STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Calhoun County
Honorable Diane Schafer Goodstein, Circuit Court Judge
Appellate Case No. 2013-001496

THE STATE,

Respondent,

vs.

DAVID J. BENJAMIN,

Appellant.

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STATEMENT OF ISSUE ON APPEAL

ISSUE ONE - The Trial Court erred in not granting the Defendant's motion for directed verdict where the State failed to produce any direct or substantial circumstantial evidence reasonably tending to prove Defendant Benjamin's guilt where the State:

A. Failed to prove that but for the actions of Defendant Benjamin, the victim would not have died;

B. Failed to prove Defendant Benjamin intended to kill the victim;

C. Failed to prove Defendant Benjamin fired the fatal shot;

D. Failed to prove Defendant Benjamin fired any of the shots that injured the surviving victims;

E. Failed to prove Defendant Benjamin joined with another in carrying out a common plan or purpose, to wit, murder and attempted murder, sufficient to find Defendant Benjamin guilty under an accomplice liability theory;

F. Failed to prove Defendant Benjamin was present at the scene as a result of a prior arrangement to carry out a prior arranged plan or common scheme sufficient to find Defendant Benjamin guilty under an accomplice liability theory in the wounding of Hampton and DeFreitas or the killing of Lawton.

ISSUE TWO - The Trial Court abused its discretion in denying Defendant's Motion for New Trial where there was insufficient evidence to support the jury's finding and where, as a matter of law, the State failed to produce substantial circumstantial evidence to support its accomplice liability theory to convict Defendant.

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the trial judge properly denied Benjamin's motion for a directed verdict on one count of murder and two counts of attempted murder because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt of these offenses, either individually or under a theory of accomplice liability?

II. Whether the trial judge properly denied Benjamin's renewed motion for a new trial based upon the alleged insufficiency of the evidence to support convictions for one count of murder and two counts of attempted murder because the direct and circumstantial

evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt of these offenses, either individually or under a theory of accomplice liability?

STATEMENT OF THE CASE

David J. Benjamin (Benjamin) is currently in the Perry Correctional Institution, of the South Carolina Department of Corrections, where he is serving a sentence of forty years imprisonment for murder and two concurrent thirty year sentences for attempted murder, as the result of events occurring in Calhoun County, on the morning of September 18, 2011. The Calhoun County Grand Jury indicted him on February 25, 2013, for one count of murder (2013-GS-09-0051) and two counts of attempted murder (2013-GS-09-0052 & -0053). **R. pp. ___-__**. Nicholas Gray Thomas, Esquire, represented him on these charges, while Assistant First Circuit Solicitors Donald N. Sorenson and Theodore N. Lupton prosecuted the case.

Benjamin received a jury trial before the Honorable Diane Schafer Goodstein, on March 4-7, 2013. The jury convicted him of the charged offenses, and each juror confirmed the verdict when polled. **Tr. p. 707, line 6 – p. 709, line 25**. Judge Goodstein imposed concurrent sentences on him of forty years imprisonment for murder and thirty years imprisonment for each of the attempted murder convictions. **Tr. p. 718, line 24 – p. 719, line 12**.

On March 15, 2013, Benjamin filed a motion for a new trial based on the insufficiency of the evidence (**R. p. ___**) and a motion to reconsider the sentence. **R. pp. ___-__**. Judge Goodstein heard his motions on June 20, 2013. Both Benjamin and counsel were present at the hearing. Mr. Sorenson again represented the State.[1] Judge Goodstein denied his motions in separate Orders filed on July 9, 2013. **R. pp. ___-__**.

He timely served and filed a Notice of Appeal. This appeal follows.

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[1] A copy of that transcript has not been included in the record.

ARGUMENT

I. The trial judge properly denied Benjamin's motion for a directed verdict on one count of murder and two counts of attempted murder because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt of these offenses, either individually or under a theory of accomplice liability.

Notwithstanding Benjamin's arguments to the contrary, Respondent submits that the trial judge properly denied Benjamin's motion for a directed verdict on one count of murder and two counts of attempted murder because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt of these offenses, either individually or under a theory of accomplice liability.

A. The prosecution's evidence.

The direct and circumstantial evidence presented at trial, viewed in the light most favorable to the State, was that early in the morning of September 18, 2011, Benjamin and co-defendants Joshua Haggood and Kevin Frazier were involved in an exchange of gunfire with the murder victim, Dominique Lawton, at a Calhoun County nightclub. The men were mutual combatants and the shooting stemmed from Dominique bumping into Benjamin on the dance floor earlier that morning. Dominique was killed by a gunshot wound to the head and two innocent bystanders, James Hampton and Shawn DeFreitas, were shot in the elbow and in the leg, respectively.

Calhoun County Sheriff's Deputy Terry Snead testified that he received a dispatch regarding a shooting shortly before 4:00 a.m. on September 18, 2011. He then responded to an Elloree, South Carolina, nightclub known as the Pine Terrace Club or Piggy Park. Sgts. Phil Rice and Earl Kinley also responded, but Sgt. Rice was delayed in going to the scene because he

responded to a tip that one of the shooting victims had unsuccessfully tried to drive to the hospital and was at a convenience store in Cameron, South Carolina. **Tr. pp. 108-12; 123.**

When Deputy Snead arrived at Piggy Park roughly thirty minutes later, the scene was "kind of chaotic," and some people were leaving as he arrived. Deputy Snead saw one person, Dominique Lawton, lying on the ground between some trees and a parked Cadillac, with a group of people huddled around him. Another wounded person was seated in a small gray car. This person had an arm or shoulder wound. EMS was already on standby and was called in for the victims. **Tr. pp 112-21; 123; 125; State's Exhibit 3.**

Twenty-five year old Andrew Haynes, who goes by the nickname "Bubba," testified that he is a DJ working under the name "DJ Stroke." He had previously worked at the Piggy Park approximately thirty times without a homicide, and he was working there on September 17-18, 2011. Mr. Haynes arrived between 11:00 and 1:30 p.m. Mike Bullock, "DJ Mike," also worked Piggy Park that night and was there before Mr. Haynes. Bullock had backed his white van up to a door on the right hand side of the nightclub, when viewed from the road (*see* State's Exhibits 4-5),[2] and it remained there the entire night. **Tr. pp. 126-29; 148-49.**

Dominique and Benjamin, as well as Benjamin's co-defendants, were on the dance floor. "[A]bout thirty minutes" after Mr. Haynes arrived, he witnessed an altercation between Benjamin and when the victim bumped into Benjamin on the dance floor.[3] There were "some words and a little shoving" but no punches were thrown. As soon as that occurred, Mr. Haynes stepped in between them and stopped it. The club was serving free liquor, everyone appeared to

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[2] This made it easier to load and unload equipment. **Tr. p. 129**. Photographs of the van (State's Exhibits 17-21) show that it was not truly "white".

[3] He knew the murder victim well because he and the murder victim had grown up in the same area. He did not know Benjamin before that night.

be drinking and the victim was intoxicated before this incident occurred. **Tr. pp. 129-33**.

After Mr. Haynes talked to the men, they both seemed to calm down. However, Benjamin, Haggood and Frazier went outside sometime later.[4] Because Mr. Haynes is respected at the club, he followed them outside shortly afterwards, in an effort to further calm them down. By the time he got outside, it looked like the three men were returning to the club from their car. Mr. Haynes spoke with Benjamin. "Well, Dominique's nickname is Killa, so [I told him] 'don't follow around with Killa because he's young, drunk, you know how they get.' "[5] Benjamin's response was, " 'I'm a killer,' and then they walked in and that was all." **Tr. pp. 133-35; 149; 151-52**.

Because Mr. Haynes knew Dominique and because violence is bad for a DJ's business, he also spoke with Dominique and told him "go ahead and calm down because it's not called for." (He explained that Dominique was given the nickname of Killa in childhood). Mr. Haynes did not notice any other altercations inside the club that morning, but the decision was made to close the club, since the crowd was "iffy." After the crowd had started leaving, someone ran back inside and told Mr. Haynes that there was another confrontation outside of the club. By the time he got outside, he did not see the murder victim, and he thought that Dominique and Dominique's friends had walked towards the road. However, he saw Kevin Frazier holding a silver revolver and aiming it in the air. **Tr. pp. 135-38; 140; 152; 155**.

Mr. Haynes knew Frazier. So, in another effort to avoid trouble, he went up to Frazier and talked to Frazier. Frazier said, " 'I just want to get out the country. I want to get home.' " Haynes told Frazier that he was respected and he promised to escort him to the car. He also got

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[4] Mr. Haynes knew Frazier because they played basketball against each other in high school.

[5] By this he meant that where there is a crowd of people who are drinking and they bump into one another, shoving can occur. **Tr. p. 149**.

between the two sides. However, both parties continued their "chatter" and Frazier continued to hold his gun in the air. **Tr. pp. 138-41**.

According to Mr. Haynes, the black car that the defendants had arrived in was parked on the side of the building and backed in, one car away from the white van. A car owned by Shawn DeFreitas was parked in front of and facing it. By the time that Mr. Haynes and Frazier reached the trunk of the defendants' car, Frazier began firing his revolver into the air. At this point, Benjamin was by the driver's door, Haggood was standing on the passenger side of the car, and roughly twenty-five or thirty men and women were in the area. Mr. Haynes ran back into the club and heard a lot of gunshots. **Tr. pp. 138-45; 153.**

After the shooting ended, Mr. Haynes went back out and saw that his friend, James "Pee Wee" Hampton, had been shot. Mr. Haynes started to drive Hampton to the hospital but the deputies arrived and would not let him leave because his car was part of the crime scene. **Tr. pp. 145-46**. Mr. Haynes had not seen anyone with a gun when Frazier fired the shots into the air and he did not see Benjamin with a gun. **Tr. p. 147; 153.**

Natasha "Tasha" Sumpter testified that she is twenty-four years old. She and her friend, Tanesha, were at Nevadria "Momma" Miller's birthday party at Piggy Park, on September 17-18, 2011. She had witnessed a "little small argument inside the club." When she and her friend were leaving "there was a lot of argument and then I saw one of the guys with the gun." This man was in front of the women. The description that she gave was of a brown-skinned man, who was slightly taller than her and had a "little haircut." She is 5'4" tall and, as will soon be clear, this description was consistent with Haggood. **Tr. p. 226-31.**

Dominique Lawton was one of the people arguing and the argument was close to the club's front door. Natasha immediately grabbed Tanesha and tried to convince her friend to

leave, but Tanesha wanted to talk. Tanesha had parked next to a ditch that ran alongside the roadway with the passenger side away from the road. The shooting began by the time they reached their vehicle. Natasha did not see the shooting, and their vehicle did not get hit by gunfire. **Tr. pp. 230-34**.

After the shooting stopped, Natasha got out of the car and heard a girl screaming that "'they shot him. They killed him.'" She subsequently saw Dominique lying on the ground close to the road and called his sister. Other than the man whom she described, she had not seen anyone else with a gun. **Tr. pp. 234-37**.

James "Pee Wee" Hampton testified that he is from Elloree, South Carolina. He and Dominique Lawton were good friends. Mr. Hampton did not know either Benjamin or Haggood, prior to the night of the shooting, but he played basketball against Frazier in high school. Mr. Hampton and his friend, Charles Goodwin, arrived at Piggy Park between 12:30 and 1:00 on September 18th. They parked along the side of the road. **Tr. pp. 202-05; 221.**[6]

At some point while Mr. Hampton was in the club, he became aware that Dominique Lawton had been involved in an altercation in the club and the other person involved in the incident was pointed out to him. He then spoke to the victim, telling Dominique "to chill out and calm down." Dominique was calm after this conversation. However, "[a]bout an hour or two" later, there was a commotion outside the club and Mr. Hampton went outside and "tried to keep it calm." **Tr. pp. 205-06**.

As soon as Mr. Hampton got outside, he saw Frazier standing on his right. Frazier had a revolver in his hand and was waiving it in the air. Frazier said "[A]ll we want to do is go home."

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[6] Frazier went to Calhoun County High School. **Tr. p. 204**.

Benjamin and Haggood[7] had guns as well and were also standing by the door. Dominique and some of his friends were in this same area and "[t]here was a lot of chatter." Hampton walked over to where the defendants were parked, backed in at the corner of the building and next to the DJ's van. **Tr. pp. 206-11; State's Exhibit 3**.

Shawn Cooper's vehicle was parked in front of the defendants' car. Although Dominique was walking to his car, he and his friends were still exchanging words with Benjamin and his co-defendants. Benjamin, Haggood and Frazier all had their guns out, and by the time that Mr. Hampton reached their vehicle, Frazier fired one or two shots into the air. As Hampton started to walk away from their vehicle and toward the road, several more shots were fired from behind him and in the area of the defendants' vehicle. When Hampton felt a bullet go past his head, he immediately ducked behind the white van. Hampton later told police that he saw Haggood shooting but he did not see Benjamin shooting and, at trial, he testified that he had inferred that Haggood was shooting. **Tr. pp. 211-14; 223-24**.

After these shots, he heard someone say, " 'Killa, get up.'"[8] Hampton ran over to where his friend was lying on the ground, by a tree, with a gunshot wound to the head. (*See* State's Exhibit 2). In a reaction to seeing his friend in this condition, Mr. Hampton ran up toward the club, pulled a green pole "out of the ground and threw it at the [defendants'] car." Mr. Hampton also saw Shawn Cooper on the ground behind his car, which was still facing the defendants' car. **Tr. pp. 214-17.**[9]

Next, Mr. Hampton walked started to walk back up behind the DJ's van, on the far side of the defendants' vehicle. However, several more shots were fired and a bullet struck him in the

[7] Mr. Hampton described Haggood as being of "[a]bout medium height." **Tr. p. 208**.

[8] He corroborated that "Killa" was a nickname that Dominique had since childhood.

[9] The pole was introduced as State's Exhibit 32.

left elbow. He alerted others present that he had been hit and he was placed in Mr. Haynes' car. (See State's Exhibit 3). Eventually, an ambulance transported him to the hospital. **Tr. pp. 218-20**.

Dr. Jerrold Buckaloo, an orthopedic at Orangeburg Regional Medical Center, and personnel at that hospital treated Hampton's gunshot wound to his left elbow, on the morning of September 18th. However, the bullet (State's Exhibit 33) was not removed until a later surgery on February 8, 2012. The bullet was turned over to the Calhoun County Sheriff's Office. **Tr. pp. 220-21; 238-43; 245-49; 430**. Dr. Buckaloo testified that a gunshot wound, generally, is the type of injury that would be likely to cause a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment in the function of a bodily part or organ. **Tr. p. 249**.

Capt. Kirk Corley, of the Calhoun County Sheriff's Office, went to Fayetteville, North Carolina to interview Joshua Haggood sometime after the murder. On a second trip to Fayetteville, he picked up a Springfield .40 caliber handgun (State's Exhibit 34) that had been loaned to Joshua Haggood on the night of the shooting by a Mr. McGarrah and which the Fayetteville authorities had collected. Haggood had apparently returned the weapon to McGarrah and McGarrah had pawned it. Capt. Corley also interviewed McGarrah, who provided him with the rest of the ammunition that was in the weapon when it was returned by Haggood (State's Exhibit 35). **Tr. pp. 252-57.**

Joshua Haggood testified that he was twenty-six years old. At the time of the murder, he was a Sergeant in the United States Army and was stationed at Fort Bragg, in Fayetteville. After his return from deployment to Afghanistan in December 2010, he would come to Orangeburg

and visit once or twice a month. He had known Benjamin, a/k/a "Killa Season,"[10] and Frazier for a long time and they were two of his closest friends. He was testifying as the result of a plea bargain.[11] **Tr. pp. 259-64; 308-09**.

At some point, he began bringing a .40 caliber semi-automatic pistol with him that he borrowed from fellow soldier Georgio McGarrah. (State's Exhibit 34). On Friday, September 16, 2011, he came to Orangeburg with the .40 caliber pistol "to visit." On Saturday night, the 17th, Haggood went and picked up Benjamin at Benjamin's Orangeburg County residence. Benjamin placed his silver, .45 caliber semi-automatic pistol in the trunk of the car.[12] They picked up Frazier at a trailer in Calhoun County and then went to the Piggy Park, for Nevadria Miller's birthday party. Benjamin drove Haggood's 2009, black, Toyota Camry to Piggy Park because he knew how to get there. **Tr. pp. 264-70**.

Haggood's brother, William Pinckney, followed them to Piggy Park in a tan car. (State's Exhibit 12). When they arrived at Piggy Park, Benjamin backed the car up "to the edge of the club." Pinckney likewise backed in and he parked his tan car between them and the white van. When they initially entered the club, Haggood's pistol was in the console of his car and both Benjamin's and Frazier's silver, .32 caliber revolver were in the trunk. **Tr. pp. 270-72; 301-02; 390**.

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[10] Benjamin got this nickname because he did not lose fights in high school and finished a victor when confronted. **Tr. pp. 309-09; 314**.

[11] Originally, he was indicted on the same charges as Benjamin for his role in the shootings, but he was allowed to plead guilty to one count of assault and battery of a high and aggravated nature for shooting Hampton and the State recommended a ten year cap on that sentence, whereas he could have received twenty years. Also, this sentence was concurrent to an unrelated Lexington County sentence for aggravated assault. **Tr. pp. 262-63**. He later received a seven year sentence on the Calhoun County conviction. *See* http://public.doc.state.sc.us/scdc-public/.

[12] Haggood had previously seen Benjamin with the .45 "a few times. **Tr. p. 267**

Inside the club, "plenty of people were dancing." Haggood only drank beer[13] while in the club, but both Benjamin and Frazier drank beer and free liquor. The entire time Haggood was at the club, he only drank four or five beers. Sometime later, Benjamin told Haggood that there had been an incident and he pointed out two individuals that he thought Haggood needed to look out for because one person had a book bag and the other one was reaching inside the bag. Benjamin thought that one of these men had a gun. **Tr. pp. 273-75; 278.**

Benjamin "was kind of agitated," and Haggood asked him what he wanted to do. Benjamin's said that "he wasn't trying to get caught slipping," meaning that he wanted to get his gun. So, the three defendants went to the car and each man armed himself. Benjamin and Haggood stuck their weapons in their waistbands, but Frazer put his .32 in his pocket. This was an hour and a half to two hours after they first got to the club and they went back inside after they had armed themselves. **Tr. pp. 275-78.**

There was "a normal club environment" when they re-entered the club and they continued to drink. Eventually, the music stopped and the lights came on, signaling that the club was closing. Haggood went outside and talked to a woman while waiting on his friends. As soon as Benjamin and Frazier came outside, Dominique "charged" his weapon, or pulled the slide back, and the gun ejected a live bullet. This happened near the front door."[E]verything became chaotic" after that occurred.[14] **Tr. pp. 278-82; 304-05.**

Frazier pulled out his gun and waived it in the air, saying, "I'm just trying to get home. I don't want any trouble." As Haggood and Benjamin headed for the car, he also reached for his gun. However, Benjamin pressed his shoulder, as if to tell him to "fall back. Chill out." A lot of

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[13] The liquor was free, but patrons had to pay for beer. **Tr. p. 273.**

[14] Dominique seemed to be the aggressor and Haggood said that this was like an "ambush." **Tr. p. 304.**

people attempted to intervene and Frazer was ushered to the car. Dominique and his crowd went towards the road. **Tr. pp. 282-83**.

"By the time I got in front of my brother's William's car, … the first shots came out. They started shooting. And then it was like everybody was scattering." Haggood did not know who fired these shots but testified that they came from "towards the road." He did not hear these shots hit anything; neither he nor his friends were shot; and his car, his brother's car, and the are of the club near him were not hit. However, Benjamin pulled out his .45, "outstretched [his] arm like downward … from the waist" and began shooting in the direction of the car in front of Haggood's car (which was Shawn DeFreitas' car). Benjamin was at the passenger side corner when he began but continued moving as he shot. **Tr. pp. 284-86; 303; 310-12.**[15]

Someone then threw a post, which hit the passenger side mirror of Haggood's car and knocked out the mirror, itself. Haggood heard shots coming from "behind the van." So, he moved to the back of his car and he fired "three or four" shots from his .40 caliber pistol in that direction. Then, Benjamin got behind the wheel and Haggood got into the front passenger seat. Frazier fired "two or three" shots in the air before getting into the back seat. **Tr. pp. 286-88; 312**.

Initially, Shawn DeFreitas' car was blocking them in, but that car backed up and they left the parking lot. As Benjamin was driving them away, Frazier said that he had fired in the air and he asked his friends if either of them had to shoot. Haggood was on his cell phone with his brother and did not respond. However, Benjamin's response was to the effect that he had not shot into the air because he was not going to waste bullets. Also, Frazier rolled down his window as they rode. Haggood later learned that he had thrown out shell casings from his .32. **Tr. pp. 289-92**.

[15] Frazier was near the rear driver's side.

Benjamin drove Frazier to another club and Haggood dropped off Benjamin at his residence. Haggood was thereafter told that DeFreitas and two other people had been shot, and he told Benjamin the news. Yet, Haggood drove back to Fayetteville, leaving around 6:00 a.m. He returned the .40 caliber pistol to McGarrah and was subsequently informed that McGarrah had pawned it. Haggood confirmed that there was no damage to his car (*see* State's Exhibits 6-10) from the shooting, and that the only damage was caused by the pole hitting the mirror of his car. **Tr. pp. 292-97**.

Haggood was contacted by the Calhoun County Sheriff's office that day, but he lied to them about what had occurred at Piggy Park. He also gave a number of statements before and after his arrest in this case but continued to lie about his involvement, as well as that of Benjamin and Frazier, until he gave his fourth statement. He only gave that statement because, based upon what he heard from others, "I wasn't under the impression that I shot anybody." He later discovered that he had shot someone. **Tr. pp. 297-301**.

At thirty one, Shawn DeFreitas is a little older than many of the other witnesses. He had attended both Calhoun County and Elloree High Schools. He has a younger sister named Latisha Cooper and he is sometimes called Shawn Cooper. He arrived at Piggy Park, alone, around 3:00 a.m. on September 18th and he parked his Chevy Impala facing two vehicles, with another car on his side. **Tr. pp. 315-17**.

Mr. DeFreitas went into the club and talked to people. He did not witness any trouble while there. When he left an hour or so later, he saw "an altercation" between Dominique and Frazier in front of the door to the club. Because Mr. DeFreitas knew both of them, he "went to go

break it up." (Sic). Eleven or twelve other people were also standing around in the area.[16] **Tr. pp. 318-19; 330.**

> Well, I got in the middle of both sides, kind of, and I was telling Dominique, you know, just leave it alone.
>
> And ... I turned to Kevin and told Kevin ... to go to his car.
>
> The altercation was still going. They were yelling at each other and then Kevin pulled out a gun. When he pulled out the gun, that's when I grabbed him and I walked him over to the car.

Tr. p. 319, lines 13-20. Mr. DeFreitas did not see anyone else with a gun at that time. **Tr. pp. 319-20.**

Although DeFreitas's car was parked in front of Haggood's car, there was almost a car length between the two cars. Even after Mr. DeFreitas and Frazier reached the driver's side of Haggood's car, Frazier and Dominique were "still going at it. And basically Dominique was heated because Kevin pulled out the gun." DeFreitas told Dominique to " 'just leave it alone' " and " 'y'all, just go to your car.' " **Tr. pp. 320-21.**

Someone came up and pulled Dominique away. Frazier was screaming that he wanted to go home, and Mr. DeFreitas told him that he was going to get home. " 'Just get in the car.' " Benjamin then walks up and to the passenger side of the car and someone told DeFreitas to move his car because it was blocking in Haggood's car. As he turned to go move his car, there were several gunshots and he was struck by one. The bullet entered his right side and exited his inner leg. He immediately dropped to the ground and crawled behind his car. **Tr. pp. 321-24.**

Mr. DeFreitas did not see who shot him. When looked up again, he saw Frazier shooting

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[16] He had seen Benjamin "a couple of times, but I didn't know him personally." He also did not know Haggood. **Tr. pp. 318-19.**

into the air[17] and "Benjamin shooting towards the opposite side of the club." Mr. DeFreitas told another man who had also ducked behind his car that he had been hit, and someone else screamed, " 'Dominique hit.' " Shawn looked over and saw Dominique lying on the ground. **Tr. pp. 324-25; 331-33.** Although most people had been ducking, screaming and running when the shooting began, Benjamin, Haggood and Frazier did not do any of those things. **Tr. p. 334.**

Mr. DeFreitas gave the keys to his car to a woman who was present, and she tried to drive him to the hospital. However, the car had a blowout along the way, and the woman flagged down a passing officer. Later an ambulance took him to the hospital where his gunshot wound was treated. His vehicle had not been shot at Piggy Park. **Tr. pp. 325-29.**

Danny Saxon testified that he was thirty-four years old. He had known Dominique Lawton for roughly fifteen years. He also knew Benjamin from school but he did not know Haggood or Frazier. **Tr. pp. 339-40.**

Mr. Saxon and a friend, Sammy Brigman, arrived at Piggy Park around 3:15 a.m., on the morning of September 18, 2011. They were in Mr. Saxon's Cadillac Seville and Brigman was driving. They "pulled in in the driveway on the far side of the club," and they parked between ten and fifteen feet off of the side of the road. Brigman headed for the club as soon as they arrived, but Saxon stayed at the car. **Tr. pp. 340-43.**

Mr. Saxon did not know what happened before he got out of his car because he had the music on, but he saw people "running around" outside of the club. Dominique walked around the front of the Cadillac and to the passenger side. Dominique "was obviously agitated," and Mr. Saxon told him to "calm down" or "take it easy." Dominique did not have anything in his hands. **Tr. pp. 343-44.**

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[17] Frazier may have been shooting in the air before then, but that was the first time that Shawn saw him shoot. Also, Shawn did not know who initially shot. **Tr. p. 333.**

Mr. Saxon then heard gunshots and took cover behind his car. Before he ducked, he saw a tall man, whom he did not recognize, shooting into the air. By the time Mr. Saxon turned back around, he saw Dominique lying on the ground, on the rear passenger side of the Cadillac. Dominique had a wound to the head. He was. Once the shooting stopped, Mr. Saxon immediately found one of Dominique's cousins and told her what had occurred. When police arrived, Saxon was asked to move his up a short distance and he moved it about a car length, to the position that it is marked on the crime scene diagram, State's Exhibit 1. **Tr. pp. 344-47**.

Later, an officer from the Calhoun County Sheriff's Office photographed a bullet hole in his car that had not been there before the shooting. Neither Mr. Saxon nor law enforcement found that bullet in his vehicle. **Tr. p. 348-45; State's Exhibit 27**.

Michael Bullock testified that he was working as a DJ at Piggy Park on September 17-18, 2011. He arrived around 9:00 p.m. He knows Benjamin, Frazier, and Haggood from school, and he met Dominique after he began DJ'ing at Piggy Park. **Tr. pp. 352-54.**[18]

For the most part, Haggood, Benjamin, and Frazier hung out together while at the club. When asked whether he became aware of an altercation inside the club while he was there, Mr. Bullock testified, "A little. They had bumped into each other in the club and Dominique kept watching him the whole time in the club." As a result, Mr. Bullock had DJ Stroke (Andrew Haynes) go talk to Dominique. Despite this intervention by Mr. Haynes, Benjamin and Dominique "were just looking back and forth at each other" for the rest of the evening. **Tr. pp. 354-55; 361-62**.

Mr. Bullock went outside to unlock his van (*see* State's Exhibit 5) after Piggy Park closed. All of the people who had been in club were outside and "[i]t was just a big commotion

[18] He knows Benjamin "a lot better than [he] knew Mr. Lawton." **Tr. p. 363, lines 1-3**.

outside. … I turned around to go back in, [and] all I heard was Kevin Frazier said all he wanted to do was go home." Frazier and his friends were standing near their car, which was to the left – or driver's side – of Mr. Bullock's van. Bullock did not see anyone with a weapon. **Tr. pp. 355-58.**

Mr. Bullock went back into the club to unplug his equipment and soon heard a lot of gunshots. Haynes ran back in the club as soon as the shooting started. After the shooting stopped, Mr. Bullock went out to load his equipment in his van but law enforcement would not let him leave. He did not notice any damage to the van, until a deputy alerted him to the presence of three "bullet holes through the window of the van in the back side" and corresponding holes on the other side. The bullet holes are depicted in State's Exhibits 17-21, and they were not present before the shooting on September 18th. **Tr. pp. 358-61.**

Delvin Lawton testified that he is Dominique Lawton's older brother. He was not at Piggy Park on September 17-18, 2011. However, Jacob "Boomer" Warren brought him a .380 caliber pistol that had belonged to Dominique on the day after the shooting. Warren told Delvin that he had found it on the ground where Dominique had fallen. Delvin then turned over the .380 (State's Exhibit 36) to law enforcement. **Tr. pp. 364-66.**[19]

Det. Matthew Trentham collected gunshot residue kits from the surviving victims, James Hampton and Shawn DeFreitas (State's Exhibits 63-64) at the hospital before 7:00 a.m. on September 18th. Based upon information provided by eyewitnesses whom Det. Trentham interviewed at the hospital, Benjamin, Haggood and Frazier were developed as possible suspects. **Tr. pp. 427-30.**

Lt. Henry Dukes, Jr., is employed by the Calhoun County Sheriff's Office as the

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[19] Delvin had seen his brother with a gun before. **Tr. p. 367.**

lieutenant over the investigation division. **Trp. p. 369**. When he arrived at Piggy Park on the morning of September 18th, he was informed that there were three gunshot victims. By that time, the scene was secure; the victims had been transported to the hospital by EMS; and other officers were taking statements from witnesses. One of Lt. Dukes' responsibilities that morning was to process the crime scene. **Trp. p. 370**.

Lt. Dukes found a live round or bullet (State's Exhibit 40) close to the front door of the club.[20] In the area behind the van, he found a spent shell casing (State's Exhibit 41).[21] In the grass and gravel on the corner area of the club, which is on the right side as one faces the club,[22] Lt. Dukes found five .45 caliber shell casings (State's Exhibits 42-46) and three .40 caliber shell casings (State's Exhibits 47-49). All of those casings were found in the same general area. **Tr. pp. 371-76**.

Dominique's body was found where there is blood stain on the ground near a large oak tree shown in State's Exhibit 2. Lt. Dukes found five 9 mm. shell casings (State's Exhibits 51-55), scattered in the grass, roughly fifteen feet behind where Dominique's body was located. **Tr. pp. 376-78; 409-10**. He found State's Exhibit 32, the green wooden post that Mr. Hampton threw at Haggood's car, in front of the club. **Tr. pp. 378-79**.

He also photographed the damage to Mr. Bullock's van, which consisted of three bullet holes that entered on the driver's side of the van, which was the side closest to where Haggood had parked (*see* State's Exhibits 17-20),[23] and three corresponding holes on the opposite side of

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[20] This area is depicted in State's Exhibit 4.

[21] A marker depicted in State's Exhibit 17 designates the location of this casing, as well.

[22] *See* State's Exhibit 3.

[23] One went through the glass on the rear side of the van. The second is into the metal on the rear side and the third bullet hole is closer to the tail light. *See* State's Exhibit 17.

the van. (*See* State's Exhibits 22-24). He managed to retrieve the projectile (State's Exhibit 50) from one of the shots that did not go all the way through the van. **Tr. pp. 379-83**. He then examined the building to see if he could find areas that appeared to have been struck by bullets. He did not see any defects on the right front of the building or behind the building in the area where Haggood and Haggood's brother were parked. **Tr. p. 383**.

On the left side of the front of the building, however, he located and photographed (*see* State's Exhibits 25-26) an area where a bullet had chipped a piece of concrete off of the building, and the concrete was on the ground. Although he saw a similar defect a short distance away from this that also may have been caused by a bullet, it did not have a piece of concrete on the ground near it and he was unable to determine whether a bullet had cased that damage. Lt. Dukes did not finish processing the scene until after daylight. **Tr. pp. 384-86**.

Kevin Frazier's name had been mentioned in the original 911 call. So, Lt. Dukes went to the residence of Frazier's mother in an effort to locate him. Lt. Dukes thereafter spoke to Frazier, who made arrangements to come speak with Lt. Dukes. Frazier did not show when promised and did not arrive until the afternoon of the 18th, and he was then arrested. A gunshot residue kit was performed at that time as well. **Tr. pp. 386-89**.

Initially, Frazier denied firing or having the gun with him at the Piggy Park, but he changed his story the following day and admitted he did have a gun. Lt. Dukes got the consent of Frazier and Frazier's girlfriend to search their residence and he recovered a .32 caliber revolver (State's Exhibit 37) that had been hidden in a couch, as the result of the search executed on September 19th. It had two spent cartridge casings (State's Exhibits 38-39) in it. **Tr. pp. 396-99**.

Lt. Dukes testified that Benjamin and Haggood were also developed as possible suspects and he contacted Haggood in North Carolina on the 18th. Based on that conversation, he was able

to locate the vehicle belonging to Haggood's brother, William Pinckney. When Lt. Dukes examined that car (*see* State's Exhibits 12-14), he discovered that there was a bullet hole in the "right back by the tail light." When the tail light was disassembled, he found and seized the bullet (State's Exhibit 56). **Tr. pp. 389-92**.

Lt. Dukes likewise examined Mr. Saxon's Cadillac (*see* State's Exhibits 27-30) and saw where a projectile had entered the door of the car and struck the door post, without penetrating the door post. Because Lt. Dukes did not find any bullet, he came to the conclusion that the bullet may have ended up between the door and the post. (*See* State's Exhibits 29-30). If this was correct, it could have simply fallen to the ground when the door was opened. In light of this and information that Mr. Saxon's car had been moved, Lt. Dukes went back to the crime scene several days later and looked for more evidence in the area near where the victim had fallen. This time, he used a metal detector. **Tr. pp. 392-95; 416; 420**.

This decision proved beneficial because he found three bullets (State's Exhibits 57-59) approximately 7' - 8,' or roughly a car length, in front of where the victim had been.[24] **Tr. pp. 395-96**. After Dominque died on September 19th, Lt. Dukes went to the hospital and obtained a gunshot residue kit of his hands. **Tr. pp. 399-400**. Also, Benjamin turned himself in on the 19th and all three defendants were charged. **Tr. pp. 400-01; 409**.

On September 2nd, Lt. Dukes and Lt. Corley went to Fort Bragg and interviewed Haggood. Although he was still lying about his involvement in the shootings, the officers were able to photograph his car. (State's Exhibits 7-10). The only damage present was that the reflective portion of the passenger side side-view mirror was broken (see State's Exhibit 9), and

[24] Again, the victim was found lying over to the right as one faces the club and near a large oak tree depicted in State's Exhibit 2. **Tr. p. 395**. Also, Mr. Saxon moved his car forward roughly a car length at the request of law enforcement. **Tr. pp. 346-47**.

there was some green paint on the mirror. This paint mark was consistent with the green post recovered at the crime scene. **Tr. pp. 401-03**.

Lt. Dukes also performed gunshot residue testing (State's Exhibit 60) on the car. He swabbed interior areas around the windows on the driver's door; the driver's side rear door; the passenger's door; and the passenger's side rear door. **Tr. pp. 403-05**. Benjamin's residence was searched several days later but officers were unable to locate his .45 caliber pistol or any other gun. Officers have likewise not been able to locate a 9 mm. consistent with the shell casings that were recovered near the victim's body at the crime scene and they have been unable to identify who fired this weapon. **Tr. pp. 405-06; 410-11; 414; 419-22; 431-33**.

Agent John Roberts was employed in SLED's trace evidence department until 2012 and analyzed the gunshot residue kits that were submitted in this case. Agent Roberts explained that the palms and the back of the hand of both hands are tested for the presence of the three metals present in gunshot primer: lead, barium and antimony. These three metals must be "in quantities that we associate with firing a gun, handling a gun, or being near a gun when it goes off," since those are the three main ways that people get gunshot residue on their hands. **Tr. pp. 448-52**.

"Gunshot residue is fairly easy to remove off your hands." Any number of activities will remove it, and within six hours a living person's body will absorb enough of the metals "to a point that we can't find it in quantities that we associate with firearm." So, no analysis is performed on tests administered over six hours after the alleged discharge of the weapon. However, the body of a deceased individual does not absorb the metals and testing may be performed even if the sample was taken beyond the six hour window. Further, clothing is often tested for gunshot residue. **Tr. pp. 453-55**.

Agent Roberts tested several of the samples received in this case. The samples taken from

Shawn Defreitas and James Hampton (State's Exhibits 63 and 64, respectively) were negative for gunshot residue.[25] **Tr. pp. 455-57**. Agent Roberts did not perform any analysis of the kits taken from Frazier or Nayrone Shivers[26] because the samples were taken outside of the six hour time frame. **Tr. pp. 457-58**. Agent Roberts opined that the kit taken from victim came back negative. However, he would not have run the test if he had known that the victim had been on life support for hours after the shooting and that the kit was not collected until after the victim's death on the 19th, since all of the markers had dissipated. **Tr. pp. 458-60.**

The next kit that Agent Roberts tested was the one performed on Haggood's vehicle. He testified that "[v]ehicles work a lot like clothing. If a gun is fired in the vehicle, or near the vehicle, sometimes you can take samples and you can find gunshot residue kit on those samples from that vehicle." **Tr. pp. 460-61**. Agent Roberts opined that his testing of the sample from the front driver's side of the car showed the presence of metals that were "associated with or consistent with gunshot residue."[27] **Tr. pp. 461-64.**

Of the remaining particle lifts, the only one that was positive "was the driver's side back. And on that particle lift I did find a round gunshot residue particle, the particle that's unique to gunshot residue and doesn't come from anywhere else. And I found a non-round particle that has lead, barium and antimony." Based upon these findings, Agent Roberts opined that "a gun fired near" the front and back of the driver's side of the car. He further opined that the shooter was located between six and ten feet from the tested areas, and that either the doors were open or the

[25] Both samples were taken roughly four hours after the shooting. **Tr. p. 456-57.**

[26] He did find gunshot residue on a black shirt belonging to Shivers. **Tr. p. 465-66.**

[27] Agent Roberts explained that he found a round lead particle on this lift and that "[r]ound lead particles are associated with gunshot residue. There [are] a couple other places that they come from, but not very many. They are not unique, but they are close." **Tr. pp. 463-64.**

windows were down at the time. **Tr. pp. 464-68.**

SLED Agent James Green is an expert firearms examiner, who examined a number of items that were submitted in this case. **Tr. pp. 474-76; 478-99.** Agent Green examined three firearms connected to this case, State's Exhibits 36-37. State's Exhibit 36 is a "Highpoint firearms Model CF-380 and a … .380 auto caliber, serial number of P844000." State's Exhibit 37 is an "Armenius, Model HW3-32, Smith & Wesson long caliber revolver with a serial number of 232359." State's Exhibit 36 was a semi-automatic pistol with a detachable magazine of bullets,[28] while State's Exhibit 37 is a .32 caliber revolver that holds seven cartridges. Both weapons were in working order. **Tr. pp. 478-82; 484.**

Agent Green explained that it is possible to eject a live round from State's Exhibit 36, either "if it were a misfire" or a person "charges" the weapon, *i.e.*, pulls back the slide to load a live bullet into the chamber, when there is a live round already in the chamber. **Tr. pp. 482-84.** Another weapon submitted for testing was State's Exhibit 34, Joshua Haggood's "Springfield Armory, 23 Model XD-40 S&W caliber, with a serial number of US298932." This .40 semi-automatic pistol was also in working order. **Tr. pp. 484-85**

State's Exhibit 40, the unfired .380 caliber round found close to the front door of the club, was the "correct caliber for use in … State's Exhibit 36," the victim's pistol. Also, it could have been ejected by someone charging the weapon, as explained. State's Exhibit 41, a spent shell casing found behind the van, was "a fired .380 auto caliber cartridge case and it was fired by State's Exhibit 36." Likewise, State's Exhibit 56, the .380 caliber bullet recovered from the tail light assembly of William Pinckney's Ford Taurus, was fired by State's Exhibit 36. **Tr. pp.**

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[28] Because State's Exhibit 36 is a semi-automatic pistol, a bullet should be fired every time the trigger is pulled, the casing of that bullet is ejected, and a new bullet is loaded into the chamber. SLED protocol is not to speculate on ejection patterns of semi-automatic weapons because too many variables can impact where a casing ultimately stops after it is ejected from the gun. **Tr. pp. 481-82.**

485-89.

Haggood's semi-automatic .40 caliber pistol, State's Exhibit 34, was the only weapon submitted to Agent Green that could have fired State's Exhibits 47-49, the three .40 caliber cartridge casings found in the grass and gravel on the right corner area of the club. State's Exhibit 34 was consistent with firing those casings, but his testing was inconclusive as to whether that was the only .40 caliber gun that could have fired them.[29] **Tr. pp. 489-90**.

The bag of seventeen bullets provided by Mr. McGarrah (State's Exhibit 35) was the same brand of ammunition as the casings in State's Exhibits 47-49. Agent Green was able to match the cartridge cases in State's Exhibit 35 to each other. While he could also match State's Exhibits 47-49 to each other, he could not match the casings in State's Exhibit 35 to State's Exhibits 47-49. " **Tr. pp. 490-91**.

Similarly, he opined that the fired bullet recovered from the van (State's Exhibit 50) "was most consistent with being ... a bullet loaded in some .40 Smith & Wesson caliber cartridges. This bullet "bore the same general rifling characteristics as test specimens from the State's Exhibit 34 pistol," but his testing was inconclusive. He explained that "[s]ome firearms just mark inconsistently." Comparison of the fired .40 caliber bullet removed from James Hampton's arm (State's Exhibit 33) to State's Exhibit 34 was also inconclusive, even though this bullet had "similar general rifling characteristics." An additional obstacle to accurately comparing State's Exhibit 33 to Haggood's weapon was that this bullet had dried blood on it. **Tr. pp. 491-94**.

Although neither a .45 caliber pistol nor a 9 mm. weapon were submitted for Agent Green's testing (**Tr. p. 485**), he opined that the five .45 cartridge casings (State's Exhibits 42-46) found at the right corner of the club and near the .40 caliber casings were all fired by the same

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[29] He opined that "the markings were not of the quality or quantity" to either include or exclude State's Exhibit as firing the casings. **Tr. p. 490**.

weapon. He explained that a .45 caliber bullet is too large to have been fired by any of the other weapons he had examined. He further explained that a .40 caliber bullet was too small to have been fired by a .45 caliber pistol and too large to have been fired by either the .380 pistol (State's Exhibit 36) or the .32 caliber revolver (State's Exhibit 34). **Tr. pp. 494-96**.

Agent Green further opined that the three bullets found about 7' - 8' in front of where the victim had been lying (State's Exhibits 57-59) were "consistent with being a .45 auto or a .45 gap caliber cartridges" and that they were consistent with the type of bullets that would have come out of the five shell casings introduced as State's Exhibits 42-46. Although comparison of State's Exhibit 59 with the other bullets was inconclusive because the jacket covering it "was abraded and gouged," Agent Green opined that State's Exhibits 57-58 were both fired by the same weapon. A possible explanation for the damage to State's Exhibit 59 was that it had been caused by penetrating a vehicle door and striking the vehicle's door post. Because the two .32 cartridge casings (State's Exhibits 38-39) had been removed from the cylinder of the weapon, Agent Green did not test them, which is a SLED protocol. **Tr. pp. 496-98**.

Finally, Agent Green opined that State's Exhibits 51-55 were five fired 9 mm. Luger cartridge casings, which had all been fired by the same firearm. By Agent Green's microscopic comparison of the class characteristics of the casings with State's Exhibit 34, he was able to determine that the victim's semi-automatic .380 caliber pistol did not fire these casings. Also, the other firearms that he examined were too large to have fired them. **Tr. pp. 494-96; 498-99**.

Dr. Janice Ross is the forensic pathologist who performed the autopsy on Dominique Lawton's body. **Tr. pp. 525-26**. The victim was 5'7'' tall and his estimated weight was roughly one hundred sixty-five pounds. **Tr. p. 532**. Dr. Ross only found one injury: "a gunshot wound that went through the head and lacerated the brain." **Tr. p. 526**. She explained that:

> The entrance wound was in the left forehead, just above the eyebrow, and it went pretty much straight back and exited maybe a little bit to the left. It went backwards and to the left and exited the left side of the head.

Tr. p. 526, lines 14-17.

She opined that the wound's track meant that the victim's head was facing the shooter when he was shot. This wound ultimately caused the victim's death because "the brain was lacerated and then [it began swelling], and the swelling and the enlargement of the brain from the swelling then impinge[d] on areas of the brain that have to do with breathing and heartbeat." As a result, the victim died "[f]rom the brain damage … which eventually results in failure to breath, [or] respiratory failure." Without a ventilator, the victim would have quit breathing within minutes up to an hour. **Tr. pp. 526-27.**[30]

Dr. Ross opined that this was the type of injury that likely would have been fatal even with medical intervention. She measured the entrance wound as .3" x .4." However, she explained that it was impossible for her to determine, on autopsy, what caliber weapon caused the injury, and she did not recover the bullet that had caused the wound. **Tr. pp. 528-31.**

B. Benjamin's motions and the trial judge's rulings.

1. The initial directed verdict motion and the trial judge's denial of it.

Benjamin moved for a directed verdict on each indictment, after the State had rested. **Tr. p. 534, lines 16-21.** The trial judge immediately called upon the State "to lay out as to each one of those [indictments,] … the witnesses that have laid down … the evidence …putting the gun in the hand of the defendant … and then pointing the gun in the area where the victims were, for me." **Tr. p. 534, line 23 – p. 535, line 8.**

[30] The victim remained on life support for some time after the injury and was pronounced dead on the 19th. **Tr. pp. 400; 459.**

Assistant Solicitor Sorenson stated that there were "multiple witnesses" and the trial judge agreed that he should start by providing witnesses who could place the gun in Benjamin's hands **Tr. p. 535, lines 10-23**. He then argued as follows:

MR. SORENSON: ... [T]here are multiple witnesses that do that. I believe Mr. Hampton had indicated that he saw basically all three defendants with guns.

> Obviously the co-defendant, Mr. Haggood, testified and his more specifically, because he has knowledge of exactly what type of gun it was also. He testified that he saw this defendant firing a .45 caliber gun that he had seen this defendant with on multiple occasions prior to this night, essentially out in the direction that I would submit the victim was ultimately hit, the victim being Mr. Lawton was struck.
>
> The two of them definitely, and there may be one other without me going through all my notes, but at least the two of them that put this defendant with a gun; one of them describing the actual caliber of the gun, indicating that he was with this defendant when they went out and armed themselves earlier that evening and brought the guns back into the club.
>
> Additionally, Your Honor, if you look at the victims that were actually hit, you look at Mr. DeFreitas' testimony that he had basically walked -- was involved in the group that had walked the defendants basically over to their vehicle.
>
> And, as you recall, when I had him kind of describe how he was walking away from his vehicle would have put his right side facing the defendants['] vehicle when he was struck in the right hip, which I submit at that point in time, you know, other testimony would have Mr. Frazier shooting in the air and this defendant then being the only person shooting in that direction at that time, which would then kind of fall into -- it's my position that he was shot basically around the same time that Mr. Lawton was shot.
>
> And, furthermore, ... when they go back ... with the metal detectors they find over in the vicinity of where Mr. Saxon's vehicle was pulled in and the victim Mr. Lawton

> was found with the gunshot wound to the head, they find three .45 caliber rounds; two of them that are matched to each other, and the third one was too damaged, which I submit is from striking Mr. Saxon's vehicle. There are five .45 caliber casings; three bullets there. I submit to you one of those other two went through Mr. Lawton's head.
>
> As to the third victim, Mr. Hampton, … it's our position, and has been since I basically delved into this case and gotten it ready for trial, that the shot that struck Mr. Hampton in the left elbow was fired by the co-defendant Joshua Haggood. So I think our argument with regards to him is more … of an accomplice liability standpoint, that these three individuals … made a decision to go arm themselves after an altercation inside this club and returned to inside that club, continued drinking alcohol that spilled out when things shut down.
>
> You have -- I mean -- and I agree, it's chaos out there, but I submit to you the three of them were part of that chaos.
>
> So it would be our theory as to Mr. Hampton would be an accomplice liability theory, not that we are arguing that this defendant actually shot him.

Tr. p. 535, line 24 – p. 538, line 7.

The trial judge stated that this had answered her question, which was based on the State's request for an accomplice liability instruction. She wanted to know the charge(s) on which the State was contending that Benjamin was guilty under a theory of accomplice liability. She was mainly confused with respect to the shooting of Mr. DeFreitas. **Tr. p. 538, lines 8-12; p. 538, lines 19-24**. The State confirmed it was asserting guilt by accomplice liability "primarily" for the shooting of Mr. Hampton, but noted that "really it could be either one of the other two." **Tr. p. 538, lines 13-18**.

The trial judge then heard from Benjamin. He argued that "there is no definitive proof as to what firearm killed" Dominique Lawton. He further argued that some witnesses had testified

that there was "a barrage of shots" and that other weapons were possibly involved. He added that "without some testimony of a defendant ... who has already made a deal with the State, without his testimony, there is nothing that puts that .45 caliber handgun in his hand, let alone there is no evidence that said a .45 caliber handgun killed the decedent Dominique Lawton." **Tr. p. 539, lines 3-14**.

Benjamin claimed that he was entitled to a directed verdict for the attempted murder of Shawn Defreitas because Mr. DeFreitas' timeline was that he did not see Frazier shoot into the air until after he was shot and had crawled to safety. On the other hand, other evidence presented by the State indicated that Benjamin only returned fire after Frazier had fired his gun. "We have ... corroborative evidence that Mr. Frazier fired twice." Thus, he could not have shot Defreitas. Finally, Benjamin argued that he would be prejudiced on the submission of accomplice liability charge with respect to the attempted murder of Mr. Hampton because "the State's witness[,] [Haggood,] admitted that he was responsible for the wounding of Mr. Hampton." **Tr. p. 539, line 15 – p. 540, line 8**.

The trial judge then denied Benjamin's motion:

> THE COURT: All right. Got it. Thank you so much.
>
> That was helpful to me, and I think the testimony you have pointed out is why I asked that of Mr. Sorenson to walk that through. And I think that he's been quite candid with the court that, particularly with regard to -- I'm going to call him Defreitas because of the – but it ' s ... Mr. Defreitas. I apologize.
>
> That Mr. Defreitas, that it's one of two theories, if you will, because of the circumstantial nature of -- particularly with regards to the injuries to Mr. Defreitas. And largely if the jury believes the testimony that you have elicited, if any, whether it's the responsibility for Defreitas has got to be hand of one, the hand of all, and I don't think it's overly prejudic[ial].
>
> ... [U]nder these facts, I think it's -- unless something changes, at this point I believe that taking the evidence in its entirety and the inferences which

could be drawn, I do believe that there is evidence on each and every element of each of these offenses, even understanding that there is a portion of it which is circumstantial, I do believe that there is evidence on each and every element from which this jury could make a determination of guilt, and I would respectfully deny your motion at this point, noting your exceptions thereto for many of the reasons that you have pointed out to me, Mr. Thomas.

Tr. p. 540, line 11 – p. 541, line 12.

2. Denial of Benjamin's renewed directed verdict motion.

At the conclusion of the defense's case, Benjamin renewed his motion for a directed verdict on the charge of murder. He argued that the testimony of a defense eyewitness demonstrated that he could not have killed the murder victim. He likewise renewed the arguments for a directed verdict for the attempted murder of Mr. DeFreitas. **Tr. p. 583, lines 10-12; p. 584, line 10 – p. 585, line 15.**

The trial judge, however, denied his motion. She noted that there was conflicting evidence, but stated that her responsibility in ruling on his motion was "to determine whether or not there is evidence on each and every element from which the jury could determine guilt." She found that there was such evidence with respect to the attempted murder of Mr. DeFreitas under the theory of "the hand of one [is] the hand of all," which she was going to charge." She further denied the remaining portion of his motion and noted his exceptions. **Tr. p. 585, line 16 – p. 586, line 4.**

The trial judge later instructed the jury on accomplice liability. **Tr. pp. 692-94.**

C. Discussion.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. A defendant is entitled to a directed verdict [only] when the state fails to produce evidence of the offense charged." *State v. Weston*, 367 S.C.

279, 292, 625 S.E.2d 641, 648 (2006); *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). "In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." *State v. Irvin*, 270 S.C. 539, 543, 243 S.E.2d 195, 197 (1978) (citing *State v. Massey*, 267 S.C. 432, 229 S.E.2d 332 (1976)).

Applying the above principles to the facts of this case, Respondent submits that Benjamin's directed verdict motion on the charge of murder and the two counts of attempted murder was properly denied. South Carolina defines "murder" as the "killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). Further, "[a] person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (Supp. 2014).[31] Both of these offenses require that the defendant act with "malice aforethought." "Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." *Kelsey*, 331 S.C. at 62, 502 S.E.2d at 69. It is the doing of a wrongful act intentionally and without just cause or excuse. *Tate v. State*, 351 S.C. 418, 570 S.E.2d 522 (2002).[32] *See* **Tr. pp. 682-84.**

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[31] "A person who violates this section is guilty of a felony, and, upon conviction, must be imprisoned for not more than thirty years." *Id.*

[32] Alternatively, malice has been defined as "something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief." *Arnold v. State*, 309 S.C. 157, 163, 420 S.E.2d 834, 837

The State's evidence reasonably tended to prove that Benjamin, personally, fatally shot the murder victim, Dominique Lawton, with his .45 caliber semi-automatic pistol. Indeed and contrary to Benjamin's understanding, the Assistant Solicitor did not rely upon accomplice liability to convict him of murder. Rather the Assistant Solicitor urged jurors to acquit him on this charge if they found that the State had failed to prove that he had killed the victim. **Tr. p. 618, lines 2-23**.

The State's evidence in this case is a far cry from the circumstantial evidence cases where this Court or the Supreme Court has found that a directed verdict should have been granted. *See, e.g., State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011); *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011); *State v. Bennett*, 408 S.C. 302, 758 S.E.2d 743 (Ct.App. 2014).[33]

(1992). *See also State v. Fennell*, 340 S.C. 266, 275 n. 2, 531 S.E.2d 512, 517 n. 2 (2000) ("[m]alice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it").

[33] In *Bostick*, the Court found that the prosecution's evidence only established a mere suspicion of Bostick's guilt. It found that the State had only presented the following pieces of circumstantial evidence of his guilt: the victim's car keys, calculator, and other items from her home were found in the Bostick family's burn pile; the fire in the burn pile was accelerated with either kerosene or diesel fuel, and Bostick's mother did not use those accelerants when she burned things in the pile; Bostick had a pattern that matched gasoline on his shoes and gasoline was the accelerant used for the house fire; and the DNA from the blood found on Bostick's jeans excluded about ninety-nine percent of the population, but the blood could not be matched to the victim's DNA. The Court held that this was insufficient to withstand a directed verdict motion because (1) the State did not present any direct evidence linking Bostick to the crime scene or to the items found in the burn pile; (2) the State failed to establish that he had control over his family's burn pile; (3) the State did not introduce any weapon that it contended had been used to beat the victim in the head; (4) there was no evidence that Bostick knew that the victim may have had money in her briefcase; and (5) there was no evidence any money was in the briefcase on the Sunday of her murder. *Bostick*, 392 S.C. at 141-42, 708 S.E.2d at 778.

In *Odems*, the state presented circumstantial evidence that: (1) police found Odems in the getaway car with the burglars and the stolen goods less than 90 minutes after the burglary; (2) Odems fled from law enforcement when the car was stopped; and (3) Odems asked an individual not involved in the offenses to lie for him. 395 S.C. at 588, 720 S.E.2d at 51. However, other evidence presented did not tend to prove Odems' guilt. For instance, the lone eyewitness saw only two people at the crime scene; a forensic investigator collected twelve sets of fingerprints from the crime scene, but none matched Odems' fingerprints; and a co-defendant testified during the State's case-in-chief that Odems did not participate in the crime but was present in the car after he offered him a ride. *Id.* The Supreme Court reversed, finding that there was not substantial circumstantial evidence on which to base a conviction, and therefore, the trial court erred in refusing to direct a verdict in favor of the petitioner. *Id.* at 592, 720 S.E.2d at 53.

Likewise, *Bennett* was purely a circumstantial evidence case. This Court held that, at most, the evidence presented

Unlike *Bostick*, *Odems*, *Bennett* and *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984), this was not a purely circumstantial evidence case. Rather, there was direct evidence of Benjamin's presence at the crime scene. Also unlike *Bostick*, there was a great deal of express malice and evidence of motive in this case, all of which pointed directly at Benjamin.

First, it is undisputed that the incident which ultimately gave rise to the shooting was the words, pushing and shoving that occurred when Dominique bumped into *Benjamin* on the dance floor. This incident did not involve either of Benjamin's co-defendants. Although there was no further violence inside the club that night, tensions still ran high between *Benjamin* and Dominique for the rest of the morning, despite the efforts of numerous people to calm down the two men. The two men continued to exchange glances and watch each other for the remainder of the morning.

Respondent submits that its evidence reasonably tended to prove that Benjamin shot Dominique. At least *two witnesses placed a gun in Benjamin's hands* and *had him firing in the direction of* where *Dominique* dropped after being fatally shot in the head. Mr. Hampton testified that he saw all three defendants with guns. Frazier was waiving his in the air. Benjamin and Haggood were also armed and had their guns out, as they stood by the car. Hampton did not see Benjamin shoot as he walked away from them after Frazier started shooting in the air, but he testified that the shots came from behind him and from the area of the defendants' vehicle. **Tr. pp. 207; 212-14**.

Haggood testified that he, Benjamin and Frazier all had weapons with them when they

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merely raised a suspicion that defendant committed the crimes. Therefore, this evidence – including evidence (1) that the defendant's fingerprint was found on a community room television set that may have been manipulated by the burglar in an attempt to remove the television, and (2) that two small droplets of blood matching his DNA were found below the space where a stolen television once sat in the computer room, where he had frequently been - was insufficient to support the defendant's convictions for burglary in the second degree, petty larceny, and malicious injury to real property. *Id.* at ___, 758 S.E.2d at 745-46.

first arrived at Piggy Park. Benjamin and Frazier left a .45 and a .32, respectively, in the trunk of the car and Haggood left his .40 in his car when they initially went into Piggy Park. Following the incident between Benjamin and Dominique on the dance floor, however, *Benjamin* told Haggood that there had been an incident. Also, he pointed out two individuals that he thought Haggood needed to look out for because one person had a book bag and the other one was reaching inside the bag. Benjamin thought that one of them had a gun. **Tr. pp. 273-75; 278.**

Benjamin "was kind of agitated," and Haggood asked him what he wanted to do. *Benjamin* said that "he wasn't trying to get caught slipping," meaning that he wanted to get his gun. So, the three defendants went to the car and each man armed himself. Benjamin and Haggood stuck their weapons in their waistband, but Frazer put his .32 in his pocket. This was an hour and a half to two hours after the first got to the club and they went back inside once they were armed with their guns. **Tr. pp. 275-78.**

Mr. Haynes corroborated this, in part. He testified that when he went outside to speak to Benjamin, Haggood, Benjamin, and Frazier were coming in and appeared to have gone to their car. Moreover, Mr. Haynes spoke with the Benjamin and tried to persuade Benjamin to ignore the young, intoxicated "Killa," a/k/a Dominique. However, Benjamin's only response was, " 'I'm a killer.' " Consciously armed and prepared to kill, he and his co-defendants then returned to the club. **Tr. pp. 133-35; 149; 151-52.**

Haggood testified that he later saw Benjamin shooting the .45 caliber semi-automatic pistol that he had seen this defendant with "a few times" prior to this night. **Tr. p. 267**. Benjamin pulled out his .45, "outstretched [his] arm like downward ... from the waist" and began shooting in the direction of the car in front of Haggood's car (which was Shawn DeFreitas' car). Benjamin was at the passenger side corner when he began but continued moving as he shot. **Tr. pp. 284-**

86; 303; 310-12. Shawn DeFreitas also testified that he saw "Benjamin shooting towards the opposite side of the club," after he had been wounded. **Tr. pp. 324-25**. Respondent submits that this testimony has him firing in the direction of where the victim was ultimately hit.

Further, the forensic evidence corroborated the testimony of Hampton, Haggood and DeFreitas as to Benjamin's location when the victim was murdered because there were five .45 caliber shell casings (State's Exhibits 42-46) and three .40 caliber shell casings (State's Exhibits 47-49) found in the grass and gravel in the right corner area of the club, which is consistent with witnesses' testimony of the location of the defendants' vehicle. Also, three, fired .45 caliber bullets (State's Exhibits 57-59) were found approximately 7'-8' – or approximately a car length, in front of where the victim had been. The .45 shell casings were all fired by the same weapon. Three fired bullets (State's Exhibits 57-59) were "consistent with being a .45 auto or a .45 gap caliber cartridges" and they were consistent with the type of bullets that would have come out of the five shell casings introduced as State's Exhibits 42-46. Two of those bullets were fired by the same weapon. **Tr. pp. 371-76; 395-96; 494-98**.[34]

Additionally, there was expert testimony that the gunshot residue testing from Haggood's car reflected that a gun was fired between six and ten feet from the front and back of the driver's side of the car, with either the doors open or the windows rolled down at the time. **Tr. pp. 464-68**. Again, this is consistent with Benjamin's location at the time that the victim was shot.

Several other pieces of circumstantial evidence likewise support the trial judge's denial of Benjamin's motion for a directed verdict on the murder charge. Dominique was only a few feet

[34] What is colloquially called a bullet is actually a cartridge, consisting of four parts: a lead bullet, smokeless powder, a brass casing and a primer. *Pistol Cartridge Basics*, Ultimate Reloader http://ultimatereloader.com/reloading-101/pistol-cartridge-basics/. (Last visited July 18, 2014). When a semi-automatic pistol is fired, the pistol's hammer strikes the primer, which ignites the smokeless powder, which then propels the bullet out of the firearm's muzzle. The momentum causes the now-empty brass casing to be ejected from the side of the gun and a fresh cartridge moves into the chamber. *Id. See also* **Tr. pp. 480-82**.

from Mr. Saxon when he was shot in the head. While Mr. Saxon did not see who shot his friend, it was obviously not the person who shot into the air, Frazier. Also, the three, fired .45 caliber bullets were found near where Saxon's Cadillac was parked and near the victim. A reasonable inference from this evidence is that the person with the .45, Benjamin, killed Dominique.

Moreover, as the group fled the scene in Haggood's car, Frazier said that he had fired in the air and he asked his friends if either of them had to shoot. Benjamin's response was to the effect that he had not shot into the air because he was not going to waste bullets. **Tr. pp. 290-92**.

Further, the witnesses present when the shooting began testified that the scene was "chaotic," with people screaming, scattering, ducking and running for cover. **Tr. p. 151; 234; 282; 303; 321; 332; 334; 343**. It remained that way for some time because Deputy Snead, the first responding officer, testified that the scene was still "kind of chaotic" when he arrived roughly thirty minutes later. **Tr. p. 112, lines 8-16**. However, no witness testified that he or she saw ducking, panicking, or running by Benjamin, Haggood or Frazier. This is hardly surprising, since their vehicle did not have any bullet holes in it; there were no bullet marks on the building in the area where there car was parked; and the bullet which came closest to them struck the rear of Pinckney's car.[35] **Tr. pp. 292-97; 383; 401-03; State's Exhibits 7-10**.

Likewise, there is the obvious evidence of Benjamin's flight from the scene, in an effort to elude capture. *See State v. Pagan*, 357 S.C. 132, 591 S.E.2d 646 (2003) (evidence of flight constitutes evidence of defendant's guilty knowledge and intent); *State v. Grant*, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980) ("[A]ttempts to run away have always been regarded as some evidence of guilty knowledge and intent") (citation omitted); *State v. Crawford*, 362 S.C. 627,

[35] Respondent submits that a reasonable inference is that this bullet was fired after the victim had been mortally wounded in the head.

634-36, 608 S.E.2d 886, 890-91 (Ct. App. 2005).[36]

Respondent would note that the State's failure to introduce the weapon with which Bostick allegedly had beat the victim in the head was one of the reasons that the Court in *Bostick* relied upon for finding that the trial judge should have granted a directed verdict. *Bostick*, 392 S.C. at 141-42, 708 S.E.2d at 778. Here, however, the State's inability to locate the weapon that Benjamin had and fired on September 18, 2011, constituted additional circumstantial evidence of his guilt. The State was able to obtain the victim's .380 and the State obtained the weapons of both co-defendants. The only weapon that was secreted, destroyed, sold, or otherwise disposed of was Benjamin's .45, which the State's theorized was the murder weapon. His act of disposing of the weapon after Haggood told him that law enforcement was looking for him, even though he had been previously seen carrying it "a few times," was circumstantial evidence of his guilt. *See State v. Southerland*, 316 S.C. 377, 383, 447 S.E.2d 862, 866 (1994) (evidence showing that defendant possessed a shotgun at the time of the murder, that the shotgun was the type used to kill victim, and that defendant disposed of the shotgun after the murder in exchange for cocaine was properly admitted because it established identity and a common scheme), *overruled on other grds., State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995) (requesting a *Batson v. Kentucky*, 476 U.S. 79 (1986), hearing in effect sets out *prima facie* case of discrimination, warranting *Batson* hearing); *Guevara v. State*, 152 S.W.3d 45, 50 (Tex.Crim.App. 2004) (defendant's attempt to conceal evidence is a circumstance of guilt).

[36] "This common law rule is based on ordinary human experience that echoes its often-quoted Biblical antecedent: 'The wicked flee where no man pursueth; but the righteous are bold as a lion.' Proverbs 28:1.' " *Ordway v. Com.*, 391 S.W.3d 762, 790 (Ky. 2013). *See also* 2 Wigmore, *Evidence* § 276 (Supp. 2007). Contrary to the evidence in *Odems,* where a witness offered a plausible alternative reason for Odems fleeing the scene of his arrest in the State's case-in-chief – *i.e.*, that he wished to avoid trouble because the driver told him that the driver did not have a license, see *Odems*, 395 S.C. at 585, 589-90, 720 S.E.2d at 49, 52 - there was no such plausible explanation here. Instead, viewing the evidence in the light most favorable to the State, the only *reasonable* inference is that Benjamin fled because he knew that he would otherwise be arrested for the crimes he and his co-defendant Haggood committed that morning.

Benjamin references the testimony of defense witness Antonio Gidron in support of the present argument. However, Gidron did not testify for the prosecution and his testimony did not supplement or augment the State's case. As such, it would be inappropriate to consider Gidron's testimony in connection with the trial judge's denial of Benjamin's directed verdict motion. *Accord State v. Hepburn*, 406 S.C. 416, 433-36, 753 S.E.2d 402, 411-13 (2013) (explaining that when the defendant's evidence "does not provide any gap-filling evidence for the government's case, then a reviewing court need not consider that testimony" on review of the denial of a directed verdict motion).[37] In light of the prosecution's evidence, Benjamin was not entitled to a directed verdict for murdering Dominique.

Benjamin likewise was not entitled to a directed verdict for the attempted murders of Shawn DeFreitas or James Hampton. While the State's theory at trial was that Benjamin, personally, shot DeFreitas, he could be convicted under principles of accomplice liability for either of these crimes (and unquestionably for the attempted murder of Hampton), a principle on which the trial judge charged Benjamin's jury. In *State v. Reid*, ___ S.C. ___, ___, 758 S.E.2d 904, 910 (2014), the Supreme Court recently explained that:

> The doctrine of accomplice liability arises from the theory that "the hand of one is the hand of all." 23 S.C. Jur. *Homicide* § 22.1 (2014). Under this theory, 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. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). 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 to be guilty under a theory of accomplice liability. *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999). Accordingly, proof of mere presence is insufficient, and the State must present evidence the participant knew of the principal's criminal conduct. *State v.*

[37] Additionally, Gidron's testimony was highly suspect and readily impeached by the State because he never went to law enforcement with his version about what occurred and he had admittedly been drinking since approximately 8:00 p.m. Yet, Gidron was able to "remember" every detail of the shooting when the shooting did not occur until after 3:00 a.m. **Tr. pp. 568-81; 622; 642-44.**

> *Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987). If "a person was 'present abetting while any act necessary to constitute the offense [was] being performed through another,' he could be charged as a principal—even 'though [that act was] not the whole thing necessary.' " *Rosemond v. United States*, —— U.S. ——, 134 S.Ct. 1240, 1246, 188 L.Ed.2d 248 (2014) (alteration in original) (quoting 1 J. Bishop, Commentaries on the Criminal Law § 649, p. 392 (7th ed. 1882)).

See also 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"). "In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties." *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct.App. 2010).[38]

Initially, Respondent submits that Benjamin did not argue in the trial court that the prosecution "[f]ailed to prove Defendant Benjamin joined with another in carrying out a common plan or purpose" to commit murder and/or attempted murder. He likewise did not argue that the State "[f]ailed to prove Defendant Benjamin was present at the scene as a result of a prior arrangement to carry out a prior arranged plan or common scheme sufficient to find Defendant Benjamin guilty under an accomplice liability theory in the wounding of Hampton and Defreitas or the killing of Lawton." Rather, he argued that the timeline established by

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[38] "It is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." *State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000). *See also State v. Fley*, 2 Brev. 338, 345, 1809 WL 338, 6 (S.C.Const. App. 1809) ("It is very clear that *a person aiding and assisting another in committing a murder, is to be regarded as a principal*, and that he may be indicted and punished, although the principal who really gave the mortal blow, or was otherwise the immediate instrument by which the murder was effected, had not been taken. The immediate injury, from which death ensues, is considered as proceeding from all who are present and abetting the injury done, and the actual perpetrator is considered as the agent of his associates. His act is their act, as well as his own; and all are equally criminal. Fost. 351. *The distinction between principals in the first and second degree* has been exploded. It *is now a distinction without a difference*") (emphasis added).

DeFreitas established that DeFreitas was shot before Frazier fired shots into the air and the State's other evidence was that Benjamin did not shoot until after Frazier fired into the air. He also argued that he would be unduly prejudiced by submission of an accomplice liability instruction for the attempted murder of Hampton because Haggood had admitted shooting Hampton. **Tr. p. 539, line 4 – p. 540, line 8**. Because Benjamin did not present these arguments to the trial judge and obtain a ruling on them from her, these arguments are not properly before this Court on direct appeal. *See State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal"). *See also State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997) (same); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"); *State v. Vanderbilt*, 287 S.C. 597, 340 S.E.2d 543 (1986) ("Issues not properly preserved at trial may not be raised for the first time on appeal. To the extent that *State v. Griffin*, [129 S.C. 200, 124 S.E. 81 (1924)], may be inconsistent with this result it is overruled"). *See also State v. Sullivan*, 277 S.C. 35, 45, 282 S.E.2d 838, 844 (1981) ("Appellants did not make a contemporaneous objection to this testimony and have waived their right to assert any error on appeal"); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error).

Alternatively, he cannot prevail for several reasons. First, as the Assistant Solicitor correctly argued both to the trial judge (**Tr. p. 536, line 17 – p. 537, line 5**) and before the jury in closing argument (**Tr. p. 619; 627-28; 633-34**), the State's evidence reasonably tended to prove that Benjamin shot Shawn DeFreitas. Mr. DeFreitas did not see who shot him. However, when he described how he walked away from the defendants' vehicle before being shot, he had his

right side facing the defendants' vehicle.

DeFreitas testified that he had walked Frazier over to the driver's side of Haggood's car, in his efforts to avoid trouble erupting. His car was parked in front of that car. Benjamin initially walked up to the passenger side of Haggood's car. The bullet that hit DeFreitas entered the right hip and exited on the inner leg. **Tr. pp. 321-22**. The record contains the following exchange, in which the State established that DeFreitas' right side was facing Haggood's vehicle when he was shot:

> Q. Okay. Now, let me back you up now. So you were walking -- you are at the driver's side kind of that vehicle?
>
> A. That's right.
>
> Q. So to get back to your car you got to turn and walk this way?
>
> Let's kind of orient these here.
>
> Pretend the car is kind of going back this way, okay?
>
> A. Yes.
>
> Q. So the front of their car is where I am.
>
> A. All right.
>
> Q. Okay. You said that you were around on the driver's side of the vehicle with Kevin?
>
> A. Yes.
>
> Q. Okay. Then Mr. Benjamin had come up more near the front passenger and the passenger's side?
>
> A. Yes, that's correct.
>
> Q. Okay. And at that point in time you turned to go walk to your car to move it, is that correct?
>
> A. Yes, sir.

Q. And that's when the gunshots go off?

A. Yes, sir.

Q. As you were walking to your car?

A. Yes, sir.

Q. Okay. Now, where do you get hit with that shot? In your body, where did you get shot?

A. In my side.

Tr. p. 322, line 21 – p. 323, line 22. He then demonstrated where he was shot in his right side. **Tr. p. 323, line 25 – p. 324, line 7**.

The State's other evidence was that the only other person firing a weapon from that area was Frazier, who was shooting into the air.[39] Dominique and his friends were at the wrong angle to have hit DeFreitas' right side because the testimony was that they were in the direction that Benjamin was shooting when the bullet struck DeFreitas, which rules them out, as well. Thus, because none of the bullets fired by Frazier could have struck DeFreitas, the only person who could have fired that bullet was Benjamin.

Further, DeFreitas' testimony that he saw Frazier firing in the air does not change this because it is quite possible that Frazier did not stop firing into the air after two or three shots. In fact, the evidence showed that only two fired shell casings were in the .32 when seized by the Sheriff's Office. However, as the defendants were fleeing the scene, Frazier told Haggood that he had thrown some casings out of the window. Thus, Defreitas' timeline of the events was not inconsistent with the State's other evidence.

Yet, even if the jury did not accept that Benjamin fired the shot that struck Defreitas in

[39] Haggood did not fire until the momentary lull in the shooting and after Mr. Hampton had thrown the green post at the defendants' car.

the right side, he was nevertheless culpable as an accomplice. Contrary to the position of Benjamin before this Court, "[i]n order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties." *Gibson*, 390 S.C. at 354, 701 S.E.2d at 770.

Here, the record is replete with circumstantial evidence and conduct by Benjamin and his co-defendants "the parties agreed to achieve an illegal purpose," *id.*:

- Haggood, Benjamin and Frazier all had weapons with them when they first arrived at Piggy Park, although they left them in Haggood's vehicle when they initially entered the nightclub;

- After *Benjamin*'s confrontation with Dominique, he was "agitated" and, while there was no further violence inside the club that night, tensions still ran high between those men for the rest of the morning;

- Benjamin eventually told Haggood that there had been an incident, and he pointed out two individuals that he thought Haggood needed to look out for because Benjamin thought that one of them had a gun;

- When Haggood asked Benjamin what he wanted to do, Benjamin said that "he wasn't trying to get caught slipping," meaning that he wanted to get his gun;

- Even though Benjamin was the only person with a beef with the victim, all three men then went to Haggood's car together and each man armed himself: Benjamin with his .45, Haggood with his .40, and Frazier with his .32;

- Once they were all three armed, all three men consciously returned to the club, as a group;

- A reasonable inference from Andrew Haynes' testimony is that both Haggood and Frazier were present and could have heard his conversation with Benjamin, before the three defendants re-entered the nightclub, in which Haynes implored Benjamin to ignore "Killa" (Dominique), and that they could have heard Benjamin reply, " 'No, I'm a killer;' "

- In spite of Haggood's testimony that he felt that the victim was the aggressor when the group went outside after the nightclub closed, the shooting did not start when the victim "charged" his .380, causing a live bullet to eject from it;

- Rather, the shooting only began after Frazier began shooting into the air;

- Despite testimony that Frazier said before the shooting that all the defendants wanted to do was go home, his actions were inconsistent with his statement because he was waiving his weapon in the air and, when he was able to get into the defendants' vehicle, he did not do so; instead, he started firing his weapon into the air (*e.g.*, **Tr. pp. 319-21**);

- Unlike other patrons in the Piggy Park parking lot on the morning of September 18th, neither Benjamin nor his co-defendants were ducking, screaming or panicking once the shooting began; rather, all three were firing weapons;

- The group all fled the scene in Haggood's car, with Benjamin driving;

- Frazier discarded possibly incriminating shell casings, while Benjamin disposed of the .45, which he had previously carried "a few times;"

- Haggood admitted shooting towards the van and the forensic evidence supports the conclusion that he shot Hampton; and

- When Frazier said, in the car as they were fleeing the scene, that he had fired into the air and asked his co-defendants if they had shot, Benjamin admitted that he had not shot into the air because he did not want to waste bullets.

Notwithstanding Benjamin's contrary argument, a reasonable inference from this evidence is that neither Haggood nor Frazier would have armed himself that evening and neither man would have fired a weapon, but for the desire and intent of each co-defendant to assist Benjamin in an armed confrontation with Dominique Lawton. A fundamental problem with Benjamin's argument is that there was no evidence of self-defense and he has never asserted that he was entitled to a self-defense charge. Rather, this shooting was "mutual combat" between the defendants and Dominique. *See Jackson v State*, 355 S.C. 568, 571, 586 S.E.2d 562, 563 (2003)

("Mutual combat exists when there is 'mutual intent and willingness to fight.' *State v. Graham*, 260 S.C. 449, 450, 196 S.E.2d 495 (1973). Mutual intent is 'manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat.' *Id.* Mutual combat bars a claim of self-defense because it negates the element of 'not being at fault' *Id.*").

II. The trial judge properly denied Benjamin's renewed motion for a new trial based upon the alleged insufficiency of the evidence to support convictions for one count of murder and two counts of attempted murder because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt of these offenses, either individually or under a theory of accomplice liability.

On March 15, 2013, Benjamin filed a motion for a new trial based on the insufficiency of the evidence (**R. p.** ___) and a motion to reconsider his sentence. **R. pp.** ___-__. The trial judge heard his motion on June 20, 2013. Both Benjamin and counsel were present at the hearing. Mr. Sorenson again represented the State.[40] The trial judge denied his motions in separate Orders filed on July 9, 2013. **R. pp.** ___-__. Respondent submits that her ruling must be affirmed because she did not abuse her discretion by denying his motion for a new trial.

"In a criminal case, the only way to contest the sufficiency of the evidence post-trial is to move for a new trial." *State v. Follin*, 352 S.C. 235, 258, 573 S.E.2d 812, 824 (Ct.App.2002), cert. denied (May 30, 2003); *State v. Miller*, 287 S.C. 280, 282, 337 S.E.2d 883, 884 (1985). In considering a motion for a new trial, the trial judge is only concerned with the existence of evidence, she is not concerned with the weight of that evidence. *State v. Smith*, 363 S.C. 111, 609 S.E.2d 528 (Ct.App. 2005); *State v. Pauling*, 264S.C. 275, 214 S.E.2d 326 (1975). "A trial judge has the discretion to grant or deny a motion for a new trial, and [her] decision will not be reversed absent a clear abuse of discretion." *State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835,

[40] A copy of that transcript has not been included in the record.

836 (2007). For the reasons argued in **Argument I**, Respondent submits that the trial judge did not abuse her discretion in denying Benjamin's motion for a new trial.

CONCLUSION

For the above-stated reasons, Respondent respectfully submits that the judgment of conviction must be affirmed.

Respectfully submitted,

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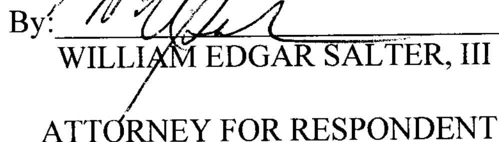
July 21, 2014.

By: 
WILLIAM EDGAR SALTER, III

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Calhoun County
Honorable Diane Schafer Goodstein, Circuit Court Judge
Appellate Case No. 2013-001496

THE STATE,

Respondent,

vs.

DAVID J. BENJAMIN,

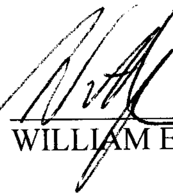
Appellant.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two (2) copies of the same in the United States mail, addressed to his attorneys of record: James L. Goldsmith, Jr., Esq., Post Office Box 92, Zirconia, North Carolina 28790-0092; and to Robert L. Sirianni, Jr., Brownstone, P.A., 201 North New York Avenue, Suite #200, Post Office Box 2047, Winter Park, Florida 32789-3159.

I further certify that all parties required by Rule to be served have been served.

This 21st day of July, 2014.



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ATTORNEY FOR RESPONDENT

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SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

July 21, 2014

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *The State vs. David J. Benjamin*
Appeal from Calhoun County
Appellate Case No.: 2013-001496

Dear Ms. Kitchings:

Enclosed for filing please find the original Initial Brief of Respondent and Designation of Matter, together with Proof of Service in the above-referenced case. If you should have any questions, please feel free to contact me.

Sincerely,

William E. Salter, III,
Senior Assistant Attorney General

WES:dmd
Enclosures
cc: James L. Goldsmith, Jr., Esq. (w/two copies of encls.)
Robert L. Sirianni, Jr., Esq. (w/two copies of encls.)

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