STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

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Appeal From Charleston County
The Honorable R. Markley Dennis, Circuit Court Judge
Appellate Case No. 2013-002665

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THE STATE,

Respondent,

v.

JARRET GRADDICK,

Appellant.

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# INITIAL BRIEF OF RESPONDENT

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III. Appellant's case was properly called for trial with the co-defendant's cases, and Appellant never moved to sever his case.

## STATEMENT OF THE CASE

The Charleston County Grand Jury indicted Appellant Jarret Graddick in April 2011 on one count of armed robbery. The Honorable R. Markley Dennis, Circuit Court Judge, presided over a jury trial commencing December 3, 2013. The jury convicted Appellant as charged, and the circuit court sentenced him to twenty years incarceration. This appeal followed

## STATEMENT OF THE FACTS

In April 2011, the Charleston County Grand Jury indicted Appellant Jarret Graddick on one count of armed robbery arising from the robbery of a cell phone store on September 15, 2010. The case was called for a jury trial on December 2, 2013, before the Honorable R. Markley Dennis, Circuit Court Judge.

Evidence at trial established two men, wearing cloths over their faces and something over their heads, entered a cell phone store on September 15, 2010, and stole the cashbox containing approximately $1000. At least one of the men had a gun. The men entered and exited through a back door, and the store owner saw them run into a field behind the store. The owner testified there was a uniquely marked $100 bill in the cashbox. (Trial Transcript [TT], pp 147-169; Record on Appeal [R ], _____).

The store employees ran out of the store when the men entered, and yelled for someone to call 911 because they were being robbed A woman in the parking lot called 911, and noticed a man "looking very nervous" standing next to a red and black car. After the employees ran out, the man got into the car and drove off. As the car backed up, the woman got the license tag number and gave it to police. (TT, pp. 226-231; R., pp. ____).

A man ("Davis"), who lived on a dead end road (Sam Edwards Road) near the shopping mall, testified he saw a red and black car drive down the road twice on the day of the robbery. The first time there were four people in the car, but there were only two inside when the car drove out. Two men followed the car down the road on foot, and then went down a path toward the shopping center. About a half hour later, the car came back, and the two men who left on foot earlier ran out on the road. One of the men was

carrying something under his coat, and Davis saw him throw it in a ditch as he ran. The men followed the red and black car out of Davis' sight, and the car then came back down the road very fast. When police arrived a short time later, Davis showed them where the man threw the item, subsequently identified as the cashbox from the cell phone store, in the ditch. (TT, pp. 294-308, 314, 326-327, 349-350; R., pp. _____).

Officer Joseph Zeitner of the Mount Pleasant Police Department testified he heard the dispatch regarding an armed robbery, with a description and license tag number of the red and black car. He almost immediately saw the car cross an intersection in front of him, and initiated a traffic stop after he was able to verify the license tag number. There were four men in the car, and he ordered them to put their hands up. (TT, pp. 362-366; R., pp. _____).

After a back-up officer arrived, Zeitner got the occupants out of the vehicle, beginning with the driver (Kevin Smalls). While he was getting Smalls out, the two males in the back seat, subsequently identified as Appellant and co-defendant Keenan Coakley were moving around Appellant, who was seated behind the driver, dropped down out of Zeitner's sight three times, and Coakley, seated behind the front passenger seat, tried to get into the front seat of the car. The officers ordered Appellant out of the car, and had Coakley slide across the backseat and exit on the driver's side. They then got the front seat passenger (Brian Mazyck) out of the car. (TT, pp. 366-375; R., pp. _____).

A police supervisor who assisted in the traffic stop testified that after the occupants were removed from the car, officers moved it out of the roadway into a parking lot to secure it and wait on the crime scene technicians. When officers looked into the

car, they saw a Glock handgun the rear passenger side floorboard under the front seat, and money in the back seat arm rest. (TT, pp. 386-397; R., pp. _____).

The crime scene/evidence technician testified he recovered some shirts turned inside-out, a black pair of pants, a belt, and plastic gloves from inside the car. He also recovered cash ($1,095) from the back seat's center console, and a .45 caliber Glock handgun from under the back of the front passenger seat. The cash included the uniquely marked bill described by the store owner. He then responded to the location where the cashbox was found, photographed the location, and retrieved the cashbox as evidence A subsequent search of the car revealed more clothing, two shirts knotted such that they could be used to cover the face, two pairs of sunglasses, and more plastic gloves. (TT, pp. 426-467; R , pp. _____).

Mazyck testified for the State, and recounted the events of September 15, 2010, leading up to the traffic stop He stated he was in the car with Smalls in the shopping mall parking lot when the store owner yelled the store had been robbed, but Smalls told him not to "get involved." Smalls then drove out of the parking lot at "a nice little speed," went to the end of Sam Edwards Road and turned around. Mazyck saw Appellant and Coakley come out of a path and wave Smalls down. They were wearing gloves and had something covering the lower part of their faces, and one of them threw the cashbox down before they got in the car. Coakley got in the backseat behind Mazyck, and Appellant got in the backseat behind Smalls. (TT, pp. 485-510; R., pp. _____).

Coakley objected to Mazyck testifying about statements Coakley made inside the car, arguing it was inadmissible hearsay. Appellant objected on the ground he could not cross-examine Coakley about the statements. The circuit court overruled the objections,

finding the statements were not made to law enforcement, they were not hearsay and Appellant could cross-examine Mazyck about the statements. (TT, pp. 510-515; R., pp. ____).

Mazyck testified Appellant and Coakley started taking off the clothes they had on when they got in the car, and putting on clothes laying on the backseat, and he saw a gun and case on the back seat. After Zeitner stopped the car and ordered them to get out, Coakley said: "Go! I'm not going back to jail." (TT, pp. 518-521; R., pp. ____).

During Appellant's cross-examination of Mazyck, the State objected to questions regarding dismissed charges, and the jury was excused. Prior to hearing the State's objection, the circuit court allowed Coakley to "supplement" his previous objection to Mazyck's testimony about Coakley's statements inside the car. Coakley argued the statement about going back to jail indicated a prior offense, and moved for a mistrial. (TT, pp. 537-538, R., pp. _____). Appellant did not join in the mistrial motion, or raise any issue of prejudice to him.

At the conclusion of Mazyck's testimony, the court denied the mistrial motion, finding the reference to "jail" was vague, it did not suggest a conviction, and the State did not attempt to prove any prior by acts by Coakley. The court also found the testimony had "significant probative value," particularly regarding Smalls' involvement, and reiterated its previous finding the testimony was not inadmissible hearsay. (TT, pp. 627-632; R., pp. _____).

The jury convicted Appellant as indicted, and the circuit court sentenced him to twenty years incarceration. (TT, pp. 905, 969; R., pp. _____). This appeal followed.

## ARGUMENT

**I. The circuit court properly denied Appellant's directed verdict motion and submitted the case to the jury because there was ample evidence from which the jury could find him guilty of armed robbery as charged.**

Appellant contends the circuit court erred in denying his directed verdict motion, arguing the State failed to present sufficient to establish "the facts and theories charged in the indictment." He cites cases from other jurisdictions as support for this contention, but completely ignores South Carolina case law regarding the circuit court and appellate court roles in considering directed verdict motions.

When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of evidence presented at trial, not its weight. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728, 732-33 (2008). In reviewing the denial of a directed verdict motion, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State, and the appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Brown, 402 S.C. 119, 740 S E 2d 493, 495 (2013), State v Gilliland, 402 S.C. 389, 741, S.E.2d 521, 525 (Ct. App. 2012). If there is any direct evidence, or substantial circumstantial evidence, reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury State v. Lane, 410 S.C. 505, 765 S E.2d 557 (2014), Brown, 740 S.E.2d at 495; State v. Gentry, 363 S.C 93, 610 S.E.2d 494, 500 (2005); Gilliland 741 S.E.2d at 525.

Thus, the court's focus at the directed verdict stage is the evidence presented at trial, not the allegations of the indictment, and Appellant's strict reliance on the literal language of the indictment indicates he does not understand the difference. Further,

Appellant apparently does not understand accomplice liability, and confuses it with conspiracy liability.

"'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. Mattison, 388 S.C. 469, 697 S E.2d 578, 584 (2010) (*quoting* State v. Dickman, 341 S.C. 293, 534 S.E.2d 268, 269 [2000]). Under the theory of "hand of one is the hand of all," or accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate in executing the common design and purpose. State v. Reid, 408 S.C. 461, 758 S.E.2d 904, 910 (2014). In order to be convicted under the 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. *Id* If the person was present while **any** act necessary to constitute the offense is performed through another, he can be charged as a principal even though the act was not the whole thing necessary *Id* (*citing* Rosemond v United States, ____ U S. ____, 134 S.Ct. 1240 [2014]).

A conspiracy is the "combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means. State v. Crocker, 366 S.C. 394, 621 S.E.2d 890, 896 (Ct. App. 2005). The primary element of a conspiracy charge is the agreement or combination, and an overt act in furtherance of the conspiracy is not necessary to prove the crime. *Id* ; *see also* S.C. Code Ann. §16-17-410 (2003) (codifying common law crime of conspiracy).

Thus, the conspiracy is complete when the agreement to commit an illegal act is formed, while accomplice liability requires the actual commission of the agreed upon crime in order to hold the defendants liable as principals Appellant was charged with armed robbery as a principal, not as a co-conspirator in a conspiracy to commit armed robbery charge.

At trial, the State presented the following evidence indicating Appellant actively participated in the armed robbery, or from which his participation could be inferred:

> 1 At approximately 6:15 p m. on September 15, 2010, two men wearing masks and head coverings entered a cell phone store through the back door. The store employees saw one of the men had a gun, and they ran out the store's front door. The men took the store cashbox, and ran out of the store through the back door into an open field behind the store. The cashbox contained a $100 bill with unique markings on it. (TT, pp. 153-156, 160-162, 167-168, 210-214, 344-345, R., pp. _____)
>
> 2. A witness in the parking lot in front of the store observed two men sitting in a red and black Impala outside the store, and one of the men was acting very nervous. When the store employees ran outside shouting the store was being robbed, the witness called 911. The men drove away and the witness got the license tag number, which she gave to the police. The witness' testimony regarding the car was corroborated by surveillance video from the parking lot. (TT, pp 226-231, 269-273, 342; R., pp. _____).
>
> 3. Another witness testified he lived on a dead-end road close to the shopping center where the cell phone store was located. On the evening of September 15, 2010, he saw a red and black car with four people inside drive down the road to property at the end of the road. A few minutes later, the car drove back down the road with only two people inside, and two people came walking down the road behind it. The two people on foot, who were wearing hoodies and white gloves, went down a path going in the direction of the shopping center. (TT, pp. 300-302; R., pp. _____).
>
> 4. Twenty to thirty-five minutes later, the witness saw the red and black car come back down the road very fast and pull out of his sight. The two people on foot came running back down the path onto the road, and one of them threw something on the ground, which was subsequently identified as the cashbox from the cell phone store. The men followed the car,

which then came back down the road very fast. (TT, pp. 302-306, 329-332, 349-350; R., pp. _____).

5. A co-defendant testified he was in the car when it was in the shopping center parking lot, and then came down the road the second time. Appellant and Coakley flagged the car down, and got in the back seat, with Appellant behind the driver and Coakley behind the co-defendant. They were wearing gloves, hats, sunglasses and something covering their faces. He saw one of them throw the cashbox down before they got in the car, and one of them had a gun. As the car left the scene, Appellant and Coakley started changing clothes in the back seat, and the co-defendant saw a gun and cash between them on the back seat. (TT, pp. 499-509, 517-519; R., pp. _____)

6. Within minutes of the robbery and the description of the car going out, a Mt. Pleasant traffic officer saw the car on Highway 17 and initiated a traffic stop. After the car stopped, the officer observed the back seat passengers moving around. When other officers arrived at the scene, they got the occupants out of the car individually, and Appellant was the one sitting in the back seat behind the driver. (TT, pp. 362-369, 371-373, 375-378; R., pp. _____).

7. Officers at the scene saw a Glock handgun on the floorboard, and cash and clothing on the back seat. (TT, pp. 391-393; R. pp _____).

8. A crime scene officer testified he processed the car before it was towed, and located clothing that was turned inside out, gloves underneath the driver's seat and in a pocket on the back of the front passenger seat, a loaded Glock .45 caliber handgun on the back seat floorboard stuck under the front passenger seat, and over $1000 cash on the back seat, including a $100 bill with unique markings on it. He also recovered the cashbox discarded by the road near the shopping center. During a subsequent search of the car, he found additional clothing on the floorboard of the back passenger seat, including shirts knotted in such a way they could be used to cover the face, and two pairs of sunglasses. In addition, one of the shirts originally seized had two plastic gloves wrapped inside it. (TT, pp. 435- 437, 441-450, 453-455, 458-474, R , pp. _____).

9. A DNA expert testified Appellant's DNA matched DNA found on the trigger and trigger guard of the Glock handgun, and swab from a t-shirt and a black shirt found in the car He could not be excluded as a contributor on other evidence found in the vehicle, including the plastic gloves wrapped up in the shirts found on the rear driver's side floorboard where Appellant was sitting Appellant's three co-defendants were excluded as possible contributors on those items. (TT, pp. 677-695; R., pp. _____).

Taken in the light most favorable to the State, it can certainly be reasonably inferred from the State's evidence not only that Appellant was involved in the armed robbery, but he was one of the men who actually entered the cell phone store, and he was the one carrying the gun. The ultimate determination of his involvement was clearly a question for the jury. *Cf*, Barber v State, 393 S.C. 232, 712 S.E.2d 436, 439 (2011) (accomplice liability charge appropriate in light of evidence the perpetrators clothed themselves all in black and wrapped shirts around their heads so only their eyes were visible and victims could not differentiate between them).

The circuit court properly considered the existence of evidence from which Appellant's guilt could be determined, and the record amply supports the denial of Appellant's directed verdict motion. Accordingly, the circuit court's ruling should be affirmed.

## II. The circuit court properly allowed Mazyck to testify about Coakley's statement when the police stopped their car within minutes after the armed robbery was reported.

Appellant asserts the circuit court erred in admitting Mazyck's testimony regarding Coakley's statement he was "not going back to jail" when the officer initiated the traffic stop, contending it violated Appellant's rights under the Confrontation Clause because he could not cross-examine Coakley about it He further contends admission of the statement was prejudicial to him because the State proceeded on a "hand of one is the hand of all" theory, which he argues means the "mouth of one is the mouth of all." These contentions are nonsensical, and not legally or factually supported.

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion, which occurs when the trial court's conclusions either lack evidentiary support, or are controlled by an error of law. State v. Pagan, 369 S.C 201, 631 S.E.2d 262, 265 (2006). The appellate court reviews a trial court's decision regarding the comparative probative value and prejudicial effect of evidence under Rule 403, SCRE, for abuse of discretion, and should only reverse that decision in exceptional circumstances State v. Collins, 409 S.C. 524, 763 S E.2d 22, 28 (2014), reh'g denied (Sept 24, 2014), *see also* State v Williams, 409 S.C. 455, 761 S.E.2d 770, 775 (Ct. App. 2014)("'If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.'") (*quoting* State v. Lyles, 379 S.C. 328, 665 S.E.2d 201, 207 [Ct. App. 2008]). In this case, the circuit court properly exercised its discretion in admitting the statement at issue.

**A. Confrontation Clause**

Prior to Mazyck's testimony regarding Coakley's statement inside the car, Appellant objected on the ground he could not cross-examine Coakley about it. Notably, as discussed below, Appellant did **not** argue the statement was unduly prejudicial to him because of the State's "hand of one is the hand of all" theory. (TT, p. 512; R., p. ____).

The circuit court determined it was a pre-arrest statement against interest made by Coakley in front of a non-law enforcement third party, and as such, it did not implicate Bruton.[1] The court further ruled Appellant could cross-examine Mazyck about what he heard Coakley say, and did not need to cross-examine Coakley. (TT, pp. 513-515; R., pp. _____). After Mazyck testified, the court also found the statement had "significant probative value." (TT, p. 628; R., pp ____).

As a threshold matter, the statement at issue was not a confession or admission regarding the armed robbery. While it could be construed as evidence Coakley feared he might go to jail for **some** reason, any inference to be drawn from the statement in relation to the armed robbery went to Coakley only, and was a matter for the jury As the circuit court found, Coakley's previous experience in jail could have been related to any number of issues, including a traffic violation or a family court matter. (TT, p. 627; R., pp. ____). Thus, the statement was no more than a vague reference indicating Coakley, **not** Appellant, had some prior interaction with the judicial system. It is undisputed law enforcement did not induce the very vague statement recounted by Mazyck, no one

[1]Bruton v. United States, 391 U.S. 123, 126 (1968) (admission of a non-testifying co-defendant's confession that implicates a defendant violates the defendant's Confrontation Clause rights).

associated with the State was present when Coakley made it, and Appellant was free to, and did, challenge Mazyck's credibility.

**B. Rule 403**

It is well established in South Carolina that an issue must be raised to and ruled on by the trial court to be preserved for appellate review. Roberts v. State, 408 S.C. 123, 757 S.E.2d 744, 748 (Ct. App. 2014) (*citing* State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 [2011)]. "Moreover, in order to preserve the issue for appeal, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector." Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731, 733 (1998). *See also* State v. Patterson, 324 S C. 5, 482 S.E.2d 760 (1997) (failure to state specific grounds for objection to solicitor's closing argument did not preserve any issue for appellate review); Jean H. Toal, Shahin Vafai & Robert Muckenfuss, Appellate Practice in South Carolina, 2nd ed. 73-74 (2002) (same). A party may not argue one ground at trial and another on appeal. State v. Brockmeyer, 406 S.C 324, 355, 751 S.E.2d 645, 661 (2013).

As noted above, the only ground Appellant raised at trial in relation to the statement was the Confrontation Clause, and he did not contend the statement was unduly prejudicial to him for any reason, much less the State's theory of the case. Therefore, this issue is not preserved for appellate review Even if preserved, however, Appellant's argument is meritless.

Probative evidence may be excluded **if** the prejudicial effect outweighs the probative value. Rule 403, SCRE "Unfair prejudice" does not mean the damage to a defendant's case resulting from the evidence's legitimate probative force of the evidence, but refers to evidence which tends to suggest decision on an improper basis State v.

McGee, 408 S.C. 278, 758 S.E.2d 730, 736 (Ct. App. 2014). Only "unfair prejudice" must be scrutinized under Rule 403. *Id*

Appellant contends admission of Coakley's statement prejudiced Appellant because it was impermissible character evidence as to Appellant, which likely led the jury to convict him only because he associated with Coakley, who had a criminal past. This contention is, at best, rank speculation.

Coakley's statement had **absolutely nothing** to do with Appellant, and in no way attacked, or even implicated, Appellant's character. It requires a quantum leap of logic and speculation to conclude a reasonable juror would infer bad character as to Appellant, and convict him simply because he was in a car with a person who had some previous interaction with the judicial system.

As outlined in Issue I above, the evidence established two male robbers left the cell phone store and went into a field behind it. A witness testified he saw two men come out of that field, throw down the cashbox, and apparently get into a car identified as one seen outside the store during the robbery. Very soon thereafter, Appellant was found in the backseat of that car, along with a gun and cash taken from the store, and his DNA was found on the gun, clothing and a plastic glove found in the car. It is far more likely the jury convicted Appellant based on that evidence, rather than Coakley's vague statement about "not going back to jail."[2]

Appellant's claim of prejudice from Coakley's statement is spun from whole cloth, with no basis in fact. There is nothing in the record from which this Court can

[2]The circuit court found Coakley's statement was highly probative of Coakley's state of mind and Smalls' involvement in the robbery, and Appellant does not challenge that finding on appeal.

conclude the jury made any inference as to Appellant from Coakley's statement regarding his own past experience. Therefore, the circuit court did not abuse its discretion, and its ruling on this issue should be affirmed.[3]

[3]Even if this Court finds error in admitting the statement, any error was harmless The materiality and prejudicial character of the alleged error must be determined from its relationship to the entire case, and an error is harmless when it could not have reasonably affect the jury's verdict. Thompson, 575 S.E.2d at 83. A conviction should not be reversed when review of the entire record establishes the error was harmless beyond a reasonable doubt. *Id* As discussed above, without considering the statement at all, there was substantial evidence from which the jury could find Appellant guilty of armed robbery.

**III. Appellant's case was properly called for trial with the co-defendant's cases, and Appellant never moved to sever his case.**

Appellant asserts the circuit court erred in trying the three co-defendants jointly because they were indicted individually, the State never moved to consolidate the cases for trial, and the State "changed" its theory of the case from individual liability to concerted liability. As a threshold matter, this issue is not preserved for review Further, it is clear from the record that Appellant was represented by competent counsel, who knew the State's theory of the case, and evidence the State intended to present, well before the cases were called for trial.

Prior to jury selection, the circuit court conducted a status conference with the State and counsel for all three defendants. After discussion regarding the order of closing arguments in a joint trial, including case law involving severance issues, the discussion moved to the number of alternate juror strikes available to the defendants. (TT, pp. 14-18; R , pp. _____).

Smalls' counsel objected to the defendants having to share the alternate strikes, and the circuit court noted there was no motion to sever filed. Smalls' counsel then made a verbal motion to sever based on the number of available strikes and the order of closing arguments. The court denied the motion, and made it clear if any other defendants wanted to join in a motion, it needed to be stated for the record. Neither Appellant or Coakley joined in Smalls' verbal motion to sever. (TT, pp. 18-23; R., pp. _____).

When the cases were formerly called for trial, the court listed all three defendants as parties, and identified each one for the jury panel. Appellant and his counsel were in the courtroom, and did not move to sever the cases at that time. (TT, pp. 30-32; R., pp. _____).

In the face of Smalls' verbal motion to sever, and the court's admonition that each defendant had to join in motions on the record, Appellant did not move to sever his case for trial even though he had ample opportunity to do so, and he clearly knew the defendants were being tried jointly before the cases were called for trial on December 3, 2013. Therefore, the issue of proper joinder is not preserved for appellate review.

Even if preserved, Appellant's contentions regarding prejudice from the joint trial are patently meritless. As discussed above in Issue I, Appellant misunderstands accomplice liability, which can arise even if co-defendants are not expressly named in an individual defendant's indictment. The record is clear Appellant and his counsel knew prior to trial the State alleged all the defendants were guilty as principles in the armed robbery under the hand of one is the hand of all doctrine, so the State's "theory" did not change between indictment and trial, and Appellant was not forced to change his defense strategy.

Appellant asserts joinder was improper because the State never moved to consolidate the cases for trial. As support for this assertion, he cites State v. Jones, 325 310, 479 S.E.2d 517 (Ct. App. 1996), for the proposition the State may consolidate indictments of separate defendants for trial "only pursuant to a timely motion." (Brief of Appellant, p. 28) A cursory review of the Jones opinion reveals, however, that it does not even "suggest" formal motions to consolidate are required, but simply states the State filed a motion to consolidate in that case. *Id* at 519.[4] Even if a motion to consolidate is

[4]Appellant does not cite, and the State cannot find, any South Carolina case holding motions to consolidate are required, or even that the circuit court must hold a hearing on the joint trial issue in the absence of any motion regarding the joint trial. Rather, the existing case law generally addresses joint trials in the context of a motion to sever by one or more of the defendants.

required, as a procedural and practical matter, the State essentially moves to consolidate the cases when it notices and calls them for trial at the same time, and the defendants are free to move for severance.

Appellant concedes there are no South Carolina cases on point, but cites "a line of cases" (consisting of two cases) from Florida holding consolidating the trial of separately indicted defendants on the eve of trial is "presumptively prejudicial." (Brief of Appellant, pp. 29-30). He fails to note, however, that Rule 3.151, Florida Rules of Criminal Procedure, which served as the basis for the Florida cases, expressly requires a "timely motion" to consolidate two or more indictments charging related offenses. *See* Brown v. State, 424 So.2d 950, 953-954 (Fla. Dist. Ct. App. 1983) (state's motion to consolidate filed two days before trial was untimely), Williams v. State, 600 So.2d 540, 541 (Fla. Dist. Ct. App. 1992) (state's motion to consolidate filed on the day of trial was untimely). There is no similar provision in the South Carolina Rules of Criminal Procedure.

Appellant also asserts he was actually prejudiced by the joint trial because of the Confrontation Clause issue associated with the testimony regarding Coakley's statement. As discussed in Issue II above, there simply was no Confrontation Clause issue arising from that testimony Further, Appellant concedes his counsel knew prior to the cases being called for trial that Mazyck was going to testify about Coakley's statement, but insists he had no reasonable opportunity to contest consolidation. (Brief of Appellant, p.

31). In light of his concession, and the clear opportunity he had to move for severance prior to jury selection, his claim of prejudice defies belief [5]

The consolidation issue was not preserved for appellate review, and in the absence of a motion to sever and a showing of prejudice, the circuit court did not abuse its discretion in allowing the joint trial to proceed. Therefore, Appellant's conviction should be affirmed.

[5]Appellant engages in a litany of various outcomes if a reasonable opportunity to contest consolidation had been available, which starkly demonstrates the pure speculation underlying many of Appellant's claims in this appeal

## CONCLUSION

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

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ATTORNEYS FOR RESPONDENT

March 23, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal From Charleston County
The Honorable R. Markley Dennis, Circuit Court Judge
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THE STATE,

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Appellant.

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**PROOF OF SERVICE**

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I, Sally B. Ellison, certify I served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing copies in the United States mail, postage prepaid, addressed to:

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

This 25th day of March, 2015.

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Re: The State v. Jarret Graddick
Appellate Case No 2013-002665

Counsel:

Enclosed are two copies (each) of the Initial Brief of Respondent and Designation of Matter, with proof of service, in the above-referenced case

Sincerely,

Deborah R.J. Shupe

Deborah R.J Shupe
Senior Assistant Deputy Attorney General

DRJS/sbe

Enclosures

cc: The Honorable Jenny A Kitchings (original and 2 copies enclosed)
Victim Services (with enclosure)