THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CALHOUN COUNTY
Court of General Sessions

Diane Schafer Goodstein, Circuit Court Judge

CASE NO.: 2013-001496

State of South Carolina, ...Respondent,

v.

David Jamar Benjamin, ...Appellant.

Final Brief of Appellant

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STATEMENT OF ISSUES 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.

STATEMENT OF THE CASE

Defendant David Benjamin was arrested on October 4, 2011, and subsequently indicted by a Grand Jury charged with one count of murder in violation of S.C. Code 16-3-10 and two counts of attempted murder in violation of S.C. Code 16-3-29. Mr. Benjamin pleaded NOT GUILTY and proceeded to a trial before a jury on March 4.

Following a four-day trial during which Mr. Benjamin did not testify, a jury found Mr. Benjamin guilty on all counts. Trial Counsel Nicholas Thomas, Esq. moved for a judgment of acquittal following the verdict arguing the evidence was insufficient to prove Mr. Benjamin's guilt. This motion was denied after a hearing. The motion followed two unsuccessful motions during trial for a directed verdict, the first following the close of the State's case and the second at the close of all the evidence.

The Hon. Diane Schafer Goodstein sentenced Mr. Benjamin to 40 years' imprisonment on Count One – Murder, and 30 years' imprisonment

on each of Counts Two and Three – Attempted Murder, to be served concurrently. Mr. Benjamin was represented in his post-trial motions by Wendy Keifer, Esq., who filed and argued a timely motion for new trial and a timely motion to reconsider the sentence imposed upon Mr. Benjamin. Both motions were denied. Mr. Benjamin, through counsel, filed a Notice of Appeal on July 10, 2013.

Undersigned counsel was substituted as attorney of record. An application on behalf of Mr. Robert L. Sirianni, Jr., has been filed to permit his appearance *Pro Hac Vice*. The transcript of the trial proceedings was received by counsel on January 6, 2014, and this Initial Brief of Appellant follows.

STATEMENT OF FACTS

Introduction

Defendant-Appellant David Jamar Benjamin ("Mr. Benjamin") was at the Pine Terrace Club, nicknamed "Piggy Park" in the late evening and early morning hours of September 18-19, 2009, with two others enjoying music and dancing provided by two disc jockeys. At one point, Mr. Benjamin is bumped on the dance floor by Dominique Lawton, who was present with a group of his friends at the same club. The two stared at each other but there was no physical confrontation.

Several hours passed until the club raised the lights and indicated it was closing down. It was pushing 4 a.m. and there was a large crowd of people exiting the club and leaving from the area. Mr. Lawton was intoxicated and confronted one of the people who had come to the club with Mr. Benjamin. All of the parties had weapons but there was no escalation until shots were fired in the air and then multiple shots were fired from all directions.

Several parties were involved in an exchange of gunfire and during the melee, Mr. Lawton was shot in the head and died. Two others, Mr. James Hampton and Mr. Shawn DeFreitas, were struck with bullets but survived. About two weeks after the event, Mr. Benjamin was arrested

along with the two people he was with that evening and charged with the murder of Mr. Lawton and the attempted murder of two others.

There were dozens of people in the area at the time of the shootings but no one could say for sure who shot first or where the fatal shot came from. Further, no witnesses could say if the shots fired by Mr. Benjamin, described as on a low angle toward the ground similar to military-style "cover fire" ever hit any of the victims. One witness who saw the fatal shot said Mr. Benjamin was not the person responsible. Another witness all but admitted that it was his shot, and not Mr. Benjamin, that ultimately wounded one of the victims. No one saw how, when, or from where the third victim was shot and wounded.

According to the State, represented at trial by Assistant State Solicitors Donald Sorenson and Theodore Lupton, Mr. Benjamin was responsible under a theory known as "the hand of one is the hand of all." This is an accomplice liability theory where Mr. Benjamin would be held responsible for all of the shootings even though he never fired any of the shots that injured or killed the victims. He was just as responsible as the persons who actually did fire the shots, each of which received stunningly light sentences after pleading guilty to significantly lesser charges.

One person was allowed to plead guilty to assault and battery and given a concurrent sentence of seven years in exchange for testifying against Mr. Benjamin at trial. The trial covered four days in early March, 2013, before a jury of ten (10) women and two (2) men.

The Parties Arrive at the Club

Joshua Haggood, an Army veteran of two combat tours in Afghanistan, was stationed at Fort Bragg, North Carolina, in September of 2011. (R. p. 121, lines 14-16). He was a long-time friend with Kevin Frazier and David Benjamin. He knew Mr. Benjamin "most of my life" and knew Mr. Frazier "since about middle school." (R. p. 122, lines 16-17; 21-22). The men were two of Mr. Haggood's "best friends." (R. p. 123, lines 5-6).

Mr. Haggood would typically travel once or twice a month from Fort Bragg back to Orangeburg, South Carolina, to visit. (R. p. 125, lines 4-8). His mother lives there as does one of his sons. (R. p. 126, lines 15-16). On his trips back, he carried with him an XD 40 .40 caliber silver and black semi-automatic pistol he borrowed regularly from a friend in North Carolina, a fellow soldier, Georgio McGarrah. (R. p. 125, lines 13-21; p. 125, line 25 - p. 126, line 3).

Over the weekend of September 16 through September 18, 2011, Mr. Haggood was visiting and had the gun with him. He said normally he

"hangs out" with Mrrs. Benjamin and Frazier when he visits when he is not visiting his mother or with his son. (R. p. 125, lines 9-12). On Saturday night September 18, 2011, Mr. Haggood met with his friends. He drove over to pick up Mr. Benjamin at his mother's home and then the two drove to Mr. Frazier's house to get him. (R. p. 127, lines 15-17).

The trio was planning to go to a birthday party for Nevadria Miller, someone all had known from high school, at a club in the Elloree area called Pine Terrace but more commonly referred to as "Piggy Park." (R. pp. 129, line 20 – 130, line 7). For about 20 minutes, the trio stayed at Mr. Frazier's house and had a few beers. (R. p. 129, lines 3-10). Mr. Haggood had not been to the club before and so Mr. Benjamin drove Mr. Haggood's car to the club "because he knew how to get there." (R. pp. 130, Line 22 – 131, line 1).

The three arrived between 12 a.m. and 1 a.m. (R. p. 131, lines 2-4). Mr. Haggood's brother William was in another car with his cousin and arrived around the same time. (*Id.*, lines 7-10). They backed in and parked about at the corner of the club. (R. p. 132, lines 1-5; 9-10). There was a van already parked there and so his brother backed in first and then Mr. Benjamin went in after that. (*Id.*, at lines 19-23).

All three friends – Mr. Haggood, Mr. Frazier and Mr. Benjamin – had weapons with them. Mr. Haggood had placed his .40 caliber in the glove

box, Mr. Frazier had a .32 caliber revolver and he believed Mr. Benjamin had a .45 caliber pistol. (R. pp. 132, line 25 – 133, line 12). Mr. Haggood locked his gun in the glove box and Mr. Benjamin and Mr. Frazier placed their weapons in the trunk. (R. p. 133, lines 6-12). None took weapons into the club.

When they arrived, there were not that many cars there and not many people inside. (R. p. 133, lines 23-25; R. p. 134, line 11). Inside, there were people on the dance floor but "nothing major." (R. p. 134, lines 11-12). There was an open liquor bar (free to patrons) but people had to pay for beers. (*Id.*, lines 14-16). Mr. Haggood said he believed Mr. Frazier was drinking the free liquor but was unsure if Mr. Benjamin was drinking. (*Id.*, lines 20-23). Mr. Haggood was drinking beer. (R. p. 135, lines 3-6).

The Incident Inside the Club

The club eventually started to fill up as more people arrived and the three were basically "hanging out" together. (R. p. 135, lines 18-19). Andrew Haynes (called "Bubba") was one of the DJs working at the club that evening along with "DJ Mike (Michael Bullock). (R. pp. 34, line 24 – p. 35, line 10). Mr. Haynes said he arrived between 11 p.m. and 11:30 p.m. and "brought a crowd with me" when he arrived. (R. p. 35, lines 13-15; R. p. 38, lines 10-12).

Already at the club was Dominique Lawton. At some point, Mr. Haynes observed that Mr. Lawton "bumped" Mr. Benjamin on the dance floor and there were words exchanged and "a little shoving" but no punches were thrown and no weapons were displayed. (R. p. 39, lines 4-11). Mr. Haynes said he intervened and stopped the episode from escalating. (R. p. 38, lines 16-17). He said Mr. Lawton appeared intoxicated. (R. p. 39, lines 20-22).

Mr. Haynes talked to both parties and calmed everyone down. (R. p. 40, lines 10-13). Antonio Gidron was also in the club at the time of the incident. He did not describe it as an altercation. (R. p. 369, lines 18-20). He spoke with Mr. Benjamin after the incident and said Mr. Benjamin told him "you are down here, you know, to have fun. We don't want no problems." (R. p. 383, lines 14-16). Mr. Gidron said he knew Mr. Lawton and told Mr. Benjamin, "I'll handle it." (*Id.*, line 17). Mr. Gidron then went over to talk with Mr. Lawton, asked what was going on, and Mr. Lawton told him "it ain't nothing." (R. p. 370, lines 6-8). Mr. Gidron told Mr. Lawton that Mr. Benjamin was one of his friends and that "they don't want no problem" and that Mr. Lawton calmed down and "thought nothing of it. He let it be." (*Id.*, lines 10-13).

Inside the club, Mr. Haggood said Mr. Benjamin pointed at presumably Mr. Lawton and another that had been involved and said that he thought one of them had a gun. (R. p. 136, lines 11-14). Mr. Haggood asked Mr. Benjamin what he wanted to do and Mr. Benjamin replied that he did not want to get caught "slipping." (R. p. 137, line 8). Mr. Haggood testified he believed that to mean that Mr. Benjamin wanted to get his gun. (*Id.*, lines 10-13). Mr. Frazier was on the dance floor and so the three went out to Mr. Haggood's car and retrieved their weapons. (R. p. 138, lines 1-4).

Mr. Gidron said he had seen people with guns at the club "all the time" prior to this incident. (R. p. 371, lines 13-15). Mr. Haynes had noticed the three leave the club and so followed them to continue to talk to them and keep everyone calm. (R. p. 41, lines 10-12). He knew Mr. Frazier from high school because he had played basketball against him. (R. p. 40, lines 23-24). He said he met them as they were coming back into the club. (R. p. 41, lines 15-17). He speculated that it appeared the three were coming from the area where cars are normally parked but could not say for sure. (R. pp. 41, line 20 – 42, line 2).

Mr. Haynes had a brief conversation with Mr. Benjamin and suggested that he should not bother getting involved with Mr. Lawton (whose nickname is "Killa") because "he's young, drunk, you know how

they get." (R. p. 42, lines 18-20). He said Mr. Benjamin replied "I'm killer" and they walked back into the club. (*Id.*, lines 21-22). Mr. Haynes also spoke to Mr. Lawton and told him to calm down as well "because it's not called for." (*Id.*, lines 24-25). Mr. Haynes said he did not see any of the three with weapons as they went back inside and he went in behind them. (R. p. 43, lines 20-23).

Mr. James Hampton, one of the injured victims, arrived at the club between 12:30 a.m. and 1 a.m. and learned after arriving that there had been a confrontation involving Mr. Lawton. (R. p. 66, lines 18-20; R. p. 67, lines 5-8). He went to speak with Mr. Lawton and told him to "chill out." (R. p. 67, line 13). He said Mr. Lawton was calm at that point. (*Id.*, lines 16-17). Mr. Hampton did not know Mr. Benjamin or Mr. Haggood but knew Mr. Frazier. (R. p. 65, line 13-23). He said someone pointed out Mr. Benjamin as the person involved in the confrontation with Mr. Lawton. (R. p. 67, lines 21-23).

After that, there were no problems during the more than two hours from the time of the incident until the club closed down. (R. p. 44, lines 7-9). It was, as Mr. Haggood described it, "a normal club environment. Nothing going on really other than music, dancing and just people talking and everything. Nothing negative was going on." (R. p. 139, lines 13-16).

People continued to drink. (*Id.*, lines 17-19). Mr. Haynes said it was about 2 a.m. or 2:30 a.m. when "the crowd was getting kind of iffy" and so he suggested to the club manager to begin shutting the party down. (R. p. 44, lines 17-21).

It was sometime later that the DJs stopped playing music and the lights came up indicating the party was shutting down. (R. p. 140, lines 4-5). Shawn DeFreitas, also known as Shawn Cooper, testified he arrived at the club around 3 a.m. and paid and went inside, spending some time talking to some people. (R. pp. 178, line 3; R. p. 179, lines 3-4). He said about an hour later, the club was closing down so he left. (R. p. 179, lines 8-10).

When the lights came up and the music stopped playing, Mr. Haggood, who was near the pool table by the front door, simply left and went outside. (R. p. 140, lines 7-8). He said Mr. Frazier and Mr. Benjamin were both near the dance floor area. (*Id.*, lines 13-14). He was outside talking with a female friend he knew from high school and saw Mr. Benjamin and Mr. Frazier exit the club. (R. p. 141, lines 7-12).

Shots Are Fired

"As soon as they got outside the door, somebody (later learned it was the victim Mr. Lawton) pulled out a gun and discharged a round," Mr. Haggood said. (R. p. 141, lines 12-14). Mr. Lawton was the aggressor

outside, according to Mr. Haggood. (R. p. 165, lines 12-14). "I guess you could say [it was] like an ambush type thing. He (Mr. Lawton) came out of nowhere. It wasn't provoked or anything. Once he walked up, he pulled out his gun, it wasn't anything said before he pulled out his gun." (*Id.*, lines 17-20).

There was chatter going back and forth between Mr. Frazier and some people with him and Mr. Lawton and his friends. (R. p. 74, line 24-25). Mr. Gidron said he saw something "like a pep rally or something" and "everybody just swarmed in." (R. p. 371, lines 18-19). He said he saw Mr. Lawton with a gun in his waistband. (*Id.*, lines 20-21).

Mr. Gidron said at one point someone said, "he got a gun" but did not recognize the voice and did not know who the voice was referring to but right after said he looked and saw Mr. Frazier with his gun out. (R. p. 372, lines 1-2). Mr. Frazier's gun at that point was not in the air but rather pointed downward near his waist. (R. p. 74, lines 8-12). After that, Mr. Haggood said, "it was just like everything became chaotic, like people arguing and everything and people trying to separate everything." (R. p. 143, lines 4-7). Mr. Haynes said somebody ran back into the club and told him there was a commotion outside the club and he went to investigate and saw 25 to 30

people outside by the door and saw Mr. Frazier holding a silver revolver in the air. (R. p. 45, line 13-14; *Id.*, lines 20-21; R. p. 46, line 23).

Mr. Hampton was also outside and saw Mr. Frazier holding his gun in the air and heard him saying, "All we want to do is go home!" (R. p. 69, line 13). He said there was "a lot of chatter." (R. p. 71, line 1). Mr. Haggood heard the same thing: "I'm just trying to get home. I'm just trying to get home. I don't want any trouble." (R. p. 143, lines 9-10). Mr. Gidron said he heard Mr. Frazier say, "man, please, we just want to go home ... we don't want no problem." (R. p. 372, lines 4-6). Mr. DeFreitas said he saw an altercation breakout "with some of the people I knew" and so he went back from his car to try to break it up. (R. p. 179, lines 14-15). He saw Mr. Frazier and Mr. Lawton right at the door with perhaps a dozen people around. (*Id.*, lines 16-23).

Mr. Haynes had stepped in to try to break up the confrontation as well and he and Mr. Benjamin and Mr. Haggood were trying to "usher" Mr. Frazier toward Mr. Haggood's car. (R. p. 46, line 6; R. p. 144, line 6). Mr. Haggood had tried to step in but Mr. Benjamin interceded and touched him on the shoulder and said "just fall back. Chill out." (R. p. 143, line 15-16). Mr. Haynes said he was focused on Mr. Frazier and was not paying much attention to anything else. (R. p. 46, lines 11-12). Mr. DeFreitas was also

with this group trying to get Mr. Frazier back to Mr. Haggood's car. (R. p. 180, lines 19-20).

The group finally gets back to Mr. Haggood's car and Mr. Haynes said this was the point where Mr. Frazier fired his revolver into the air. (R. p. 46, lines 15-16; R. pp. 74, line 25 – p. 75, line 3). Mr. DeFreitas said "shots just started firing" after that and he got hit in the leg and "went down." (R. p. 183, lines 15-17). He had no idea who fired the first shots. (R. p. 190, lines 1-3). Mr. Haynes ran after the shots started and took cover by the door to the club near the van and ultimately retreated inside. (R. p. 51, lines 20-22). Mr. Haggood said he heard the first shots before Mr. Frazier fired and in fact it was even before they reached his car. (R. p. 145, lines 1-2).

"They started shooting," he said, "and then it was like everybody was scattering." (R. p. 145, lines 2-3). He said he could not tell where the initial shots came from but believed they came from an area near the road. (*Id.*, lines 15-18). It was after that point when Mr. Benjamin pulled out his gun "and let off about two shots." (R. p. 146, lines 4-5). He said Mr. Benjamin's shots were fired "like [in] the direction of the car that was in front of mine." (*Id.*, lines 18-19). Mr. Benjamin was still moving when that was happening. (R. p. 148, lines 17-20).

Mr. Haggood said somebody was firing from behind the van (which was parked near the club) and that it seemed people were "shooting like from different directions" so he took cover towards the rear of his car. (R. p. 148, lines 1-3). He pulled out his .40 caliber and shot back. (Id., lines 4-5). He said he shot "three or four shots" back in the direction of the van. (R. p. 149, lines 5-7).

The gunfire Mr. Haggood described as "enemy fire" based on his experience as a combat soldier. (R. p. 164, lines 11-12). He said the first shot was not fired by Mr. Frazier or Mr. Benjamin. (R. p. 167, lines 1-7). "Once the first shot came out it was like shots from everywhere." (*Id.*, lines 9-11). "Like I guess you could say people already had their guns on them in the parking lot" before Mr. Frazier fired his weapon into the air. (*Id.*, lines 11-12).

When Mr. Benjamin was initially moving from one location seeking cover near Mr. Haggood's car, his shots were fired with his arm extended at a downward angle equivalent to "cover fire" used to provide a chance to rally a group of people into a safe place. (R. p. 168, lines 5-9). Mr. Haggood never saw Mr. Benjamin shoot anyone and was "on the move" when the rounds were discharged. (*Id.*, lines 13-14).

When Mr. Hampton saw Mr. Frazier fire into the air, he turned and walked away back towards the road. He said then more shots were fired and he could "feel the bullet coming past my own head" so he ducked for cover behind the van and went the other way. (R. p. 75, lines 17-19). He said the shots he believed came from behind him. He never saw Mr. Benjamin shooting. (R. p. 76, lines 6-7).

He said once he ducked behind the van and heading in the opposite direction he started hearing yelling and someone saying, "Killa get up!" (R. p. 76, line 24). He ran over to where it was coming from and saw Mr. Lawton on the ground and that he had been shot in the head. (R. p. 77, lines 9-12; R. p. 78, line 2). He said he then ran back to the club, picked up a pole out of the ground and threw it at a car. (R. p. 78, lines 12-13). Mr. DeFreitas said he had no idea who fired the shots that killed Mr. Lawton. (R. p. 193, lines 22-24).

Daniel Saxon arrived at the club about 3:15 a.m. and said he could not hear any gunfire when he got there but also said he had his music on in the car with the windows up. (R. p. 199, lines 10-12; R. p. 201, lines 4-5). He was in his car and saw Mr. Lawton at one point come around to the front of his vehicle on the driver's side. He said Mr. Lawton was "kind of agitated."

(R. p. 201, lines 19-20). Mr. Saxon got out of his vehicle and tried to calm him down. (*Id.*, lines 21-23).

After this, Mr. Saxon said he heard gunshots and so he ducked down. The only person he saw shooting was "a guy shooting in the air – not aiming." (R. p. 203, lines 1-3). After kneeling down, he turned and looked at the rear of his car and saw Mr. Lawton lying there with a wound to his head. (*Id.*, lines 21-24). He walked around to the front of his car and got one of Mr. Lawton's cousins and told him he thought Mr. Lawton was dead. (R. pp. 203, line 25 – 204, line 5).

Mr. Gidron said he was "99 percent sure" that he saw the point at which Mr. Lawton was shot and that Mr. Benjamin did not fire that shot or even aim a gun at him. (R. p. 374, lines 2-8; R. p. 375, lines 10-12). He said Mr. Haggood was shooting toward the van because "somebody was on the back of the van firing shots." (R. p. 387, lines 12-15). "Josh was saying, 'Don't come --- don't come from around the van. Don't come around the van.'" (R. p. 389, lines 17-18).

Mr. Hampton said that after he had thrown the post he started moving back towards an area behind the DJ's van that was backed up to a door at the club and heard some more shots go off and it was at that point he realized he had been hit in his arm. (R. p. 80, lines 1-13). He said he yelled out, "I'm

hit" and "then some girl came over and wrapped my arm up and they sat me down in Andrew Haynes' car." (R. p. 81, lines 21-23).

Mr. Haggood said Mr. Frazier was in the backseat of his car and he and Mr. Benjamin got into the front seat about the same time. He said Mr. Benjamin was driving and had put the car into gear and "hit the horn a couple of times" because there was a car in front of them and that car, he said, eventually started moving backwards. (R. p. 150, lines 8-11). He said Mr. Frazier was yelling and that it was difficult at first to hear. (R. p. 151, lines 18-21).

Mr. Frazier asked Mr. Benjamin and Mr. Haggood if either of them "had to shoot." (R. p. 152, lines 10-12). Mr. Benjamin, according to Mr. Haggood, said there was no reason to do so because Mr. Frazier had "let off a few shots in the air to let them know what time it was." (*Id.*, lines 19-22). Mr. Haggood did not initially respond, he said, because he was on his cell phone trying to call his brother to find out what happened.

Mr. Frazier, later on, opened the rear window and tossed out some shell casings from his weapon, according to Mr. Haggood. (R. p. 152, lines 6-9). Mr. Benjamin drove and they dropped off Mr. Frazier at another club, Mr. Haggood took Mr. Benjamin back to his mother's house, and Mr. Haggood then went home to his mother's house for a few hours before

getting into his car and heading back to Fort Bragg, North Carolina. (R. p. 153, lines 5-10; R. p. 154, lines 4-13).

The Investigation

Calhoun County Sheriff's Deputy Terry Snead was on duty on the night and early morning of September 17-18, 2011. (R. p. 16, lines 23-25). He was dispatched to the incident and headed there with others with lights and sirens on. (R. p. 17, lines 10-17). He said the first call from the scene came in around 4 a.m. (R. p. 30, lines 15-18).

It took Deputy Snead approximately 26-27 minutes to arrive on scene. (R. p. 30, lines 6-8). While en route, one of his fellow deputies, Sgt. Phil Rice, was told to respond to a convenience store in Cameron because it was reported that a victim was there. (R. pp. 18, line 22 – p. 19, line 2). Deputy Snead and fellow Deputy Sgt. Earl Kinley arrived on the scene of the incident about the same time.

Deputy Snead described it as "chaotic" and that they spent their time trying to find out what had happened. (R. p. 19, lines 13-14; R. p. 31, lines 15-16). One person was found on the ground and another was sitting in a small gray car. (R. p. 19, lines 17-21). The person on the ground was the victim Dominique Lawton and Deputy Snead could not remember the identity of the other victim he saw. (R. p. 27, lines 1-7). As to Mr. Lawton,

Dr. Janice Ross, M.D., a forensic pathologist, could not determine what caliber bullet was the actual bullet that killed Mr. Lawton. (R. p. 354, lines 11-14; R. p. 355, 11-13).

The scene of the shooting had not been secured prior to his arrival and he said there was no way to know if, in the 25 to 30 minutes prior to his arrival, anything was moved or the scene was otherwise compromised. (R. p. 31, lines 7-10). He said when he first arrived on scene, his first concern was securing the scene, meaning making sure that there were no active shooters and then to render what emergency aid he could. (R. p. 27, lines 17-18).

The first 911 call came in "right around 4 a.m.," according to Deputy Snead. (R. p. 30, lines 17-18). He said once it was determined there were no other "active shooters" and the victims had been tended to, he and other deputies secured the scene "and try not to let anything move or be disturbed until we could call other investigators in." (R. p. 28, lines 4-7). This meant roping off the scene "to keep it as sterile as possible." (*Id.*, lines 18-19). To his knowledge, "other than people scattering" the scene was not disturbed or tampered with. (*Id.*, lines 11-15).

Calhoun County Sheriff's Lieutenant Henry Dukes, Jr., was the lead investigator in the case. This was his first homicide investigation in that capacity. (R. p. 267, lines 18-23). Assisting him was Deputy Matthew

Trentham, a criminal investigator. Investigator Trentham received the first call from dispatch at 4:08 a.m. (R. p. 280, lines 14-15). He was the "on-call" investigator that evening. (R. p. 279, lines 13-14).

Investigator Trentham arrived on the scene "right before 5 o'clock" and said the scene was secure at that point. (R. p. 280, lines 18-22). Lt. Dukes arrived on the scene within a few minutes of Investigator Trentham and the two then began coordinating "who was going to do what and who was going to respond back to the hospital." (R. p. 281, lines 8-11). All of the victims had been transported at that point. (*Id.*, lines 2-3). Investigator Trentham went to the hospital and Lt. Dukes remained on scene.

Lt. Dukes said upon his arrival he saw that statements were being obtained from some witnesses (the DJs were still there, according to Trentham (R. p. 281, lines 11-12)) and law enforcement had "started doing [an] initial report." (R. p. 228, line 12). Ultimately, Lt. Dukes began processing the scene that had been roped off previously by Deputy Snead. (*Id.*, lines 19-22). He said he recovered an unspent shell cartridge near the front door; one spent shell casing in the area behind the van; five .45 caliber shell casings and three .40 caliber shell casings in the area near the corner of the club; and five 9-millimeter shell casings in a general area scattered about

fifteen feet from where the body of Mr. Lawton had been. (R. pp. 229, lines 10 – p. 235, line 16).

As far as suspects, Lt. Dukes said initially Mr. Frazier was identified as a result of his name being provided when the 911 call came into dispatch and he was arrested about two o'clock in the afternoon of September 18, 2009. (R. p. 244, lines 20-23; R. p. 245, lines 16-18). A gunshot residue kit was collected at the time of his arrest, Lt. Dukes said. (*Id.*, lines 20-22). He said he also received information about Mrrs. Benjamin and Haggood as possibly involved. (R. p. 247, lines 20-23).

Investigator Trentham arrived at the hospital in the hopes of speaking with the victims and, based on rumors that this was a "family-type function" and that family members might be present, that potentially other witnesses might be present as well from whom he could take statements. (R. pp. 281, line 20 – 282, line 4). Two of the victims, Mr. Hampton and Mr. DeFreitas, were stable and had been treated while Mr. Lawton had been airlifted to Palmetto-Richland. (R. 282, lines 22-25).

Gunshot residue kits were collected from Mrrs. Hampton and DeFreitas. (R. p. 284, lines 8-9). He said as a result of his conversations with the witnesses, the focus of the investigation was on Mr. Benjamin, Mr. Frazier and Nayrone Shivers "as possible suspects." (R. p. 285, lines 18-20).

He reported back to Lt. Dukes with these names. (R. p. 285, line 24 – p. 286, line 1). There were no other leads or any other suspects. (R. p. 288, lines 2-5).

Mr. Shivers was dismissed as a suspect shortly after this when it was learned that although he had a weapon that evening "it was after the fact, after Mr. Lawton was already struck." (R. p. 288, lines 20-22; R. p. 287, lines 21-22). Lt. Dukes said an arrest warrant was issued for Mr. Shivers but never executed and investigators never met with Mr. Shivers to speak with him about the incident. (R. p. 268, lines 4-15). No one was ever identified as being responsible for the 9-millimeter shell casings and there is "no proof at this time" that Mr. Shivers was the shooter. (R. p. 268, line 16 – p. 269, line 1).

Several days after the incident, and after the crime scene tape had been removed, Lt. Dukes said he returned to the scene with a metal detector to continue to look for any evidence. A full week following the shooting, Lt. Dukes executed a search warrant at the home of Mr. Benjamin but recovered no evidence. (R. p. 272, lines 16-18). No firearms were recovered and specifically there was no .45 caliber located. (R. p. 263, lines 14-20). Additionally, there was a search conducted at Mr. Frazier's home where a

revolver was recovered. (R. p. 255, lines 9-12). Lt. Dukes said that to date, there has been no .45 caliber or 9-millimeter recovered.

John Roberts is a forensic investigator with the South Carolina Law Enforcement Division, commonly called SLED. (R. p. 290, lines 7-8). Specifically, his testimony related to his gunshot residue analysis. (*Id.*, lines 22-23). He was provided several gunshot residue kits that had been collected by Investigator Trentham as part of his investigation at the regional medical center. Agent Roberts said the kits taken from Mr. DeFreitas and Mr. Hampton were both negative for evidence of gunshot residue. (R. p. 299, lines 7-9; *Id.*, lines 15-19).

He also testified that he received a gunshot residue kit taken from Mr. Frazier but no test was conducted because its collection took place more than six hours after the shooting, something he said was the cut-off when effective analysis could not be done. (R. p. 299, lines 20-23; R. p. 297, lines 5-7). There was no analysis performed, for the same reason, on a kit taken from Mr. Shivers and on a kit taken from Mr. Lawton.[1] Analysis was also

[1] Investigators did not travel to Palmetto-Richland prior to Mr. Lawton's death to collect any evidence and Agent Roberts testified that because Mr. Lawton remained alive, albeit on life support, for a period of time exceeding six hours from the time of the shooting, no test would be conducted because it was too late. (R. p. 301, lines 17-24). As to Mr. Shivers, there was no testimony from any investigator identifying the circumstances of when or how this kit was collected or whether or not Mr. Shivers was ever interviewed. This reference from Agent Roberts is the first reference to any evidence collection involving Mr. Shivers.

conducted on the vehicle belonging to Mr. Haggood and it was determined that a "single round gunshot residue particle" was detected on a test strip taken from the driver's side rear of the vehicle, indicating a weapon was fired near the vehicle. (R. p. 306, lines 14-17).

To put the size in perspective, Agent Roberts testified that the particles are actually "submicroscopic" detected utilizing a beam of electrons fired through a vacuum. (R. p. 310, line 3). "They are not quite nanometers, but micrometers." (*Id.*, lines 11-12). He said two of these particles were found. (*Id.*, lines 20-23). Additional testing was conducted on the t-shirt belonging to Mr. Shivers and it revealed evidence of gunshot residue. (*See* Note 1 below) (R. p. 307, lines 17-18). "It was near a gun when it went off." (R. p. 308, line 1). There was no gunshot residue kit collected from Mr. Benjamin. (R. p. 309, lines 17-18).

SLED Agent James Green is a firearms and ballistics examiner. (R. p. 313, line 16). He examined three firearms: a Highpoint Model CF-380 .380 caliber semi-automatic pistol; an Armenius Model HW3-32 Smith and Wesson long caliber revolver; and a Springfield Armory Model XD-40 .40 caliber Smith and Wesson semi-automatic pistol. (R. p. 318, lines 5-8; *Id.*, lines 17-20; R. p. 323, lines 22-23). No other weapons were received from law enforcement for testing. (R. p. 324, lines 9-10). He also compared

several shell casings recovered from the scene and attempted to match them to the various weapons presented for review.

Agent Green testified he could not determine if the three .40 caliber casings were fired by the .40 caliber Springfield that was recovered. (R. p. 329, lines 7-8). As to the bullet recovered from Mr. Hampton, Agent Green said it was "consistent" with having been fired by *some* .40 caliber Smith and Wesson but could not say it came from *the* .40 caliber introduced into evidence. (R. p. 331, lines 10-12)(emphasis added). He said the .45 caliber cartridge casings were all fired from the same weapon but the weapon was never recovered and could not be tested. (R. p. 331, lines 5-10; *Id.*, lines 18-19). Finally, the five 9-millimeter casings were consistent with a Luger 9-millimeter and were all fired from the same weapon but no 9-millimeter was ever recovered. (R. p. 337, lines 14-23).

Agent Green conceded that the three fired .40 caliber cartridge cases all were fired by the same pistol but that it could have been a pistol other than the .40 caliber entered into evidence. (R. p. 339, lines 18-20). One of the fired bullets examined was fired either from a Smith and Wesson .40 caliber or possibly a 10-millimeter. (R. p. 340, lines 8-13). Additionally, the .45 caliber casings could have been fired by more than one weapon and the

testing was inconclusive. (R. p. 341, lines 23-25; R. p. 342, line 20 – p. 343, line 1).

Investigator Trentham said, "We worked diligently to identify all – anybody that had a firearm that night and anybody involved" but came up with no one. (R. p. 287, line 23 – p. 288, line 5). Agent Green concluded there could have been at least eight and as many as nine different firearms involved in the shooting that evening. (R. p. 344, lines 8-10).

The Defense Motion for Directed Verdict

Following the testimony from Dr. Ross, the forensic pathologist who conducted the autopsy on Mr. Lawton (and who could not determine what caliber bullet killed him (R. p. 355, lines 11-13)), the State rested its case. Mr. Benjamin, through trial counsel, moved for a directed verdict of not guilty on all counts. (R. p. 358, lines 16-21). The Court asked the Assistant Solicitor to lay out the evidence supporting the elements of the crimes including which witnesses "[put] the gun in the hand of the defendant and then pointing the gun in the area where the victims were." (R. p. 359, lines 1-8).

In response the Assistant Solicitor responded that Mr. Haggood testified that Mr. Benjamin possessed a .45 caliber semi-automatic and saw Mr. Benjamin firing it "essentially out in the direction that I would submit

the victim was ultimately hit, the victim being Mr. Lawton was struck." (R. p. 360, lines 2-9). He also noted Mr. Hampton "basically saw all three defendants with guns." (R. p. 359, line 25 – p. 360, line 1). "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." (R. p. 361, line 1-5).

The Assistant Solicitor also relied upon the discovery, several days later with a metal detector, of three .45 caliber rounds, two of which are matched to each other and a third was "too damaged" as a result, he suggested, of striking Mr. Saxon's vehicle. "I submit to you one of those other two went through Mr. Lawton's head." (recalling Dr. Ross could not say what caliber bullet inflicted the fatal wound to Mr. Lawton)(R. p. 361, lines 13-14). He conceded the injury to Mr. Hampton was inflicted from Mr. Haggood's weapon "so I think our argument with regards to him is more of an accomplice liability theory." (*Id.*, lines 15-23).

"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," the Assistant

Solicitor opined. "I agree it's chaos out there but I submit to you the three of them were part of that chaos." (R. p. 361, line 23 – p. 362, line 4).

No further evidence was presented by the Assistant Solicitor in support of his theory of the case. It rests exclusively on an accomplice liability theory based upon speculation as to who and what killed Mr. Lawton and the fact that Mr. Benjamin was seen with a .45 caliber semi-automatic. There was no explanation as to the common plan or scheme to commit a crime that involved Mrrs. Benjamin, Haggood and Frazier, no intent to commit a crime at all against any of those injured, and not explanation or evidence supporting that the three defendants met up with the purpose of committing a crime as a result of a prior agreement to do so.

The Court conceded at least a portion of the State's prosecution rested on circumstantial evidence. (R. p. 365, lines 5-7). Additionally, the Court concluded that "taking the evidence in its entirety and the inferences which could be drawn" there was sufficient evidence on "every element of each of these offenses" that a jury could find guilt beyond a reasonable doubt. The motion was denied. (*Id.*, lines 7-10).

Mr. Benjamin did not testify. (R. p. 394, lines 19-20). His defense included the testimony of Mr. Gidron, who specifically said he did not see Mr. Benjamin aim at or shoot Mr. Lawton, and Kelly Fite, a firearms expert.

Following this testimony, the Defense rested its case again moved for a directed verdict of not guilty. (R. p. 395, lines 10 – p. 396, line 15). The motion was, again, denied. "There is evidence both ways, without question." (R. p. 396, lines 17-19).

ARGUMENT

ISSUE ONE - THE TRIAL COURT ERRED IN NOT GRANTING 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.

"In criminal cases an appellate court sits to review errors of law only." *State v. Baccus,* 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An appellate court reviews the denial of a directed verdict by viewing the evidence and all reasonable inferences in the light most favorable to the State. *State v. Weston,* 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); *State v. Lollis,* 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001). A defendant is entitled to a directed verdict where the State fails to produce evidence of the offense charged. *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) *citing State v. McHoney*, 344 S.C. 85, 97, 544 S.E. 2d 30, 36 (2001).

"If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, [an appellate court]

must find the case was properly submitted to the jury." *See Weston,* 367 S.C. at 293–93, 625 S.E.2d at 648; *State v. Odems,* 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

Direct evidence "is based on personal knowledge or observation and ... *if true,* proves a fact without inference or presumption." *Black's Law Dictionary* 636 (9th ed.2009) (emphasis added). The presentation of direct evidence "immediately establishes the main fact to be proved." *State v. Salisbury,* 343 S.C. 520, 524 n. 1, 541 S.E.2d 247, 249 n. 1 (2001). Circumstantial evidence is "based on inference and not on personal knowledge or observation," *Black's Law Dictionary* 636 (9th ed.2009), and establishes "collateral facts from which the main fact may be inferred." *Id.* Circumstantial evidence is "proof of a chain of facts and circumstances from which the existence of a separate fact may be inferred." *State v. Cherry,* 361 S.C. 588, 596, 606 S.E.2d 475, 479 (2004).

Mr. Benjamin was charged by indictment with murder, in violation of S.C. Code 16-3-10, and two counts of attempted murder in violation of S.C. Code 16-3-29. The Court instructed the jury that to prove murder, the State was required to prove beyond a reasonable doubt that Mr. Benjamin killed Mr. Lawton with malice aforethought, defined as an intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an

injury, and as a result, the intended victim actually died. "But for the acts of this defendant, the victim would not have died." (R. p. 452, lines 19-21). There must have been "previous evil intent and malice must have existed in the mind of the defendant just before and at the time the act is committed." (R. p. 453, lines 11-14).

Attempted murder, the Court instructed, required the State to prove beyond a reasonable doubt that Mr. Benjamin, with malice aforethought and with the intent to kill, shoot and wound the two surviving victims, Mr. Hampton and Mr. DeFreitas. (R. p. 458, lines 6-8). The State "must show more than mere preparation and an intent." (*Id.*, lines 16-17).

Here, the State conceded it could not prove Mr. Benjamin, and in fact the State was not arguing, that Mr. Benjamin was responsible for the injury to Mr. Hampton or Mr. DeFreitas and was relying on a theory of accomplice liability. (R. p. 362, lines 5-7). There was also no direct evidence that Mr. Benjamin actually killed Mr. Lawton and no evidence that he intended to kill Mr. Lawton with malice aforethought.

The State in the instant matter all but conceded that there was no direct evidence linking Mr. Benjamin to any of the crimes charged. "Obviously I can't be positive who shot – I mean really it could be either one of the other two ..." (R. p. 362, lines 14-15). There was no eyewitness

who saw Mr. Benjamin fire the fatal shot that killed Mr. Lawton and in fact, there was uncontroverted direct evidence to the contrary where Mr. Gidron, an eyewitness to the exact moment when Mr. Lawton was struck, testified he did not see Mr. Benjamin shoot at or even aim at Mr. Lawton.

The only connection is an unsupported speculative conclusion from the Assistant Solicitor that is contrary to the state's own forensic expert, Dr. Ross, that one of two .45 caliber bullets recovered several days after the shooting must have hit Mr. Lawton in the head.

The State also conceded that it was NOT Mr. Benjamin who fired any of the shots that wounded Mr. Hampton or Mr. DeFreitas. There was direct testimony from the State's own witness, Mr. Haggood, who took a very favorable plea deal in exchange for his testimony, that it was likely his weapon that injured Mr. Hampton. There was no evidence supporting who shot Mr. DeFreitas other than he was shot sometime during the hail of gunfire that every witness testified was coming from all directions.

Mr. Benjamin's guilt is based upon mere speculation and only marginal circumstantial evidence. Here, the only testimony offered that connected Mr. Benjamin to any gunfire was that of Mr. Haggood, testifying under a very favorable plea deal. Mr. Benjamin fired his weapon perhaps two or three times while moving toward cover from the other gunfire. It was

described as "cover fire" used to permit a group of people to rally in a safe place. He was not aiming his weapon and was not shooting at anyone but rather was holding his weapon at a downward angle.

The evidence presented by the State was that Mr. Benjamin had possession of a .45 caliber semi-automatic several hours prior to the incident outside "Piggy Park" that ultimately led to Mr. Lawton's death. There was an incident inside the club shortly after Mr. Benjamin, Mr. Haggood, and Mr. Frazier arrived between 12:30 a.m. and 1 a.m. where Mr. Benjamin and Mr. Lawton "bumped" on the dance floor and it appeared some words were exchanged. There were no punches thrown and no weapons displayed. After a few minutes, both parties were calmed by friends and each side had made it clear neither wanted any problems with the other.

Several hours later, without any incidents in between, there party at the club was breaking up and the club shutting down and so Mr. Benjamin, Mr. Frazier and Mr. Haggood made their way, separately, outside. Once outside, according to Mr. Haggood (the State's chief witness testifying as a result of a very favorable plea deal) "someone pulled a gun and discharged a round." He stated Mr. Lawton was the aggressor and was likely the one who pulled his weapon. He had possession of a .380 semi-automatic and a .380

caliber round was found near the front door consistent with the testimony from witnesses.

"I guess you could say it was an ambush type thing. He (Mr. Lawton) came out of nowhere. It wasn't provoked or anything. Once he walked up, he pulled out his gun, it wasn't anything said before he pulled out his gun," Mr. Haggood testified.

Everything became chaotic and this is when Mr. Frazier pulled his gun and held it in the air or at his side but had not fired. His concern was echoed by nearly every witness who was present: he and his friends did not want any problems, they just wanted to get home. Mr. Benjamin and others tried to usher Mr. Frazier out of the area toward Mr. Haggood's car, away from the situation. There were perhaps as many as a dozen people right by the door when Mr. Lawton and his friends confronted Mr. Frazier.

Mr. Haggood tried to step in to protect Mr. Frazier but Mr. Benjamin told him to "fall back." The goal was to exit from the area and not escalate the situation. "They started shooting," Mr. Haggood said, referring to unknown others and NOT as to Mr. Benjamin, "and then it was like everyone was scattering." Faced with gunfire in all directions, Mr. Benjamin began moving toward a place of safety and "pulled out his gun

and let off about two shots," according to Mr. Haggood, "in the direction of the car that was in front of mine."

There is no other testimony that Mr. Benjamin fired any additional rounds from his weapon. There is no evidence he aimed at anyone and no evidence that any shot he fired actually hit anyone. There was no .45 caliber weapon recovered by police despite searching Mr. Benjamin's home. The Assistant Solicitor simply speculated in his closing argument that Mr. Benjamin must have disposed of the weapon at some point after the shooting.

"This Court has repeatedly affirmed the principle that when the State fails to produce substantial circumstantial evidence that the Defendant committed a particular crime, the defendant is entitled to a directed verdict." *Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

Having conceded there was no evidence that Mr. Benjamin actually committed the crimes charged, the State rested its prosecution on the theory that Mr. Benjamin is responsible for the actions of his co-defendants, namely Mr. Haggood and Mr. Frazier, as an accomplice. The theory is referred to as "the hand of one is the hand of all." Under this theory, the State can hold Mr. Benjamin responsible for his co-defendants' actions if it proves Mr. Benjamin joined with them "to accomplish an illegal purpose 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).

Under this accomplice liability theory, the State utterly failed to prove an essential element: there was no prior agreement to commit a crime and Mr. Benjamin did nothing to aid, abet or assist any of his co-defendants in carrying out this mystery scheme. "In order to be guilty as an aider and abettor, the participant (Mr. Benjamin) must be chargeable with knowledge of the principal's criminal conduct." *Mattison*, 388 S.C. 469, 480, 697 S.E.2d 578, 584, *citing State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987).

First, the State could not prove who the principal was that murdered Mr. Lawton. The State presumed, speculated, and suspected Mr. Benjamin but never proved it. The State never proved Mr. Haggood or Mr. Frazier fired the fatal shot. The State's own expert witness could not say what caliber bullet killed Mr. Lawton and the firearms and ballistics expert testified that his tests were inconclusive. Absent proof of the "principal" there can be no aiding and abetting sufficient to tie Mr. Benjamin to any crime.

Second, there was no evidence, direct or otherwise, of any common scheme or plan to commit a criminal act. The State suggested in its closing

argument that the plan was hatched the minute the three co-defendants exited the club to retrieve their weapons from Mr. Haggood's car. However, there was no evidence it was done for any criminal purpose. Mr. Benjamin, who had just been bumped on the dance floor, stated he thought Mr. Lawton had a weapon and did not want to get caught unprepared. The State argues this proves a criminal intent to commit a criminal act.

But the testimony from all of the State's witnesses who were at the club that evening said whatever bad feelings there may have been between Mr. Benjamin and Mr. Lawton had long since evaporated by the time the club closed down, Mr. Frazier and his friends exited the club, and Mr. Lawton "ambushed" them at the front door. All the State suggested in arguing against a direct verdict was that "it's chaos out there and the three of them are part of that chaos." (R. p. 362, lines 3-4). And so were at least a dozen others including the victim who pulled his .380 semi-automatic and ambushed Mr. Frazier as he left the club.

Interestingly, the State failed to articulate ANY argument about the necessary elements to meet its burden about accomplice liability. All the State articulated was mere presence at the scene, prior possession of a weapon that was never linked to the murder of Mr. Lawton or the wounding of Mr. DeFreitas or Mr. Hampton, and the fact that Mr. Benjamin fired two

shots as he was running for cover to escape the hail of gunfire. There was no evidence of some pre-planned agreement to meet at the front door to kill Mr. Lawton. There was no evidence that Mr. Benjamin aided and abetted anyone because the killer was never identified.

At best, there was only the State's suspicion and speculation that Mr. Benjamin was responsible. The Court instructed the jury that it must find that there was a prior arranged plan or common scheme in order to find guilt. (R. p. 463, lines 13-15). Accomplice liability is shown where "a person joins with another to commit an unlawful act in carrying out a common plan or purpose." (R. p. 462, lines 7-11). Even if the State could prove who the principal was, and even if Mr. Benjamin had prior knowledge that the principal was going to commit a crime, that prior knowledge is insufficient to prove guilt. (R. p. 463, lines 4-10).

Neither is mere presence at the scene enough to find guilt. (R. p. 464, lines 7-10). At best the State's case was one of speculation and conjecture. The murder weapon was never introduced because it could not be determined, according to the State's own expert witness. At most, the State's case, and its artful stringing together of inference upon inference to the jury, raised only a suspicion.

"Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *State v. Cherry,* 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004); *State v. Lollis,* 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001)). Under these circumstances, "and settled principles, the trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty." *State v. Lewis*, 403 S.C. 435, 743 S.E.2d 124 (2013) *citing State v. Zeigler,* 364 S.C. 94, 102, 610 S.E.2d 859, 863 (Ct.App.2005) *citing State v. Arnold,* 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004); *State v. Schrock,* 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984)).

Here, there was nothing more than speculation and suspicion without any proof of some criminal scheme to commit a criminal act upon the victims in this case. No one can say for sure who fired the fatal shot that killed Mr. Lawton. No one can say who fired the shot that injured Mr. DeFreitas. Mr. Hampton's injury was likely the result of a shot from Mr. Haggood's weapon but even so, there was no evidence Mr. Benjamin did anything to aid, abet or assist Mr. Haggood carry out a criminal act as a result of a pre-planned common plan or scheme. Absent this evidence, the Court should have granted a directed verdict in favor of Mr. Benjamin on all

counts and erred in denying the motion and submitting it to the jury. The conviction should be overturned and the indictment dismissed.

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.

"The decision whether to grant a new trial rests within the sound discretion of the trial court, and [the appellate court] will not disturb the trial court's decision absent an abuse of discretion." *State v. Mercer,* 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009); *State v. Kelly,* 331 S.C. 132, 502 S.E.2d 99 (1998); *State v. Smith,* 316 S.C. 53, 447 S.E.2d 175 (1993). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *State v. Hughes,* 346 S.C. 339, 342, 552 S.E.2d 35, 36 (Ct.App.2001).

Similar to the standard utilized in examining a motion for directed verdict, if there is any evidence, direct or circumstantial, which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced, the appellate court must find the case was properly submitted to the jury. Here, there is no fair and logical reading of the

evidence sufficient to sustain the jury's verdict and the Court abused its discretion in not ordering a new trial.

Here, there was no direct evidence supporting Mr. Benjamin's guilt as to the murder of Mr. Lawton and the attempted murders of Mr. Hampton and Mr. DeFreitas. The State conceded that its theory of liability rested upon the "Hand of One is the Hand of All" accomplice liability where Mr. Benjamin was held responsible for the actions of his co-defendants in furtherance of a pre-arranged common plan or scheme to commit a criminal act. The State could not establish, and admitted as much during its argument against a directed verdict, who fired the fatal shot that killed Mr. Lawton or injured Mr. DeFreitas. Mr. Haggood essentially admitted during his testimony, given in exchange for a favorable plea deal, that it was likely his gun that fired the bullet that his Mr. Hampton in the arm.

Without identifying the principal in the shooting death of Mr. Lawton or Mr. DeFreitas, the Court erred as a matter of law in not granting Defendant's motion for new trial on this basis. The Court abused its discretion when it determined, contrary to established case law, the jury's verdict was supported by sufficient evidence when it was clear no such sufficient circumstantial evidence existed. The State's evidence, articulated in Point One, supra., was insufficient to support the jury's verdict and the

Court abused its discretion in denying the motion for new trial. The verdict should be vacated and the indictment dismissed.

CONCLUSION

For all of the foregoing reasons, and in light of the legal authority herein cited, it is respectfully submitted that this Court should vacate Defendant Benjamin's conviction and dismiss the indictment; and to provide such other and further relief as the Court deems just, fair and equitable.

Respectfully Submitted.

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Dated: 8/30/14

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CALHOUN COUNTY
Diane Schafer Goodstein, Circuit Court Judge

Case No. 2013-001496

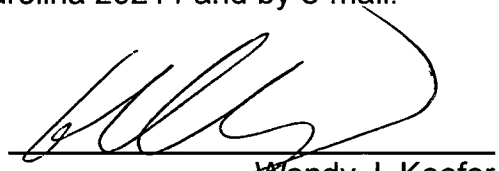
The State of South Carolina, ... Respondent,

v.

David Jamar Benjamin, ... Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief, by having a copy of it deposited in the United States Mail, postage prepaid, on September ___, 2014, addressed to attorneys of record at the S.C. Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211 and by e-mail:



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