STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM HORRY COUNTY
Larry B. Hyman, Circuit Court Judge

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Appellate Case No. 2013-0008764

THE STATE, .....RESPONDENT

v.

JOHN HENRY SMITH, .....APPELLANT.

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# INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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## RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court properly denied Appellant's motion for a directed verdict on the charge of armed robbery where the State presented direct and substantial circumstantial evidence from which the jury could fairly and logically find Appellant alleged, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon?

## STATEMENT OF THE CASE

John Henry Smith (Appellant) was indicted at the February, 2012 term of the grand jury for Horry County for one count of armed robbery. He was represented by Jonathan Eric Fox, Esquire, of the Fifteenth Circuit Public Defender's Office. The State was represented by assistant solicitors George H. DeBusk, Jr. and Heather T. von Herrmann of the Fifteenth Circuit Solicitor's Office. (Tr.p.1). On April 17-18, 2013, Appellant proceeded to trial by jury before the Honorable Larry B. Hyman, Jr., pursuant to which he was found guilty as indicted. He was sentenced to twenty-five (25) years' imprisonment. (Tr.p.161, lines 1-21; R.p.330, lines 1-13). Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent (the State) follows.

## STATEMENT OF FACTS

A little after two o'clock in the morning on December 12, 2011, Hilton LaShawn Fryar was working the cash register at Walgreen's when a man entered the store, got a box of Ziploc bags from a shelf, brought it to the counter, and asked Fryar for the price.[1] Fryar was able to identify Appellant as the man who entered the store. Appellant then ordered Fryar to give him the money from the cash register and told Fryar not to make any noise because he had a gun. One of Appellant's hands was in his pocket. Fryar opened the register and started removing money when Appellant suddenly snatched approximately sixty dollars ($60) from Fryar's hand and ran out the door. The incident was captured by the store's video surveillance camera and that video recording was introduced into evidence over Appellant's objection. After it was published, two still shots from that video were also introduced. Fryar repeated his testimony that during the robbery Appellant claimed to have a gun and had his hand in his pocket as if he may have had a gun. (Tr.p.62, line 1-p.74, line 24). On cross-examination Fryar acknowledged he never actually saw a weapon. (Tr.p.77, lines 16-20). On re-direct examination, Fryar testified he was in fear for his safety and backed away from the register after Appellant claimed to have a gun. (Tr.p.82, lines 7-25).

Police officers responded to the Walgreen's shortly after the robbery. Based on Fryar's description of the perpetrator and a subsequent search of the surrounding area, Appellant was located on foot, chased, and ultimately apprehended. The police officers who chased and caught Appellant after the incident, placed him under arrest, and booked him into the detention center did not see Appellant with a weapon, did not see him throw

[1] Appellant's theory of the case was an acknowledgment he committed the robbery, but a claim that he was not armed. (Tr.p.57, line 20-p.60, line 23).

anything to the ground during the pursuit, and did not discover a weapon in his possession. (Tr.p.88, lines 18-24; p.89, lines 21-24; p.95, line 7-p.96, line 13; p.100, lines 2-17; p.106, line 4-p.107, line 2; p.115, lines 11-22).

At the close of the State's case, Appellant moved for a directed verdict. He argued the State failed to produce evidence of any actual weapon and, relying on our supreme court's opinion in State v. Muldrow,[2] argued his words alone were insufficient to allow the case to go forward. The solicitor argued evidence of more than mere words existed to support the armed robbery charge and that Appellant made an actual representation of a weapon by having his hand in his pocket and claiming he had a gun. The trial judge agreed, found the evidence against Appellant went beyond the evidence in Muldrow, and denied the motion. (Tr.p.116, line 9-p.119, line 15). The trial court subsequently granted Appellant's request for jury charges on the lesser-included offenses of strong-arm robbery and larceny. (Tr.p.123, line 20-p.126, line 15). During closing arguments, the solicitor argued Appellant's claim he had a gun combined with having his hand in his pocket constituted a representation of a deadly weapon and argued it was reasonable for Fryar to think Appellant had a gun. (Tr.p.131, lines 2-23). Appellant argued these actions were insufficient to carry the State's burden of proof. (Tr.p.142, line 8-p.144, line 4). The trial judge gave standard jury charges on the respective roles of the judge and jury, the State's burden of proof, the presumption of innocence, reasonable doubt, direct and circumstantial evidence, credibility of witnesses, and the elements of armed robbery. (Tr.p.145, line 5-p.158, line 22). In regard to the State's burden of proving Appellant was either armed with a deadly weapon or alleged he was armed while using a representation of a deadly weapon, the judge charged in part: "However, words

[2] 348 S.C. 264, 559 S.E.2d 847 (2002).

alone are not sufficient to establish the defendant was armed with a deadly weapon. The State must show evidence corroborating the allegation of being armed, for example, the use of a physical representation of a deadly weapon, to establish an armed robbery." (Tr.p.153, line 23-p.154, line 4). The jury deliberated for approximately forty-five minutes and returned a verdict of guilty of armed robbery. (Tr.p.161, lines 1-19).

## ARGUMENT

**The trial court properly denied Appellant's motion for a directed verdict on the charge of armed robbery where the State presented direct and substantial circumstantial evidence from which the jury could fairly and logically find Appellant alleged, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon.**

Appellant argues the trial judge erred in refusing to direct a verdict of acquittal for armed robbery because the State failed to introduce evidence of a deadly weapon or the physical representation of a deadly weapon during the robbery. He acknowledges the existence of evidence that he used words alleging he was armed but contends the mere fact his hand was in his pocket, without more, does not constitute the representation of a weapon needed for armed robbery. He therefore argues there was insufficient evidence on the deadly weapon element such that he was entitled to a directed verdict. The State submits this argument is without merit.

### Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "A defendant is entitled to a directed verdict when the State fails to present evidence of the offense charged." State v. Heath, 370 S.C. 326, 329, 635 S.E.2d 18, 19 (2006). When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. Condrey, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002). When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. Weston, 367 S.C. at 292-93, 625

S.E.2d at 648. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. Id.; State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 477-78 (2004). Critically, the appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling or if the ruling is based on an error of law. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002); State v. Dantonio, 376 S.C. 594, 603, 658 S.E.2d 337, 342 (Ct. App. 2008). Indeed, "unless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

**Law / Analysis**

Section 16-11-330(A) of the South Carolina Code provides in pertinent part as follows:

> A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony and . . . .

S.C. Code Ann. § 16-11-330(A) (2003). Under this section:

> [T]he State may prove armed robbery by establishing the commission of a robbery and either one of two additional elements: (1) that the robber was armed with a deadly weapon or (2) that the robber alleged he was armed with a deadly weapon, either by action or words, while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon.

Muldrow, 348 S.C. 264, 267-68, 559 S.E.2d 847, 849 (2002). Under the first prong, the presence of a weapon may be inferred from circumstantial evidence. Id. at 268, 559 S.E.2d at 849. The display of a deadly weapon is not an essential element of the offense. State v. Jones, 342 S.C. 248, 252, 536 S.E.2d 396, 398 (Ct. App. 2000). However, words alone are not sufficient under either the first prong or the second prong of the statute, and a threat to shoot or kill someone, in and of itself, is insufficient to establish the element of a deadly weapon. Muldrow, 348 S.C. at 268-69, 559 S.E.2d at 849-50; State v. Dodd, 354 S.C. 13, 17-18, 579 S.E.2d 331, 333-34 (Ct. App. 2003). It is the use or alleged use of a deadly weapon that distinguishes armed robbery from robbery. State v. Moore, 374 S .C. 468, 477, 649 S.E.2d 84, 88 (Ct. App. 2007). A defendant may be convicted of armed robbery under the statute if the jury concludes that the robber alleged he was armed under the requisite circumstances without having to conclude that he was, in fact, so armed. Jones, 342 S.C. at 253, 536 S.E.2d at 398.

The State submits there is sufficient evidence under the second prong of § 16-11-330(A) such that the trial judge properly denied Appellant's motion for directed verdict. While Appellant is correct in asserting that words alone are insufficient to establish the element of a deadly weapon, evidence exists that Appellant alleged, by action and words, he was armed "while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon." See S.C. Code Ann. § 16-11-330(A). Appellant said he had a gun and ordered Fryar to give him the money from the cash register. Fryar testified that during this encounter Appellant had his hand in his pocket. At that point, having been threatened, Fryar believed Appellant was armed. This testimony was corroborated by the

surveillance video recording of the robbery and the still-shot photographs from that video which showed Appellant's hand in his pocket during the robbery. (State's Exhibit #2 - video, State's Exhibit #3 - photograph, & State's Exhibit #4 - photograph). Therefore, the State presented direct and substantial circumstantial evidence that Appellant alleged he was armed with a deadly weapon while using a representation of a deadly weapon or an object which the victim could have reasonably believed to be a deadly weapon.

Appellant argues that as in Muldrow, his words were unaccompanied by any "corroborating action" and are therefore not sufficient to establish the armed element for armed robbery. However, in Muldrow the State only produced evidence that Muldrow entered the store, asked the clerk for a pack of cigarettes, then handed her a note that read: "Give me all your cash or I'll shoot you." When the clerk asked if he was serious, Muldrow responded "yes" and told her to hurry up before he shot her. Muldrow, 348 S.C. at 267, 559 S.E.2d at 848-49. Here, by comparison, the State produced evidence Appellant's hand was concealed in his pocket during the robbery, during the time he alleged he had a gun. The State submits this was a "corroborating action" that was simply absent in Muldrow.

Next, Appellant attempts to distinguish his case from State v. Dodd, 354 S.C. 13, 579 S.E.2d 331 (Ct. App. 2003), wherein this Court affirmed the denial of a motion for a directed verdict on a charge of armed robbery where Dodd never alleged he was armed nor used an item to represent a deadly weapon, but later confessed to being armed. Appellant argues his case is distinguishable from Dodd because he never admitted having a gun. While it is true Appellant did not admit having a gun, Dodd has little relevance here because it dealt with the "corroboration rule" regarding extra-judicial confessions

and the first prong of the armed robbery statute. While a subsequent confession may be one method of corroborating the element of a deadly weapon for purposes of evaluating the sufficiency of the evidence of an armed robbery, it certainly is not the only method of corroboration. Indeed, as recognized in Muldrow and the terms of the armed robbery statute itself, an allegation by the defendant during the robbery that he was armed while using a representation of a deadly weapon constitutes armed robbery regardless of a subsequent confession. Indeed, actions or words alleging one is armed, accompanied by any corroborating action, can suffice.

For these reasons the State submits the evidence was sufficient, as a matter of law, to submit the case to the jury. See State v. Brown, 205 S.C. 514, 520, 32 S.E.2d 825, 827 (1945) ("Where there is any evidence, however slight, on which the jury may justifiably find the existence or the non-existence of material facts in issue, or if the evidence is of such character that different conclusions as to such facts reasonably may be drawn therefrom, the issues should be submitted to the jury."). The trial judge committed no error in denying Appellant's motion for a directed verdict on the armed robbery charge, and Appellant's conviction should be affirmed.

## CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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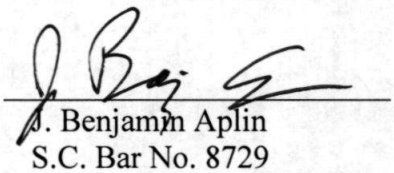
BY: 
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Columbia, South Carolina
July 7, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

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**DESIGNATION OF MATTER**

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In addition to the matter designated by Appellant, Respondent proposes the following matter to be included in the Record on Appeal:

**(1) State's Exhibit #3 – photograph.**
**(2) State's Exhibit #4 – photograph.**
**(3) Transcript page 30**

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers. The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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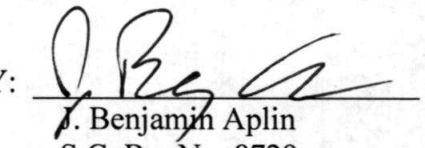
BY: 

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**PROOF OF SERVICE**

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I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter* , both dated July 7, 2014, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
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I further certified that all parties required by Rule to be served have been served. This 7th day of July, 2014.

Angela Bennett
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ALAN WILSON
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July 7, 2014

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Re: The State v. John Henry Smith
Appellate Case No. 2013-000876

Dear Counsel:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Assistant Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services