prove elements of breach of peace (Brief of Appellant 35-38), (3) the State failed to prove that Appellant proximately caused the breach of peace (Brief of Appellant 40):, (4) Appellant accuses the State of failing to investigate Paxton for DUI-related

offenses as well (5) Appellant accuses Paxton of negligently causing the homicide (brief of Appellant 41). A party cannot argue one ground for directed verdict at trial and in turn argue an alternative ground on appeal State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); State v. Jordan, 255 S.C. 86, 177 S.E.2d 464 (1970). Accordingly, the issues outlined above are not properly before this Court.

B. The trial court properly denied the motion for directed verdict because the State presented direct testimony that, viewed in the light most favorable to the State, reasonably tended to prove Appellant breached the peace in a high and aggravated nature.

Even if preserved, Appellant's allegations fail. In criminal cases, appellate courts only review errors of law. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v.Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). Further, an appellate court must affirm the trial judge's ruling "[i]f there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused[.]" State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004).

"Breach of the peace is a common law offense . . . embracing 'a great variety of conduct destroying or menacing public order and tranquility.'" State v. Randolph, 239 S.C. 79, 83, 121 S.E.2d 349, 350 (1961). The offense of breach of the peace is defined as "a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence, which includes any violation of any law enacted to preserve peace and good order." State v. Poinsett, 250 S.C. 293, 297, 157 S.E.2d 570, 571, 572 (1967). "Peace" means "the tranquility which is enjoyed by the citizens of a . . . community, where good order reigns among its

members which is the right of all persons in political society. . . . It is not necessary that the peace be actually broken to lay the foundation of a prosecution for the offense." Webber v. Farmers Chevrolet Co. et al., 186 S.C. 111, 195 S.E.2d 139 (1938). "Anything that disturbs that state is a breach." Lyda v. Cooper et al., 169 S.C. 451, 169 S.E.2d 236, 238 (1933). It includes violent acts as well as acts and words likely to produce violence in others. State v. Brown, et al., 240 S.C. 357, 126 S.E.2d 1 (1962). However, the crux of the offense, and "[w]hether [the] conduct constitutes a breach of the peace depends on the time, place, and nearness of other persons." While it is not necessary that the peace actually be broken in order to sustain a conviction for the offense of breach of the peace, there must be at least, "commission of an unlawful and unjustifiable act, tending with sufficient directness to breach the peace." Id.

First, the State presented direct evidence that Appellant violated public order or disturbed the public tranquility. While traffic was congested before the crime, Dan Robinson testified that the scene had become chaotic and difficult to control after the incident. R. 588. Other law enforcement officers testified similarly. R. 153, 641. Further, James Martin testified that he and several people pulled over their vehicles to help the mortally wounded victim. R. 212-213. These members of the public had their lives interrupted by Appellant's actions. Major Smith noted that he and his family were trapped in the location for over two hours by emergency vehicles, and he directly attributed the lack of movement to Gasque's death. R. 745, 750. All of this is direct evidence Appellant disturbed public order. While the area was initially congested after the game, Appellant conflates the congestion of post-game traffic with a total breakdown of order to minimize the effect of his conduct. See Brief of Appellant 39. There was order before Appellant's action. Charging into traffic and punching Gasque directly caused the total breakdown of that order.

Second, the State presented direct evidence Appellant disturbed the peace by any act or conduct inciting to violence, which includes any violation of any law enacted to preserve peace and good order. It is undisputed that Appellant struck Gasque in the face, knocking Gasque to the ground under Paxton's pickup. See, e.g., R. 165. At minimum, intentionally striking another in the face violates S.C. Code Ann. § 16-3-600 (Supp. 2012) (Assault and battery statute). This statute preserves peace and good order by making it illegal to batter someone, reducing the risk that citizens will be attacked by fellow citizens.[1] Thus, the State presented evidence that Appellant committed a violent act that disturbed the peace.

Appellant asserts that he was not the proximate cause of the chaos that ensued.[2] Brief of Appellant 40. That was a later issue for the finders of fact, not the trial court at the directed verdict stage. In the light most favorable to the State, Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478, Appellant struck Gasque in the face, knocking him unconscious under the truck on a congested roadway. Appellant's self-serving speculation about whether he proximately caused the chaos is irrelevant to the directed verdict analysis. The trial court's ruling must be viewed at the time it was made and not in retrospect. To accept Appellant's argument about proximate cause would require the trial court and this Court to engage in an improper exercise of weighing the evidence rather than reviewing for the existence of evidence as taken in the light most

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[1] In this case, Appellant's charge into the lane of traffic and pummeling of Gasque was the catalyst that created the ensuing chaos. The proper analysis is whether a violent act breaches peace and good order. State v. Poinsett, 250 S.C. at 297, 157 S.E.2d at 572. For example, punching a friend in a private dwelling, while a battery, would not disturb the peace unless it significantly agitated neighbors.

[2] Appellant appears to rely on Judge Goodstein's comment after the jury verdict to show that Appellant's conduct was not the proximate cause of Gasque's death. See footnotes 10 and 11, Brief of Appellant 40, 45 (citing R. 1452, 1454). But the trial court is not a fact finder, as Judge Goodstein clearly explained to the jury. R. 114-115. The jury could have found Appellant not guilty of involuntary manslaughter but guilty of BOPHAN for many reasons, not only on Appellant's speculation. Appellant's reliance on this finding improperly presupposes knowledge of the jury's deliberations.

favorable to the State.

Charging onto a public road congested with traffic and pummeling another citizen in the face in a public street does not suddenly become acceptable merely because a Gamecock football game recently ended. It was completely foreseeable to Appellant entering lanes designated for vehicular travel and punching Gasque in a public road would lead to Gasque falling into the flow of traffic, where his body would divert the flow of traffic or, as tragically happened here, kill him and create chaos.[3]

Finally, the nature of the elements of breach of the peace depend on the time, place and nearness of other persons. Over 95,000 people attended the game. R. 146. While the exact number of people affected by this incident is impossible to know for certain, it is clear from the officer's testimony that a significant portion of them were affected by Appellant's actions. R. 745. Further, eyewitnesses James Martin, Guy Echenroth, Rhonda Echenroth, James Adams, Travis Brown and Brian Kern, none of whom had anything to do with either party before the incident, were traumatized and inconvenienced by Appellant's actions. These members of the public were in close proximity to the actions when they occurred, and their lives were disrupted.

Appellant cites several cases in support of his argument. Brief of Appellant 42-44. Every case cited involves circumstantial evidence, and are completely distinguishable from this case. Every witness presented by the State gave a first-hand account.

Given that the State presented direct testimony that Appellant (1) disturbed public order; (2) through an act of violence, and both elements involve a significant number of directly

[3] Appellant disputes whether Gasque was on the road. As Investigator Cassie Redford testified, Gasque was in the roadway, on the concrete. R. 166, 188. Numerous other eye witnesses confirmed that Gasque was in the roadway as set forth above. Whether he was closer to the white line marking the pedestrian walkway or the middle of the road is irrelevant to the directed verdict analysis.

affected people who were in close proximity to the act, there was ample evidence that reasonably tends to prove that Appellant breached the peace.

To survive a motion for directed verdict on a BOPHAN charge, the State must also prove a circumstance of aggravation. Circumstances of aggravation charged by the trial court included but were not limited to the use of a deadly weapon, the intent to commit a felony, the infliction of serious bodily injury, a great disparity between the ages or physical conditions of the parties, a difference in the genders of the parties, the taking of indecent liberties or familiarities with a female through the use of force, the purposeful infliction of shame and disgrace, and the resistance of lawful authorities. These are only examples of circumstances of aggravation. State v. Fennel, 340 S.C. 266, 531 S.E.2d 512 (2000).[4]

The circumstances surrounding this breach of the peace are aggravated for multiple reasons.[5] Starting with the least violent circumstance, Appellant, a former football player, was much larger than Gasque. R. 218; 276; 296; 308-09; 311; 334-45; 374; 800; 841. The difference in physical size was likely the reason Appellant so easily and quickly knocked Gasque under the truck unconscious. R. 210. Additionally, charging into a public street and beating someone in the face in an area congested with traffic carries a significant risk of serious bodily injury and

[4] Fennel is an ABHAN case, but the aggravated circumstances language the parties agreed to use in this case is identical. These jury instructions are available on the South Carolina Judicial Department website at http://sccourts.org/juryCharges/GS%20InstructionsJune2013.pdf (last visited December 30, 2013). The specific charge is on page 104 of the PDF. This jury instruction was given to the jury, without objection. R. 1140. The indictment incorporated these traditional circumstances of aggravation ("accompanied by circumstances of aggravation") and also listed fighting in the roadway and/or disrupting traffic. R. 1465.

[5] In his third argument Appellant isolates a comment by Assistant Solicitor McDuffie, taking it out of context and accusing the State of believing that "anything may be an aggravating circumstance." Brief of Appellant 46 (citing R. 1046). Appellant misconstrues McDuffie's words. As the jury instructions Appellant agreed to note, "These are only examples of aggravated circumstances." R. 1140. McDuffie was reiterating the point. Immediately afterward, McDuffie listed a series of aggravating circumstances the evidence established in this case. R. 1046.

death. Even if Gasque had not died, knocking him unconscious was infliction of serious bodily injury into a stream of congested traffic would have created a significant problem as cars attempted to avoid his body, possibly causing accidents or forcing traffic into the opposite lane for a significant period of time. Appellant's punches, even if it had not resulted in Gasque's death, was an aggravating circumstance. The punches rendered Gasque unconscious. Further, traffic was delayed for a significant period of time due to Appellant's actions. R. 745.

Beyond the traffic issues, however, Appellant's gross conduct of charging onto a public road because he could not gain access to travel when he wanted and beating Gasque to unconsciousness and causing him to fall in the roadway was certainly an aggravated disturbance of the public tranquility and safety we expect where good order reigns. To suggest otherwise is to sanction disorder and condone unlawful, physical attacks in during post-game celebrations. Additionally, Gasque's horrible injury traumatized several people involved in the accident, or simply nearby. Adam Paxton, the driver, testified that he has undergone regular counseling since the incident. R. 573. Lauren Coggin and Mike Davis, who were with Appellant, became ill after the incident. R. 441. Several witnesses testified that they were shocked and frightened the incident occurred. See, e.g., R. 212; 282; 326; 346; 370; 383; 388; 428; 441; 631; 663; 702; 752; 833; 841; 916 - 17; 998).

Finally, the injury resulting from Appellant's actions was mortal. Dr. Nichols, the medical examiner, testified that Gasque suffered from a hinge fracture, which is a fracture from ear to ear at the base of the brain. R. 579. Once the pickup's tire had crushed Gasque's skull, he was going to die. Id.

While Appellant presents a different version of the evidence in his brief,[6] the charges against Appellant were based on direct observations of multiple eyewitnesses. Considering the evidence in the light most favorable to the State, Judge Goodstein properly denied the directed verdict motions, and the rulings should be affirmed.

III.

THE SENTENCING RANGE IN S.C. CODE ANN. § 22-3-560 DOES NOT APPLY TO BOPHAN; S.C. CODE ANN. § 22-5-150 DID NOT REPEAL § 22-3-560; HAIR V. STATE DOES NOT APPLY TO §§ 22-3-560 AND 22-5-150; AND JUDGE GOODSTEIN DID NOT ABUSE HER DISCRETION IN SENTENCING APPELLANT TO THE STATUTORY MAXIMUM FOR BOPHAN.

Appellant was convicted of Breach of Peace of a High and Aggravated Nature ("BOPHAN") and sentenced to ten years imprisonment suspended upon the service of three years and three years of probation. R. 1173,1455. He argues that S.C. Code Ann. § 22-3-560 (Supp. 2012), as amended by the Omnibus Crime Reduction and Sentencing Reform Act of 2010 ("2010 Act"), abrogates the common law offense of BOPHAN by reducing the maximum sentence to thirty days. Relying on Hair v. State, 305 S.C. 77, 406 S.E.2d 332 (1991), he further argues S.C. Code Ann. § 22-5-150 (2007) was implicitly repealed by the 2010 Act. Finally, Appellant argues that the trial judge abused her discretion in sentencing him to the discretionary maximum.

The State submits, first, that the legality of Appellant's sentence exceeding 30 days was not properly preserved for appellate review because Appellant failed to contemporaneously

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[6] In his brief, Appellant accuses Adam Paxton of committing vehicular homicide. Brief of Appellant 41. Appellant also accuses the State of not investigating Paxton for DUI or felony DUI crimes. Brief of Appellant 41. Both of these accusations are pure speculation, and are irrelevant whether the trial judge properly granted a motion for directed verdict. Further, Appellant never argued these points during the directed verdict motion. See State v. Jordan, 255 S.C. 86, 177 S.E.2d 464 (1970) (issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review.) Therefore, they are not properly before this Court.

object to the legality of the sentence when he was sentenced. R. 1192. A contemporaneous objection is required to properly preserve an error for appellate review. State v. Johnson, 333 S.C. 459, 510 S.E.2d 423 (1999) (stating that a sentence which exceeds the maximum allowable is not a question of subject matter jurisdiction; therefore an objection must be made to the sentence at trial to preserve the issue for appellate review); State v. Cox, 328 S.C. 371, 492 S.E.2d 399 (Ct. App. 1997). Appellant had ample opportunity to challenge the legality of the statute before doing so for the first time by post-trial motion. Appellant was put on notice before trial that he could be sentenced to ten years in prison by the February 2011 indictment. R. 1465. Appellant, after being found guilty of BOPHAN, had the opportunity to inform Judge Goodstein before sentencing of his argument, which he failed to do, despite significant colloquy by counsel. R. 1184-1192. Third, Appellant had the opportunity immediately object to the sentence, which he failed to do. R. 1192. See State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981)(stating failure to contemporaneously object cannot be later bootstrapped by a motion for mistrial).

Alternatively, the State submits that the 2010 Act did not abrogate the common law offense of BOPHAN or repeal § 22-5-150. Also, Hair v. State does not apply to this case. Finally, Judge Goodstein sentenced Appellant within the discretion given to her by S.C. Code Ann. § 17-25-30. There was no abuse of her discretion.

A. The sentencing range in S.C. Code Ann. § 22-3-560 does not apply to BOPHAN

1. History

S.C. Code Ann. Section 22-3-560, governing a magistrate judge's jurisdiction and authority, states: "[m]agistrates may punish by fine not exceeding five hundred dollars or imprisonment for a term not exceeding thirty days, or both, all breaches of the peace." S.C. Code Ann. § 22-3-560. BOPHAN, on the other hand, is a common law offense, charged under

S.C. Code Ann. §§ 17-25-30 (2003) and 22-5-150 and prosecuted in the courts of general sessions. See State v. Cogdell, 273 S.C. 563, 257 S.E.2d 748 (1979); State v. Edwards, 239 S.C. 339, 123 S.E.2d 247 (1961), reversed on other grounds by Edwards v. South Carolina, 372 U.S. 229 (1963). See also Op. S.C.Atty. Gen. 2003 WL 22378707 (September 23, 2003)[7]; Op. S.C. Atty Gen. 1977 WL 46010 (August 10, 1977); see also State v. Robinson, 31 S.C. 453 (1889); State v. Sims, 16 S.C. 486, (1882); State v. Fillebrown, 2 S.C. 404 (1871). Since § 22-3-560 only applies to magistrate level offenses, it cannot apply to BOPHAN.

The history of § 22-3-560 supports this conclusion. In 1870, the General Assembly enacted a statute respecting the jurisdiction of what are now known as magistrates:

> **All** affrayers, rioters, disturbers and **breakers of the peace**, and all who go armed offensively, to the terror of the people, and such as utter menaces or threatening speeches, or otherwise dangerous and disorderly persons, **and all persons arrested for assaults and batteries,** shall be examined by the Trial Justice [Magistrate] before whom they are brought, and may be tried before him, and, **if found guilty**, may be required to find sureties of the peace, and be punished, **or, when the offense is of a high and aggravated nature, they may be committed or bound over for trial before the Court of General Sessions, either by fine or forfeiture not exceeding one hundred dollars, or imprisonment in the jail or work house not exceeding thirty days.**

The Revised Statutes of the State of South Carolina, p. 741 Sec. 4 (1873) (emphasis added).[8] Significantly, the bolded phrases match the text found in both modern statutes at issue in this case. See S.C. Code Ann. §§ 22-3-560,[9] 22-5-150.[10] The statute was divided in 1880, into

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[7] Appellant cites this opinion on page 58 of his brief, but completely misapprehends its meaning. The closest the Attorney General opinion comes to the proposition Appellant cites it for is: "Such offense still exists at common law although another offense, public disorderly conduct, S.C. Code Ann. Section 16-17-530 (2003), also exists which would cover similar conduct." Id. The Attorney General's Office did not opine that disorderly conduct should supplant breach of peace in that opinion.

[8] For convenience, the statute is attached to the State's return to Appellant's Petition for Writ of Habeas Corpus in this Court's Original Jurisdiction as attachment #1.

[9] "Magistrates may punish by fine not exceeding five hundred dollars or imprisonment

sections 818 and 819. Sections 818, 819, p. 128, A Bill for Revising and Consolidating the General Statutes of the State (1881).[11] Notably, the description next to section 818—the precursor of § 22-3-560—describes the statute as the "[e]xtent to which they [Magistrates] may punish breaches of the peace." Id. In 1902, the General Assembly exchanged the term "trial justice" for "magistrate," kept the statutes side-by-side, and placed the two statutes in the chapter addressing "Jurisdiction of Magistrates and their Courts." Sections 13, 14, p. 229-230, Code of Laws of South Carolina, 1902. Volume II: Code of Civil Procedure and Criminal Code (1902).[12]

The statutes remained side-by-side until 1952, when the General Assembly inserted several statutes in between them; however, the two statutes remained in the chapter titled "Magistrates and Constables." See 1952 Code § 43-64 (now § 22-3-560); 1952 Code § 43-215 (now § 22-5-150). These sections remained undisturbed until 2008, when the General Assembly separated the magistrate level assaults and batteries from the breaches of peace and increased the fine for assaults and batteries. S.C. Code Ann. § 22-5-560 (Supp. 2009). Importantly, the General Assembly did not modify the language relating to breaches of the peace in subsection (a). See id. Two years later, the General Assembly enacted the 2010 Act, which removed all references to assault and battery from § 22-5-560. See S.C. Code Ann. § 22-5-560 (Supp. 2012).

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for a term not exceeding thirty days, or both, all breaches of the peace." S.C. Code Ann. § 22-3-560.

[10] Magistrates may cause to be arrested (a) all affrayers, rioters, disturbers and breakers of the peace, (b) all who go armed offensively, to the terror of the people, (c) such as utter menaces or threatening speeches and (d) otherwise dangerous and disorderly persons. Persons arrested for any such offenses shall be examined by the magistrate before whom they are brought and may be tried before him. If found guilty they may be required to find sureties of the peace and be punished within the limits prescribed in § 22-3-560 or, when the offense is of a high and aggravated nature, they may be committed or bound over for trial before the court of general sessions.
S.C. Code Ann. § 22-5-150.

[11] See attachment #2 supra footnote 8.

[12] See attachment #3 supra footnote 8.

Appellant fails to address § 22-5-150, and, as a result, presents a distorted view of how these two statutes function. See Brief of Appellant 48-50. Furthermore, the language Appellant claims abrogates BOPHAN ("all breaches of peace") has existed since 1870, and the 2010 Act did not change the language in any meaningful way. The relevant language of § 22-5-150 has not changed in 140 years.[13]

The purpose of § 22-3-560 is to determine the maximum punishment **magistrates** may provide for breaches of the peace, while § 22-5-150 allows greater punishment by a **circuit court** judge for the offense of BOPHAN. Appellant claims that both BOPHAN and breach of peace have the same sentence range under § 22-3-560. The argument is without merit. BOPHAN requires the State to prove all elements of breach of peace, as well as circumstances of aggravation. Judge Goodstein asked this question below. R. 1325-36. It would make no sense to charge a defendant with BOPHAN when the same result may be obtained without proving a circumstance of aggravation. Additionally, there would be little reason to transfer a defendant from magistrate's court to general sessions, even if the crime was so extreme it shocked the conscience.

In conclusion, Appellant was charged under S.C. Code Ann. § 17-25-30 and § 22-5-150. He was charged with the common law offense of BOPHAN, not the magistrate-level offense described in § 22-3-560. To give § 22-5-150 full effect, Appellant's BOPHAN sentence must be determined by § 17-25-30 and § 22-5-150, instead of § 22-3-560.

2. Effect of the 2010 Act

Appellant also claims the 2010 Act explicitly abrogated BOPHAN by modifying § 22-3-560. Brief of Appellant 49 ("...the Legislature explicitly amended Section 22-3-560 to apply the statutory maximum punishment to 'all breaches of the peace.'") While the 2010 Act explicitly

[13] See supra footnote 8.

abrogates certain common law assault and battery offenses, no such language abrogates BOPHAN. Preamble, Omnibus Crime Reduction and Sentencing Reform Act of 2010, S.C. Acts No. 273 ("An Act...to repeal certain common law assault and battery offenses.") Since the canons of construction dictate that to express or include one thing implies the exclusion of another, it must follow that the 2010 Act was not intended to abrogate BOPHAN. See Hodge v. Rainey, 341 S.C. 79, 86-88, 553 S.E.2d 578, 581-582 (2000).

Other clues support the conclusion the 2010 Act did not abrogate the common law offense of BOPHAN. First, the statute related to common law BOPHAN, S.C. Code Ann. § 22-5-150, has not changed in over 140 years, and was not changed by the 2010 Act. Second, the Criminal Docket Report (CDR) code for common law BOPHAN, 0955, is still active and independent of § 22-3-560.[14] Third, the offense is still actively charged and prosecuted in South Carolina.[15] Since the legislature did not explicitly abrogate BOPHAN and analysis indicates that the offense still exists, the State submits that the 2010 Act did not abrogate BOPHAN.

B. S.C. Code Ann. § 22-5-150 did not repeal § 22-3-560.

Appellant claims that § 22-5-150 conflicts with § 22-3-560, and argues § 22-3-560 controls because the two statutes conflict. Brief of Appellant 50-51. On the contrary, the two

[14] See http://sccourts.org/cdr/ (enter 0955 into the CDR Code box and press submit). See also Douglas Strickler, South Carolina Criminal Offenses and Penalties 297 (2011). The State notes that CDR codes are not binding precedent on this Court, but nevertheless wishes to proffer it for the Court's consideration. See State v. Bennet, 375 S.C. 165, 650 S.E.2d 490 (2007).

[15] At least one attorney was charged with the offense, although the charges were later dismissed. In re McClain, 395 S.C. 536, 719 S.E.2d 675 (2011). Also, the Court of Appeals issued two unpublished opinions in which the defendants pled guilty to BOPHAN. See State v. Smith, 2009-UP-055 (2009), State v. Smith, 2012-UP-178 (2012). The State again notes these two unpublished cases are not binding precedent, but proffers them for the Court's consideration. The State also notes the prosecutor's statement that fifty-three people have been convicted of BOPHAN in Richland County. R. 1374.

statutes have harmoniously coexisted for over 140 years. This coexistence has been recognized by case law.

Because there is no explicit conflict between these two statutes, and nothing in the 2010 Act explicitly repeals § 22-5-150, Appellant must rely on an implicit repeal, which this Court strongly disapproves of:

> The law does not favor the implied repeal of statute. Statutes dealing with the same subject matter must be reconciled, if possible, to render both operative. It is presumed that the Legislature is familiar with prior legislation, and that if it intends to repeal existing laws it would... expressly do so; hence, if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the latter repealed the first.

Hodges v. Rainey, 341 S.C. 79, 88-89, 553 S.E.2d 578, 583 (2000) (internal citations omitted). See also Strickland v. State, 376 S.C. 17, 274 S.E.2d 430 (1981); Lewis v. Gaddy, 254 S.C. 66, 173 S.E.2d 376 (1970); Busby v. State Farm Mut. Auto. Ins. Co., 280 S.C. 330, 312 S.E.2d 716 (Ct. App. 1984). The common law will not be impliedly changed. State v. Carson, 274 S.C. 316, 262 S.E.2d 918 (1980); see also State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993) (stating that common law offenses are not abrogated simply because there is a statutory offense relating to similar conduct).

To determine whether § 22-3-560 implicitly repealed § 22-5-150, this Court must examine whether the two may be interpreted together in a reasonable and harmonious manner. Hodges v. Rainey, 341 S.C. at 88-89, 553 S.E.2d at 583. Section 22-3-560 states: "Magistrates may punish by fine not exceeding five hundred dollars or imprisonment for a term not exceeding thirty days, or both, all breaches of the peace." Section 22-5-150 states: "Magistrates may cause to be arrested all...breakers of the peace....If found guilty they may be...punished within the limits prescribed in § 22-3-560 or, when the offense is of a high and aggravated nature, they may be committed or bound over for trial before the court of general sessions."

As stated above, these two statutes function harmoniously. After explicitly referencing § 22-3-560, § 22-5-150 states that if an offense is of a high and aggravated nature, it may be bound over to General Sessions. Thus, § 22-3-560 dictates the maximum discretionary sentence **magistrates** may impose for breaches of the peace presented to them, while § 22-5-150 provides for **general sessions** jurisdiction of offenses of a high and aggravated nature. Appellant was charged with BOPHAN, an offense of a high and aggravated nature, and the charge was filed in general sessions rather than magistrate's court. Thus, the charge must fall under § 22-5-150 rather than § 22-3-560. Because the two statutes do not conflict, the State submits that it is unnecessary to implicitly overrule § 22-5-150.

Cases immediately following the initial enactment of §§ 22-3-560 and 22-5-150 support this distinction between magistrate and general sessions crimes. See, e.g., State v. McKettrick, 14 S.C. 346 (1880) (distinguishing between simple assault and battery, which must be tried by a magistrate, and aggravated assault, which require the case to be bound over to the Court of General Sessions); State v. Sims, 16 S.C. 486, 492 (1882) ("Assaults and batteries and other breaches of the peace, rioters, &c., **not of a high and aggravated nature**, can only be punished by...imprisonment not exceeding thirty days")[16] (emphasis added); State v. Burch, 43 S.C. 3, 20 S.E. 758 (1895) (holding that aggravated assault, tried in general sessions, consists of two elements: the assault itself and circumstances of aggravation). Further, in 1882, the legislature amended the trial justice statute as follows: "[Trial justices] may punish by fine not exceeding one hundred dollars, or imprisonment in the jail or house of correction, not exceeding thirty days, all assaults and batteries, and other breach of the peace, **when the offense is not of a high and aggravated nature, requiring in their judgment greater punishment.**" State v. Burch, 43

[16] The two constitutional provisions the Sims case cites as authority for its findings are still good law today. For S.C. Const. art. IV, § 18 (1865), see S.C. Const. Art. V, § 11. For SC. Const. art. I § 19, see S.C. Code Ann. § 22-3-550 (Supp. 2013)

S.C. 3, 20 S.E. 758 (quoting Section 824, General Statutes of South Carolina (1882)) (emphasis added). Because the 2010 Act did not explicitly repeal § 22-5-150 and the two statutes may be interpreted together harmoniously, there is no basis for overturning the statute. The two statutes have coexisted for 140 years.

C. Hair v. State does not apply to §§ 22-3-560 and 22-5-150

Appellant's reliance on Hair v. State, 305 S.C. 77, 406 S.E.2d 332 (1991), is misplaced. In Hair, two statutes specifically referred to the portion of their sentences inmates were required to serve before becoming eligible for parole. Id. at 78, 406 S.E.2d at 333. The burglary statute, S.C. Code Ann. § 16-11-312(c), required Hair to serve one-third of his sentence before becoming parole eligible, while the latter statute, S.C. Code Ann. § 24-21-610, indicated he must serve one-fourth of his sentence before becoming eligible. Id. The two statutes directly conflicted, and this Court held the latter statute controlled. Id.

In the current case, one statute deals with breaches of the peace at the magistrate level jurisdiction (See S.C. Code Ann. § 22-3-560), while the other deals with the proper disposition of an offense of a high and aggravated nature. Thus, unlike the statutes at issue in Hair, these statutes do not directly conflict with each other.

D. Judge Goodstein did not abuse her discretion in sentencing Appellant to the statutory maximum penalty for BOPHAN

In section IIIC of his brief, Appellant presumes he was sentenced properly and then argues that the trial judge abused her discretion. The State submits, first, that Appellant moved for reconsideration of the sentence and made specific arguments in support of sentence reduction. Judge Goodstein granted the motion such that the active sentence Appellant was required to serve before being released to probation was reduced from five years to three years.

Appellant accepted the reduced sentence without further objection or the argument he now presents on appeal. Because Appellant received the relief requested and did not make further objections known to Judge Goodstein, he waived the ability to complain on appeal. State v. McEachern, 399 S.C. 125, 731 S.E.2d 604 (Ct. App. 2012). Nevertheless, the State submits that Judge Goodstein did not abuse her discretion, and properly sentenced Appellant within the statutory maximum for the offense charged.

For the purpose of this argument, Appellant assumes he was sentenced under S.C. Code Ann. § 17-25-30. Brief of Appellant 52. Section 17-25-30 states that "In cases of legal conviction when no punishment is provided by statute the court shall award such sentence as is conformable to the common usage and practice in this state, according to the nature of the offense, and not repugnant to the Constitution."

This Court has determined § 17-25-30 sets the sentence range for common law misdemeanors between three months and ten years. State v. Hill, 254 S.C. 321, 175 S.E.2d 227 (1970). A reviewing court should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes. State v. Franklin, 267 S.C. 240, 266 S.E.2d. 896 (1976), State v. Brannon, 341 S.C. 271, 533 S.E.2d 345 (Ct. App. 2000). Once a sentencing range is established, judicial alteration of a specific sentence or sentence range within the statutorily established maximum violates the separation of powers between the legislative and judicial branches. S.C. Const. Art. I § 8, State v. Langford, 400 S.C. 421, 434, 735 S.E.2d 471, 478 (2012) ("An usurpation of power exists, for the purpose of constitutional separation of powers doctrine, when there is a significant interference by one branch of government with the operations of another branch.) (internal citations omitted). The courts do not rewrite statutes.

Appellant argues his "counsel is unaware of any decision requiring ten years to be the mandatory maximum setting for all common law misdemeanors." Brief of Appellant 53.[17] This sentence is perplexing because (as can be inferred from above) there are no cases in South Carolina requiring a judge to impose any specific sentence within a range governed by statute.

This Court has expressly declined to alter sentences under § 17-25-30 if the sentence imposed by the trial court is within the statutory limits. See State v. Hill, 254 S.C. 321, 175 S.E.2d 227, State v. Mallory, 270 S.C. 519, 242 S.E.2d 693 (1978) (Twenty-year sentence was proper where defendant was convicted of both burglary and common law ABHAN, since maximum of ten years could have been imposed for assault plus any number of years less than life for burglary, making aggregate of sentences which might have been imposed far beyond that imposed by trial judge.), State v. Fogle, 256 S.C. 149, 181 S.E.2d 483 (1971) (holding there is no statute which prescribes a specific punishment for the crime of receiving stolen goods and the sentencing for such offense is determined under the provisions of this what is now S.C. Code Ann. § 17-25-30, which must be construed with what is now S.C. Code Ann. § 17-25-20). The precedent holds firm even when this Court apparently disagrees with the sentence. State v. Hall, 224 S.C. 546, 80 S.E.2d 239 (1954) (A sentence of two years on first offense of unlawful manufacture of alcoholic liquors, although somewhat harsh, was not excessive.); State v. Hurt, 212 S.C. 461, 48 S.E.2d 313 (1948) ("If the trial Judge was of opinion that the jury properly found the appellant guilty, we cannot hold that the sentence imposed was so severe as to require this Court to remand the case for a re-sentence of the appellant. Any relief which the appellant

[17] Appellant also exhaustively cites breach of peace statutes from other jurisdictions. Brief of Appellant 55-57. These statutes are irrelevant to whether Judge Goodstein abused her discretion in sentencing Appellant. The State is aware of no case law requiring a trial judge to consider a survey of similar offenses from other states before sentencing.

obtains must necessarily come from some source other than the judicial branch of the Government.")

Judge Goodstein sentenced Appellant to 10 years suspended upon the service of three years and probation, which was within the range of § 17-25-30. Appellant's belief that the sentence was unduly harsh and does not make it illegal. Moreover, the data and statutory comparisons Appellant presents for the first time on appeal should not be considered because this information and argument were not presented below. State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995). Judge Goodstein acted well within the discretion afforded the Court under the applicable statutes, and the sentenced imposed should be affirmed.

CONCLUSION

Based on the foregoing, the State submits Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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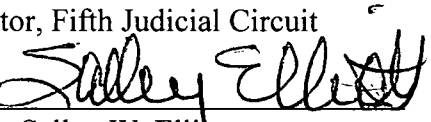
BY: 
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January 13, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County
Honorable Diane S. Goodstein, Circuit Court Judge
Appellate Case No. 2031-001219

THE STATE,

Respondent,

vs.

CURTIS SIMMS,

Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 13th day of January, 2014.

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