THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

Case No. 2012-GS-29-00636
Appellate Case No. 2014-000603

State of South Carolina, ...Respondent,

v.

Al Martinez Green,.....Appellant.

INITIAL BRIEF OF APPELLANT

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Did the trial court err by refusing to direct a verdict for Al Green when the State failed to present direct or substantial circumstantial evidence that Mr. Green was an accomplice to murder?

STATEMENT OF THE CASE

Procedural Facts

On March 30, 2012, the Lancaster County Sheriff's Office arrested Al Martinez Green for murder in violation of S.C. Code Ann. section 16-3-10. The State indicted him on June 7, 2012. ROA * (Indictment). He was tried along with his codefendant, Devatee Clinton, beginning March 10 through March 14, 2014 before the Honorable R. Knox McMahon and a jury. The jury found Mr. Green and Mr. Clinton guilty of murder and the trial court sentenced them both to life in prison on March 14, 2014. ROA * (Sentence sheet).

Mr. Green timely filed his notice of appeal on March 21, 2014.

Factual History

On January 19, 2012, a single bullet killed Jenika Jones. Tr. 364:21-23. Four-year-old Duce, the oldest of her three children, went to a neighbor for help. Tr. 162:14-16, Tr. 166:18-23. The Lancaster County Sheriff's

Department and the South Carolina Law Enforcement Division (SLED) investigated the case. Tr. 778:5-21.

After developing some leads, law enforcement charged Devatee Clinton, Al Green, and Wayne Blakeney for Jenika Jones' murder.[1] Tr. 725:13-23.

Mr. Blakeney[2] said, "I told someone about [the murder] because I couldn't keep it to myself." Tr. 756:2-3. The person he told reported it to law enforcement. Tr. 756:4-6. Mr. Blakeney provided a written statement the same day he was arrested. Tr. 733:2-8.

Mr. Blakeney told law enforcement that he drove himself, Devatee Clinton, and Al Green to Roseanna Lane on the night of the murder. Tr. 754:10-14, Tr. 740:17-25, Tr. 741:1-4, Tr. 749:12-17, Tr. 740:1-4. Later, Mr. Blakeney provided the nickname of a fourth person who was with them,

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[1] The State charged Mr. Blakeney, Mr. Green, and Mr. Clinton with Murder, Armed Robbery, and Burglary, First Degree. The State only proceeded to trial against Mr. Clinton and Mr. Green on the murder charge. Public records show the State dismissed the remaining charges against Mr. Green and Mr. Clinton. http://sccourts.org (follow Records Search hyperlink; then select Lancaster County; then search by name).

[2] After testifying at Mr. Green and Mr. Clinton's joint trial, Mr. Blakeney pleaded guilty to Accessory After the Fact of a Felony and the court sentenced him under the Youthful Offender Act to a term not to exceed six years, which was suspended the sentence to time served and eighteen months probation. The State dismissed all other charges against Mr. Blakeney. http://sccourts.org (follow Records Search hyperlink; then select Lancaster County; then search by name)

and then confirmed Delrico McDow's identity when an investigator showed him Mr. McDow's picture.[3] Tr. 756:21-25, Tr. 757:1-5.

Several months after his arrest, the State consented to Mr. Blakeney being released from jail on a house arrest bond. Tr. 726:2-8. At trial, Mr. Blakeney testified for the State. Tr. 725:1-2.

Mr. Blakeney testified he was hanging out with Mr. Clinton, Mr. Green, and Mr. McDow in an area of Lancaster County called Newtown on January 19, 2012. Tr. 734:3-10. They were walking and Mr. Clinton saw a man he knew, and asked to borrow his car. Tr. 737:10-21. Mr. Blakeney drove all of them in the borrowed car to the Hole in the Wall club. Tr. 738:4-9. While at the club, Mr. Clinton asked Mr. Blakeney to drive him to get some money. Tr. 739:7-15. The same four men left the Hole in the Wall club together and went to a trailer park on Roseanna Lane. Tr. 739:22-25, Tr. 740:1-4, 15-18.

On the way to Roseanna Lane, Mr. Blakeney saw Mr. Clinton carrying a small gun near his side while he sat in the front passenger seat. Tr. 741:6-23, Tr. 742:3-4. When they arrived on Roseanna Lane, Mr. Blakeney waited in the car for about ten minutes after the others left the

[3] As of December 5, 2014, the State has not charged Mr. McDow with any crime related to this murder. http://sccourts.org (follow Records Search hyperlink; then select Lancaster County; then search by name).

car. Tr. 742:14-23, Tr. 743:5-6. Mr. Blakeney could not provide any details about where they went, whether they went to the same place, or to which trailer, if any, one or all of them may have gone. Tr. 742:17- 23, Tr. 773:23-774:21.

Mr. Blakeney testified the men returned in a "bit of a hurry," and Mr. Clinton told him to just chill, while the others in the back told him to "go." Tr. 743:13-25, Tr. 744:1-5. Mr. Blakeney drove back to the Hole in the Wall club where they stayed for about thirty to forty minutes. Tr. 745:17-25. Mr. Blakeney then dropped off Mr. Green, and others, in the Newtown area. Tr. 746:12-747:16. Mr. Clinton remained the only passenger in the car. Tr. 747:17-23. Mr. Blakeney was driving Mr. Clinton to his grandmother's home on Roseanna Lane, when Mr. Clinton said, "I killed that bitch." Tr. 749:6-7, 11-17.

Mr. Blakeney stated he felt "shocked a little bit" when Mr. Clinton made this statement. Tr. 750:2-5. Mr. Blakeney told the jury he really didn't believe Mr. Clinton until he later heard about Ms. Jones' murder. Tr. 749:18-23, Tr. 755:11-14.

Mr. Clinton left the gun in the car's glove compartment and told Mr. Blakeney its location and requested he "to hold it for him." Tr. 750:13-18.

Mr. Blakeney then sold the gun to a relative; although he previously lied by telling a friend he had buried the gun. Tr. 752:3-7, Tr. 775:15-19.

In addition to having Mr. Blakeney's statement, Mr. Clinton provided three separate oral statements to law enforcement regarding his whereabouts and knowledge of Mr. Jones' murder. In his first statement, Mr. Clinton said his cousin Tony Cunningham took him to the Hole in the Wall club on January 19, 2012. Tr. 797:3-11.

In his second statement, Mr. Clinton said he went to the Hole in the Wall club, wearing a camouflage jumpsuit, the night of murder. Tr. 808:7-10. Mr. Clinton also said he owned a blue jumpsuit, and he had loaned it to two other people on several occasions. Tr. 808:17-23. He then stated his DNA could be on the blue jumpsuit because he moved it around in his house. Tr. 811:19—812:5. Initially, Mr. Clinton denied knowing Pomp Blackmon, the owner of the white Cadillac, but then later admitted he knew him. Tr. 809:22—810:13. Mr. Clinton stated he never drove Blackmon's white Cadillac but had leaned on it at Hole in Wall club so his DNA might be there. Tr. 811:4—812:15.

In his third and final statement, Mr. Clinton said he saw Mr. Blakeney at the Hole in the Wall club on January 19, 2012.[4] Tr. 817:3-6. After a *Jackson v. Denno* hearing, the trial judge allowed the jury to hear Mr. Clinton's three statements. Tr. 695:5—699:2.

Mr. Green also provided a written statement to law enforcement and the trial court allowed the jury to hear the contents of his written statement that he arrived at the Hole in the Wall club on January 19, 2012 between 11:30 and 11:45 p.m. Tr. 780:7-10, Tr. 786:10-19, Tr. 790:17—791:5.

Two State witnesses, Dominique Davis and Jamal Twitty, testified they heard Mr. Clinton ask Mr. Green if he wanted to do a "lick" with him. Tr. 272:7-11, Tr. 287:10-24.

Latoya Green, Mr. Green's sister, testified she and the victim, Ms. Jones, were friends and she was Ms. Jones' children's godmother. Tr. 262:18-19, Tr. 263:12-14. Prior to Ms. Jones' move to Roseanna Lane, Latoya Green, Ms. Jones and her children, and Mr. Green shared an apartment. Tr. 263:25, Tr. 264:1-8.

Mr. Green made a pretrial motion regarding the admissibility of a statement that Ms. Jones' four-year-old son made to law enforcement close

[4] Mr. Clinton also stated that Mr. Green was at the club in this statement. The State said it would not "elicit testimony from the officer who took Mr. Clinton's statement that Green was in the white Cadillac." Tr. 171:4-6.

in time to his Mother's death. Tr. 158:15—Tr. 161:13. The four-year-old said, "Shi's daddy killed my mama." Tr. 160:3-5. Shi was the nickname of a child belonging to Rashad Johnson, who law enforcement investigated but did not charge. Tr. 844:9-22.

The court found it did not have to determine the competency of the child to determine whether it would allow the child's hearsay statement, and stated it would be admissible depending on how it developed. Tr. 177:10-21.

The jury did not hear this child's statements about "Shi's daddy [killing his] mama" but Mr. Green's counsel argued in closing that the four-year-old had lived with and knew Mr. Green, and never said Mr. Green was in his home the night his mother died. Tr. 950:3-18.

None of the DNA evidence implicated Mr. Green. ROA * (State's Exhibit 60). It excluded Mr. Green as a contributor on all tested items except one, in which no conclusive statement could be made about the inclusion or exclusion of Ms. Jones, Mr. Green, or Mr. McDow's DNA on a seatbelt cutting. ROA * (State's Exhibit 60), Tr. 603:24-25, Tr. 604:1-3.

After the State rested its case, Mr. Green made a motion for a directed verdict. Tr. 846:9—Tr. 850:11. His counsel argued the State presented no direct evidence against Mr. Green. Tr. 847:1-4. State's witness,

Mr. Blakeney, could not state whether Mr. Green ever went into Ms. Jones' trailer, never sees Mr. Green with a gun, and doesn't see Mr. Green come back to the car with the spoils of a robbery. Tr. 847:4-8, Tr. 848:1-7. The Judge denied his motion for directed verdict. Tr. 852:18—Tr. 859:2.

STANDARD OF REVIEW

When reviewing an appeal from a denial of a directed verdict, the court views the evidence in the light most favorable to the State. *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) (citing *State v. Lollis*, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001) and *State v. Burdette*, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)). If there is no direct evidence or *substantial* circumstantial evidence that reasonably tends to prove the accused's guilt, an appellate court must find the trial court improperly submitted the case to the jury. *Odems*, 395 S.C. at 586, 720 S.E.2d at 50 (emphasis in original) (citing *State v. Pinckney*, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000)).

The trial court should direct a verdict for the defendant when the State fails to produce evidence of the offense charged. *Odems*, 395 S.C. at 586, 720 S.E.2d at 50 (citing *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001)). When the evidence merely raises a suspicion the accused is guilty, a circuit judge should grant a directed verdict motion. *Odems*, 395

S.C. at 586, 720 S.E.2d at 50 (citing *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984)).

ARGUMENT

Did the trial court err by refusing to direct a verdict for Al Green when the State failed to present direct or substantial circumstantial evidence that Mr. Green was an accomplice to murder?

Circumstantial evidence that merely arouses suspicion is an improper basis to deny a motion for directed verdict. *State v. Lollis*, 343 S.C. 580, 585, 541 S.E.2d 254, 257 (2001)."'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *Id.* at 584, 541 S.E.2d at 256 (internal citations omitted). A defendant is entitled to a directed verdict when the State's case is built wholly on circumstantial evidence, and the State fails to present substantial circumstantial evidence the defendant committed a particular crime. *State v. Bennett*, 408 S.C. 302, 306, 758 S.E.2d 743, 745 (Ct. App. 2014) (citing *Odems*, 395 S.C. at 586, 720 S.E.2d at 50).

In *State v. Arnold*, our Supreme Court upheld this court's decision reversing the defendant's murder conviction. 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004). The defendant and victim had been involved in a sexual relationship, the victim was shot and the defendant had been seen

possessing a firearm, the victim's car was found about ten miles from where the defendant was living, and the defendant's fingerprint was found on a coffee cup lid in that car. *Id.* at 388-89, 605 S.E.2d at 530. The court held the facts were insufficient to raise a substantial circumstantial evidence case that could be submitted to the jury. *Id.* at 390, 605 S.E.2d at 531.

Murder is "the killing of any person with malice aforethought, either express or implied." S. C. Code Ann. § 16-3-10 (1976, as amended). For one to be guilty under an accomplice liability theory, "a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing *State v. Langley*, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999) (internal citations omitted)).

One who joins another to achieve an illegal purpose is criminally liable for everything his partner does in carrying out the common design and purpose. *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002) (citing *Langley*, 334 S.C. at 648, 515 S.E.2d at 101). Importantly, mere presence at the scene, even with prior knowledge a crime may be committed, is not enough to establish accomplice liability. *State v.*

Thompson, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007) (citing *Condrey*, 349 S.C. at 194, 562 S.E.2d at 324).

The State presented neither direct nor substantial circumstantial evidence to support the trial court's denial of a directed verdict for Mr. Green. The circumstantial evidence against Mr. Green included testimony from two inconsistent witnesses, Ms. Davis and Mr. Twitty, and Mr. Blakeney's testimony that Mr. Green rode with him to Roseanna Lane, got out of the car with Mr. Clinton and Mr. McDow, and returned "ten minutes" later, and said "go." Tr. 743:6, Tr. 744:2-3.

Three particular witnesses, Dominique Davis, Jamal Twitty, and Wayne Blakeney, provided the limited circumstantial evidence against Mr. Green. This evidence showed Mr. Green and Mr. Clinton discussed a "lick" but did not discuss any details about where and when a lick may occur, and that Mr. Green rode with Mr. Blakeney to Roseanna Lane, got out of the car for ten minutes, got back into the car and told Mr. Blakeney to "go." Tr. 743:6, Tr. 744:2-3, Tr. 272:7-11, Tr. 287:10-24.

Dominique Davis' testimony simply indicated she heard a conversation when Mr. Clinton and Mr. Green talked about a "lick," but it was not direct evidence because it did not "immediately establish the main fact to be proved." *State v. Phillips*, Op. No. 5280 (S.C. Ct. App. filed

November 12, 2014) (Shearouse Adv. Sh. No. 45 at 76, 82) (citing *State v. Rogers*, 405 S.C. 554, 563, 748 S.E.2d 265, 270 (Ct. App. 2013)).

Dominique Davis told the jury she heard Mr. Clinton and Mr. Green talking about a "lick" and she thought "lick" meant robbery. Tr. 271:5-7, 15-24, Tr. 272:7-13. Ms. Davis told the jury they did not talk about any details, such as where or when this robbery might occur or whom they might rob. Tr. 273:19—Tr. 274:9, Tr. 279:5-16.

Ms. Davis heard Mr. Clinton said, "he had Taz's gun and he wasn't going to give it back to him." Tr. 272:18-19. Ms. Davis told the jury she did not know who Taz was. Tr. 272: 20-25. Yet, during her pretrial *in camera* testimony, Ms. Davis stated Taz was Mr. Clinton's brother. Tr. 90:7-8.

Ms. Davis told the jury she heard Mr. Green ask Mr. Clinton "[d]oes she drive a black car?" but did not know to whom they may have referred. Tr. 274:10-23. Again, Ms. Davis' trial testimony diverged from her pretrial testimony, because, *in camera*, she testified, "I don't know who said who, but one of them said she had a black car." Tr. 95:23-24.

Ms. Davis only provided circumstantial evidence through her testimony because it merely established "collateral facts from which the main fact may be inferred." *Rogers*, 405 S.C. at 563, 748 S.E.2d at 270 (citing *State v. Salisbury*, 343 S.C. 520, 524 n. 1, 541 S.E.2d 247, 249 n. 1 (2001)).

Jamal Twitty testified, and like Ms. Davis, offered no direct evidence against Mr. Green. Mr. Twitty testified Mr. Clinton asked him if he wanted to do a lick that was not far away, and later that evening, Mr. Clinton asked Mr. Green the same question. Tr. 285:22-25, Tr. 286:1-3, 11-20, Tr. 287:15-19. Mr. Twitty testified both he and Mr. Green said, "yeah, whatever" when Mr. Clinton asked. Tr. 286:1-3, Tr. 287:16-24. Mr. Twitty's testimony conflicted with two prior statements he provided to law enforcement in the months after Ms. Jones' death. Tr. 120:18-21, 24-25, Tr. 121:1-11.

Mr. Twitty's testimony, if true, did not "prove a fact without inference or presumption," and, therefore, is not direct evidence. *Rogers*, 405 S.C. at 563, 748 S.E.2d at 270 (internal quotation marks and citation omitted).

Mr. Blakeney's testimony about Mr. Green requires the fact finder to infer or presume to establish the main fact to be proved. Mr. Blakeney only provided "collateral facts from which the main fact may be inferred." *Rogers*, 405 S.C. at 563, 748 S.E.2d at 270 (citing *Salisbury*, 343 S.C. at 524 n. 1, 541 S.E.2d at 249 n. 1 (2001)). As such, Mr. Blakeney only offered circumstantial evidence against Mr. Green.

Wayne Blakeney, also charged with Ms. Jones' murder, testified that he, Mr. Clinton, Mr. Green, and Mr. McDow left the Hole in the Wall Club, and Mr. Blakeney drove, at Mr. Clinton's request and direction, to a trailer park on Roseanna Lane the evening of January 19, 2012. Tr. 725:13-19, Tr. 738:1-9, Tr. 739:22-25, Tr. 740:1-4, 15-25, Tr. 741:1-4. When they arrived on Roseanna Lane, Mr. Blakeney waited in the car for about ten minutes after the three other men left the car. Tr. 742:14-25, Tr. 743:1-6.

Mr. Blakeney said the men "disappeared" after they "they went off to [his] left." Tr. 742:19-23. Mr. Blakeney could not see where they went, could not see Ms. Jones' trailer, and did not see them again until they came back to the car. Tr. 774:5-21. When they returned to the car, they were in a "bit of a hurry," Mr. Clinton told Mr. Blakeney to just chill, and the others told him to "go." Tr. 743:13-25, Tr. 744:1-5.

Although Mr. Blakeney testified he "pulled into a driveway" on Roseanna Lane, he could not identify which driveway when shown an aerial view photo of the location. Tr. 771:13-17, Tr. 772:4-6, 10-25, Tr. 773:1-5, ROA * (State's Exhibit 54).

Mr. Blakeney's testimony, if true, merely established Mr. Green rode with him, Mr. Clinton, and Mr. McDow to Roseanna Lane and placed him

in the vicinity where a crime occurred, but does not place him at the scene of the crime.

Although Mr. Blakeney provided only circumstantial evidence as to Mr. Green, he provided direct evidence against Mr. Clinton. Mr. Blakeney testified he saw a small gun near Mr. Clinton's side when he was in the front passenger seat on their way to Roseanna Lane. Tr. 741:13-23, Tr. 742:3-4. Mr. Clinton directed Mr. Blakeney where to go. Tr. 740:19-25, Tr. 741:1-4.

Mr. Blakeney testified it was just the two of them in the car when Mr. Clinton said, "I killed that bitch." Tr. 749:2-7, 17. Arguably this incriminating statement is direct evidence against Mr. Clinton, but to use this evidence against Mr. Green, one must infer information to determine whether Mr. Green was guilty of murder. As such, this is merely circumstantial evidence against Mr. Green.

In it closing argument, the State contended, "Tate Clinton shot and killed Jenika Jones." Tr. 887:20-21. It pursued the charges against Mr. Green on an accomplice liability theory. Tr. 887:25, Tr. 888:1-2.

The evidence against Mr. Green is akin to that against Ashley Hepburn, whose homicide by child abuse conviction was reversed by the Supreme Court because there was not circumstantial evidence to support

the trial court's denial of her directed verdict motion. *State v. Hepburn*, 406 S.C. 416, 442, 753 S.E.2d 402, 416 (2013).

In *State v. Hepburn*, the Supreme Court reversed "the trial court's refusal to direct a verdict of acquittal because the State did not put forward sufficient direct or substantial circumstantial evidence of Appellant's guilt." *Id.* at 440, 753 S.E.2d at 415. A jury convicted Ms. Hepburn of homicide by child abuse and convicted her former boyfriend, Mr. Lewis, of aiding and abetting homicide by child abuse. *Id.* at 428, 753 S.E.2d at 408.

Unlike the murder statute, the homicide by child abuse statute specifically includes language about accomplice liability in the statute. It states one may be guilty of homicide by child abuse if one "knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven." S.C. Code Ann. §16-3-85 (A)(2) (2003). This statute, however, is similar to the accomplice liability case law applied in murder cases. *See State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing *State v. Langley*, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999) (internal citations omitted)).

While the *Hepburn* case is similar to Mr. Green's case, it is also distinguishable in that the State had stronger evidence against Ms. Hepburn than it did against Mr. Green. Neither Hepburn nor her codefendant, Mr. Lewis, confessed to injuring the minor child in any way, but in the present case, Mr. Clinton, not Mr. Green, confessed he killed Ms. Jones. Tr. 749:17, *Hepburn*, 406 S.C. at 428, 753 S.E.2d at 408.

No evidence disputed that both Ms. Hepburn and Mr. Lewis were in the home when the minor victim was injured, whereas the State could only place Mr. Green in the vicinity of where a crime occurred but could not place him at the crime scene. *Hepburn*, 406 S.C. at 436, 753 S.E.2d at 412. ("Appellant did not dispute the State's contention that the victim died from homicide by child abuse inflicted by one of the two defendants."), Tr. 742:19-23, Tr. 771:13-17, Tr. 772:4-6, 10-25, Tr. 773:3-5, Tr. 774:1-21, ROA * (State's Exhibit 54) (Mr. Blakeney testified he could not see where the men went after they got out of the car and didn't see them again until they got back in the car. At trial, he could not identify the driveway where he parked his car when viewing an aerial photo of Roseanna Lane).

Mr. Green's case is distinguishable from two other South Carolina cases. *State v. Thompson*, 374 S.C. 257, 647 S.E.2d 702 (Ct. App. 2007), *State v. Gibson*, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010).

The State presented no evidence Mr. Green ever possessed or fired a gun. *But cf. Gibson*, 390 S.C. at 352, 701 S.E.2d at 768 (noting the defendant called another person to the crime scene and pointed out the victim before he was killed).

The State presented no evidence Mr. Green instigated the crime or that he went to the crime scene, Ms. Jones' trailer. *But cf. Thompson*, 374 S.C. at 263, 647 S.E.2d at 705 (noting defendant in *Thompson* called several others about planning a robbery, attended the meeting where others planned the robbery details, and drove the person who committed the robbery to the crime scene), *But cf. Gibson*, 390 S.C. at 355, 701 S.E.2d at 770 (stating evidence showed defendant called another person to the scene and pointed out the victim), Tr. 287:16-19 (Mr. Twitty testified that Mr. Clinton started the conversation with Mr. Green.), Tr. 737:16-19 (Mr. Blakeney testified that Mr. Clinton asked the owner to borrow his car.), Tr. 739:8-18 (Mr. Blakeney testified that Mr. Clinton requested Mr. Blakeney drive him to get some money and no one else said anything about money.), Tr. 742:19-23, Tr. 772:15-25, Tr. 773:3-5, Tr. 774:1-21 (Mr. Blakeney testified he could not see where the men went after they got out of the car and he didn't see them again until they got back in the car.)

South Carolina law requires the State present evidence that shows more than a suspicion of guilt or the court should grant the defendant's directed verdict motion. In denying Mr. Green's directed verdict motion, the trial court erred in basing its decision on evidence, specifically Ms. Stradford's testimony, possessions of "tools" for the crime, and Mr. Clinton's statement, that only implicated Mr. Clinton. Tr. 852:18—Tr. 858:25.

Ms. Stradford testified she saw Mr. Clinton at the Crenco convenience store several hours after Ms. Jones' murder, and asked him if he heard what happened to Jenika Jones. Tr. 630:4-9, 21-23, Tr. 631:1-15. Ms. Stradford told the jury "he wasn't interested in what I was talking about," so their conversation was mostly about cigarettes. Tr. 633:24-25. No one disputed Ms. Stadford's testimony that Mr. Clinton was alone when she saw him at the Crenco convenience store. Mr. Green was not with him and no evidence showed Mr. Green even knew about the conversation between Ms. Stradford and Mr. Clinton. Tr. 630:14—631:17.

The state presented no evidence that Mr. Green had any "tools" or knew that someone else had "tools" to commit this crime.[5] While Ms. Davis' testimony may have shown Mr. Green knew Mr. Clinton possessed

[5] Based on a full reading of the record, it appears the only "tool" to which the court may be referring would be Mr. Clinton's gun.

a gun at some time, no evidence revealed Mr. Green knew Mr. Clinton carried a gun to Roseanna Lane. Tr. 272:14-19.

The trial judge stated, "I would be remiss if I didn't point out also the direct statement by Mr. Clinton to Mr. Blakeney that I killed that individual. Not by name but by expletive." Tr. 858:22-25. No evidence disputed Mr. Blakeney's testimony that only he and Mr. Clinton were in the car when Mr. Clinton made this statement. Tr. 749:6-7, 11-17. This incriminating evidence against Mr. Clinton unfairly prejudiced Mr. Green and the trial court should not have used it as a basis for denying Mr. Green's motion for directed verdict.

In viewing the light most favorable to the State, the trial judge improperly denied Mr. Green's motion for directed verdict. The State presented neither direct evidence nor substantial circumstantial evidence to support the trial court's denial of a directed verdict for Mr. Green. The circumstantial evidence against Mr. Green includes testimony from two inconsistent witnesses, Ms. Davis and Mr. Twitty, and Mr. Blakeney's testimony that Mr. Green rode with him to Roseanna Lane, got out of the car with Mr. Clinton and Mr. McDow, and returned "ten minutes" later, and said "go." Tr. 743:6, Tr. 744:2-3, Tr. 272:7-11, Tr. 287:10-24.

Simply put, this does not rise to the level of substantial circumstantial evidence to justify the trial court's denial of a directed verdict for Mr. Green. The State's evidence merely raised a suspicion of Mr. Green's guilt. "It is not sufficient that they create a probability, though a strong one . . . ." *State v. Schrock*, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984).

In *State v. Cherry*, the Court reviewed a jury charge about circumstantial evidence, which stated the jury could not convict the defendant unless:

> Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances so proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.[6]

State v. Cherry, 361 S.C. 588, 597, 606 S.E.2d 475, 480 (2004).

This language illustrates the lack of evidence against Mr. Green, even though Mr. Green's argument is about the denial of his directed verdict motion and not the jury charge.

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[6] At one point the court appeared to abandon this charge. *State v. Hernandez*, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009)) (citing *State v. Cherry*, 361 S.C. 588, 601, 606 S.E.2d 475, 482 (2004) and *State v. Edwards*, 298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989)). However, this charge may be given so long as it is not the sole charge given over the defendant's objection. *State v. Logan*, 405 S.C. 83, 100, 747 S.E.2d 444, 453 (2013).

CONCLUSION

The trial court erred in denying Mr. Green's motion for directed verdict. The State presented limited, not substantial, circumstantial evidence against Mr. Green. This court should reverse the trial court's denial of Mr. Green's motion for directed verdict.

By: _____

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December 8th, 2014

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