STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case No. 2014-000594

THE STATE,

Respondent,

vs.

DEVATEE TYMAR CLINTON,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant, Devatee Tymar Clinton (Clinton), is currently incarcerated in McCormick Correctional Institution, where he is serving a life sentence for murdering Jenika Jones on January 19, 2012, in her Lancaster County residence. The Lancaster County Grand Jury indicted him in in 2012 for murder (2012-GS-29-616). **R. pp. ___-__**. His co-defendant, Al Martinez Green[1] was also indicted for her murder (2012-GS-29-636). **R. pp. ____-__**. William P. Frick, Esquire, represented Clinton in the trial court, while Amy S. Raney, Esquire, represented Green. Sixth Circuit Solicitor Douglas Barfield prosecuted the case.

On March 10-14, 2012, Clinton and Green received a joint jury trial before the Honorable R. Knox McMahon. The jury convicted both men of murder and each juror affirmed the verdict when the jury was polled. **Tr. pp. 989-92**. Judge McMahon sentenced both defendants to life imprisonment. **Tr. 1011, lines 15-25**. Clinton timely served and filed a Notice of Appeal.[2] This appeal follows.

ARGUMENTS

I. Assuming that Clinton's argument is preserved for appellate review despite his failure to make an adequate proffer at trial to support introduction of the testimony, after obtaining a favorable *in limine* ruling on its admissibility, the trial judge did not abuse his discretion by sustaining the State's objection because there was no evidence that the victim's son witnessed the shooting of his mother and Clinton did not satisfy the other foundational requirements for introducing the out-of-court statement under Rule 803(2), SCRE.

Clinton first argues that the trial judge erred by refusing to permit him to elicit an out-of-court declaration by the victim's four year old son that someone other than Clinton or Green shot

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[1] Although the judge granted Green's pretrial motion to prevent his jury from learning his nickname, Green's nickname is "Capone," which is the same surname as one of the most notorious gangsters in American history. **Tr. p. 171, line 18 – p. 172, line 13.**

[2] Green has likewise appealed his conviction and sentence, and his appeal is pending. *See State v. Al Martinez Green*, Appellate Case No. 2014-000603.

his mother. Assuming *arguendo* that Clinton's argument is preserved for appellate review even though he did not make an adequate proffer at trial to support introduction of the testimony, after obtaining a favorable *in limine* ruling on its admissibility, the trial judge did not abuse his discretion by sustaining the State's objection because there was no evidence that the victim's son witnessed the shooting of his mother and Clinton did not satisfy the other foundational requirements for introducing the out-of-court statement under Rule 803(2), SCRE.

A. The State's pretrial motion and the trial judge's *in limine* ruling.

The State moved pretrial to bar either Clinton or Green from eliciting out-of-court declarations by the victim's four year old son to the first responders after the Sheriff's Department took custody of them, "until other arrangements could be made." **Tr. pp. 157-58.** Counsel for Clinton explained that after law enforcement arrived and were "still trying to assess what occurred," the victim's four year old son "spontaneously states to I think Investigator Crump first and then to another officer and I think maybe a third officer on the scene that Shi's daddy shot my momma." Later, the child says that "Shortycake shot my momma." **Tr. pp. 158-59.**

To further clarify the issue, counsel explained that the victim's son was named Antonio Lamont Truesdale, II, that the son's nickname is Deuce," and that his father was Antonio Lamont Truesdale. The nickname in the son's declaration, "Shortycake," was not the nickname of either Clinton or Green. Rather, it was the nickname of a Rashad Johnson, who is the father of "Shi." **Tr. pp. 159-60.**

The Solicitor stated that the State had verified that there was a child whose nickname was Shi, that Rashad Johnson was Shi's father, and that Rashad Johnson's nickname is "Shortycake." The Solicitor also acknowledged that "Deuce" had made a statement to Inv. Crump. **Tr. pp. 160-**

61.

After Clinton's attorney confirmed that his position was the statement was admissible as an excited utterance, under Rule 803(2), SCRE, the trial judge stated, "I realize [under Rule] 803 [the] availability of a witness is immaterial but you have to determine the competency of the individual that made the statement. In this regard I'm dealing with a four-year old." **Tr. p. 161.**

The Solicitor indicated that the child's competency was the basis for his objection. He argued that the declarant must be competent to testify for an excited utterance to be admissible, and that Clinton would have to make a showing of the child's competency as a witness before the statement could be introduced. In response to Clinton's point that the Sheriff's Office had investigated Johnson, the Solicitor noted that the competency as a witness was a different question than whether the statement would be investigated. **Tr. pp. 161-62.**

Counsel for Clinton then argued that the child was four years old at the time of the murder. Almost immediately after the shooting, Deuce

> goes to the next door neighbor's house and asks for help. They called 911. The police respond within 15 minutes." Because it was cold, Deuce and his siblings were "put in an ambulance. [Deuce] makes the comment Shi's daddy hurt my momma. Jamia's (phonetics) daddy hurt my momma. Jamia and Shi are the same person and daddy they are referring to is Rashad Johnson. He makes this statement ... to Investigator Crump. He makes it in the ambulance in front of some of first responders who are on the [S]olicitor's witness list, and Mr. Plyler and Mr. Hope and then he says it spontaneous to Christy Rogers who is a CSI officer that responds there on the scene.

Tr. pp. 162-63.

Counsel presented three cases to the trial judge in support of the admissibility of this declaration under Rule 803(2) did not depend upon the competency of the out-of court declarant and he asked the trial judge to consider these cases before ruling. Specifically, counsel relied upon *State v. Ladner*, 373 S.C. 103, 644 S.E.2d 684 (2007) (the incompetency of a declarant at

the time of trial does not preclude the admission of that declarant's excited utterance through a different, competent witness), *State v. Sims*, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002), and *In Interest of Smith*, 277 S.C. 187, 284 S.E.2d 586 (1981) (three year old victim's statements describing defendant's actions to mother immediately after the incident, while she was still crying and showing signs of pain, were admissible under *res gestae* exception to hearsay rule in case charging juvenile defendant with criminal sexual conduct in the first degree). **Tr. p. 163**.

The trial judge pointed out factual differences between those three cases and this case.[3] However, in response to argument by counsel for Green, the trial judge made clear that his real problem with the proffer was that there must be a "foundation of the personnel knowledge of the hearsay declarant and then meet the three requirements within the rules." *See* Rule 602, SCRE. He also observed that "[p]resence in the home doesn't mean observation of the fatal act. That's all I am saying. ... That goes back to the rule 600 or something." **Tr. pp. 163-67**.

When counsel for Green asked if he was referring to the rule governing competency of a witness, the trial judge emphatically said, "No, ma'am. I am referring to the rule of personnel knowledge and I just don't have the number right now." **Tr. p. 167**. He added, "I am not saying it is or isn't admissible. I am saying a foundation has got to be laid for its admissibility and ... you all are welcome to do it in whatever manner you all so choose." **Tr. p. 168**.

The trial judge addressed this issue again the following morning. He stated that:

> As to the hearsay exception, under that Ladner case it appears and my thoughts yesterday was the difference between a victim who makes the statement, a child victim versus a child witness. It is clear in the case that is cited in Ladner, Sims and I forget the other name -- that those two children that were witnesses were found competent and then would not continue to testify on behalf of the State. They were called by the State. *It is clear* Judge Waters said *there does not have to be a finding of competency of the child necessarily under that hearsay exception.*

[3] He specifically noted that in two of the three cases relied upon by Clinton, the children were competent to testify, and the child declarant in the third case was the victim. **Tr. pp. 163-66**.

Depending on how it develops, I think is admissible.

> Now, having said that that if it meets the standard of 803.2. As far as the startling event, under the influence of the startling event, no time for reflection, quite frankly I really struggled with no time for reflection having many times in my life been around four years old I don't know what reflection they really do. But at the same time I can't group four year olds and say absolutely they don't reflect. With that being said it does not mean that [Deuce] [cannot] be called as a witness. I'm not saying he should be. I am just saying it does not mean he [cannot] be, if either side chooses to do that and of course the jury could determine their observations of his competency. Of course it has been two years. [Sic)]. It's fuzzy in my memory, but there was a big difference in my children four to six years old. They are now regressing, but back then it was a big difference between four and six years as far as maturity level. As I say they are now regressing.

Tr. p. 177, line 10 – p. 178, line 15. (Emphasis added).

When the Solicitor indicated that his understanding of the trial judge's ruling was that the declaration could be admitted "if the competency issue is not there and if they can establish the elements of the excited utterance," the trial judge again stated that the defendants did not have to show the declarant's competency "for purposes of asking those questions, but they do have to lay the foundation under the excited utterance." The child's competency or incompetency, however, could be presented to the jury. **Tr. p. 178, line 16 – p. 179, line 13**.

B. Events during trial.

On Clinton's cross-examination of Inv. Taylor, he established that Inv. Taylor saw the children at the crime scene on the night of the 19th; that all three had blood on their clothing, including the oldest child; and that Inv. Taylor had seized their bloody clothing. **Tr. p. 499, line 25 – p. 501, line 24**.

Clinton then engaged in the following inquiry, which he contends preserves the present issue for appellate review:

> Q Did you ever have any conversation with any of these children?

A Yes.

Q Which one?

A Oldest child.

Q Okay. Where did you have this conversation?

A In the EMS truck.

Q Do you recall about when you had this conversation? How long you [had] been on the scene?

A I had probably been there about maybe 20 minutes, 30 minutes. So it was probably shortly before midnight, maybe.

Q Do you recall the demeanor of this child?

A He seemed -- he didn't really seem too upset to a great extent. Kind of being entertained by EMS folks. They were trying to keep him and his sister and I guess the younger brother occupied to keep [their] mind[s] off maybe their thoughts or whatever.

Q Okay. Did you take a statement from any of these children?

A No, I did not take a statement.

Q Was anything told to you?

MR. BARFIELD: Objection.

MR. FRICK: I didn't ask what.

THE COURT: I will sustain the objection. You may ask your next question.

MR. FRICK: Thank you, Your Honor.

Tr. p. 501, line 25 – p. 502, line 25.

On cross-examination by Green, Inv. Taylor testified that he had been in the ambulance with the children "[p]robably about ten minutes." **Tr. pp. 517-18**. Also, based upon the blood of the children's clothing, it appeared that they would have been physically close to the victim; and

the four year old was able to see the blood on his siblings' clothing while he was in the ambulance. However, he appeared to be "happy-go-lucky" during the time that Inv. Taylor was with him. **Tr. pp. 517-21.**

C. Assuming that Clinton's argument is preserved for appellate review, even though he did not make an adequate proffer at trial to support introduction of the testimony, after obtaining a favorable *in limine* ruling on its admissibility, the trial judge did not abuse his discretion by sustaining the State's objection because there was no evidence that the victim's son witnessed the shooting of his mother and Clinton did not satisfy the other foundational requirements for introducing the out-of-court statement under Rule 803(2), SCRE.

Initially, Respondent submits that the current issue is not preserved for appellate review. As the discussion in section **A** reflects, Clinton received a favorable *in limine* ruling and the trial judge repeatedly stated that testimony concerning the out-of-court declaration would be admissible if the defense established an adequate foundation for the introduction of the testimony by offering evidence that (1) the child had witnessed the shooting, see Rule 602, SCRE ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter"), and (2) the declaration met the other requirements for introduction into evidence as an excited utterance under Rule 803(2), SCRE. Because he did not make an adequate proffer in accordance with the favorable *in limine* ruling, there is nothing for this Court to decide on appeal. *See State v. Trotter*, 322 S.C. 537, 543, 473 S.E.2d 452, 455 (1996) ("Inasmuch as petitioner was granted the relief he sought, but failed to take advantage of it, there was actually no issue to be decided on appeal"); *State v. Sinclair*, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (where defendant received the relief requested from the trial court, there is no issue for the appellate court to decide); *State v. Brown*, 274 S.C. 48, 260 S.E.2d 719 (1979) (same). *See also State v. Simmons*, 360 S.C. 33, 46, 599 S.E.2d 448, 454 (2004) (the failure to make a proffer of excluded evidence will preclude review on appeal); *TNS*

Mills, Inc. v. S.C. Dep't of Rev., 331 S.C. 611, 628, 503 S.E.2d 471, 480 (1998) (a failure to make a proffer of what an excluded witness's testimony would have been precludes appellate review); *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990) ("An alleged erroneous exclusion of evidence is not a basis for establishing prejudice on appeal in absence of an adequate proffer of evidence in the court below") (citations omitted).

Yet, even assuming *arguendo* that this issue is preserved for appellate review, Clinton is not entitled to relief. "The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). "Hearsay is defined as 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' Rule 801(c), SCRE. Hearsay is inadmissible except as provided by the South Carolina Rules of Evidence, by other court rule, or by statute. Rule 802, SCRE." *State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011) "In order for [an appellate court] to reverse a case based on ... exclusion of evidence, error and prejudice must be shown." *State v. Bell*, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990).

Clinton does not dispute that the oldest child's declarations were hearsay but argues that these declarations were admissible "under the excited utterance exception to the rule against hearsay. **IBOA, p. 17** (citing Rule 803(2), SCRE). Respondent submits that the trial judge did not abuse his discretion by sustaining the State's objection. First, it is axiomatic that in order for the declaration that "Shi's daddy shot my momma" to have been admissible, the four year old declarant must have, in fact, witnessed the shooting. See Rule 602, SCRE ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not,

consist of the witness' own testimony"); *State v. Brockmeyer*, 406 S.C. 324, 339 n. 11, 751 S.E.2d 645, 653 n.11 (2013).

Clinton assumes that the four year old child saw the shooting of his mother and that this was the basis for his declaration. However, the trial judge correctly recognized that he had not made any such proffer and that he had only established that the child was in the house (with his siblings) when the victim was shot: "Presence in the home doesn't mean observation of the fatal act." **Tr. p. 167, lines 14-15**.

In the absence of a proffer tending to show that the child witnessed the shooting - as opposed to being awakened by the noise of the gunshot that night - the testimony concerning his declaration was inadmissible. Indeed, even assuming that the child was competent to testify and was called as a witness, he could not have testified that "Shi's daddy shot my momma," unless he had witnessed the shooting. *Id.*

Based upon the current record, it is not possible to determine why the child made the statement at issue. In other words, it cannot be determined whether (1) this was something that he thought that he saw, (2) he disliked Shi's father for some unstated reason, (3) he dreamed this, or (4) the suggestion that Rashad Johnson was responsible for the shooting was suggested to him by an adult whom he encountered when he went to his neighbor's residence to report the shooting. Moreover, the failure to affirmatively establish that the declarant witnessed the shooting distinguishes this case from *Ladner*, *Sims*, and *In Interest of Smith*, *supra*. *See*, *e.g.*, *Sims*, 348 S.C. at 21, 558 S.E.2d at 521 (finding that non-testifying child's statement to officer "relates to the startling event of the son seeing his mother after she was attacked and possibly while she was being attacked").

Nor did the declaration fall within the ambit of Rule 803(2), SCRE. An excited utterance

may be admitted whether or not the declarant is available as a witness. *See* Rule 803, SCRE (entitled "Hearsay Exceptions; Availability of Declarant Immaterial"). Also, when a statement is admissible under a Rule 803 exception, it may be used substantively, *i.e.*, to prove the truth of the matter asserted. *See State v. Dennis*, 337 S.C. 275, 283–84, 523 S.E.2d 173, 177 (1999).

The Supreme Court explained in *Ladner* that:

> there are three elements that must be met to find a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. *State v. Sims*, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002). The excited utterance exception is based on the rationale that "the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." *State v. Dennis*, 337 S.C. at 284, 523 S.E.2d at 177. A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception, and that determination is left to the sound discretion of the trial court. *Sims*, *supra*.

Ladner, 373 S.C. at 116, 644 S.E.2d at 691.

"Other factors useful in determining whether a statement qualifies as an excited utterance include the declarant's demeanor, the declarant's age, and the severity of the startling event." *Sims*, 348 S.C. at 22, 558 S.E.2d at 521. Whether a statement is admissible as an excited utterance depends on the circumstances of each case and the determination is generally left to the sound discretion of the trial court. *See State v. Harrison*, 298 S.C. 333, 380 S.E.2d 818 (1989).

In the present case, Clinton cannot meet his burden on these criteria. As to the first requirement, Respondent does not dispute that the child's statements "relate to a startling event or condition." Rather, Respondent asserts that there was a failure to establish that the child witnessed startling event or condition. More importantly, Clinton did not establish that the statement must have been made while the four year old child was under the stress of excitement.

Clinton maintains that this requirement was met because the statements were made at the

scene and less than two hours after the event. He further asserts that "too much analysis of the child's demeanor here is fraught with uncertainty." **IBOA, p. 23.**

However, as the party offering the declaration, it was his burden to establish that it was admissible under Rule 803(2). The only evidence in the record is that, at the time the child made these declarations, "he didn't really seem too upset to a great extent" (**Tr. p. 502, lines 11-13**) and he was "happy-go-lucky." **Tr. p. 520, lines 19-22; p. 521, lines 20-24**. In contrast, the victim's five year old son in *Sims* was "found upset and crying outside the apartment of his mother." *Sims*, 348 S.C. at 18, 558 S.E.2d at 520. The three year old victim in *In Interest of Smith*, described the defendant's actions to her mother immediately after the sexual assault, while she was still crying, disheveled and showing signs of pain. *See* 277 S.C. at 188, 284 S.E.2d at 587. In *Ladner*, the hearsay statement "was made by a two-and-a-half year old girl to her caretakers immediately after they discovered blood coming from her vaginal area." *Ladner*, 373 S.C. at 113, 644 S.E.2d at 689.

While the statements in each of those cases appear to have been made while the declarants were under the stress of excitement, and the stress of excitement was caused by the startling event or condition, the same cannot be said here. There was simply no evidence that the four year old declarant was crying, despondent or even upset by the time he made the declarations at issue. Thus, the rationale underpinning the excited utterance exception was absent. *Contra Dennis*, 337 S.C. at 284, 523 S.E.2d at 177.

Clinton did not argue a Rule 403, SCRE, analysis in the trial court. Thus, his argument on pages 24-25 of his brief is not properly before this Court on appeal. *See State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one theory at trial and a different theory on appeal). *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for

an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal").

Moreover, the proffered testimony does not survive a Rule 403, SCRE analysis, even assuming its admissibility under Rule 803(2). Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "Unfair prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one." *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct.App. 2003). Here, the child's statement had very little probative value. While it was evidence that Rashad Johnson -someone other than Clinton and Green - was responsible for murdering Jenika Jones, it was made by a four year old child who may not have been competent to testify and, more importantly, who may not have even witnessed the shooting.

Also, the proffer was that the child went to his next door neighbor's residence to get help. Because evidence presented at trial was that the victim lived in a mobile home adjacent to the one Clinton shared with his grandmother (**Tr. pp. 740; 751; 793**), it is possible that the neighbor from whom the child sought assistance or another person whom the child encountered suggested that Rashad Johnson shot the victim. Further, there was absolutely no other evidence presented tying Johnson to the shooting. *Contra Holmes v. South Carolina*, 547 U.S. 319, 330-31, 126 S.Ct. 1727 (2006).

On the other hand, the prejudicial effect of introducing the statement would have been tremendous. It would have diverted the jury's attention from the issues that were properly before it and caused jurors to speculate about whether the victim's son actually witnessed the shooting when there was no evidence that he had witnessed it. Likewise, introduction of the declaration would divert jurors to the question of third party guilt. In turn, the State would have been

required to present Deuce to testify as to what he actually witnessed and, worse, the State would have had to present evidence negating the question of third party guilt even though the statement by the child was the only evidence connecting Johnson to the murder of Jenika Jones was this unsubstantiated statement and the only evidence uncovered by the State's investigation was that the victim was murdered by Clinton, while Green and McDow, his friends and co-defendants acted as accomplices. *Contra Holmes*, *supra*; *see also State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941).[4]

Nor did Clinton argue in the trial court that the child's declarations were admissible under the present sense impression exception to the hearsay rule. *See* Rule 803(1), SCRE. As a result, his argument based upon that Rule is not properly before this Court. *See Bailey*, 298 S.C. at 5-6, 377 S.E.2d at 584; *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94. *See also State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991) (issues not raised to and ruled on by the trial judge are not preserved for appeal); *State v. Newton*, 274 S.C. 287, 262 S.E.2d 906 (1980) (questions neither presented to nor passed upon by the trial judge are waived and should not be considered by the appellate court for the first time on appeal).

Finally, Respondent submits that any error in excluding the proposed line of inquiry was harmless beyond a reasonable doubt. "Error is harmless beyond a reasonable doubt where it did

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[4] In *Gregory*, the Court explained that:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.... But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

198 S.C. at 104-05, 16 S.E.2d at 534-35 (internal citations omitted).

not contribute to the verdict obtained." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (citing *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)). "When guilt is conclusively proven by competent evidence such that no other rational conclusion can be reached, [the appellate court] will not set aside a conviction because of insubstantial errors not affecting the result." *State v. Kelley*, 319 S.C. 173, 179, 460 S.E.2d 368, 371 (1995); *State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006); *State v. Livingston*, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984).

Here, the evidence was harmless because it could not have affected the result of the trial. The prosecution's evidence is discussed at length in **Argument, II**. Although the case was largely based upon circumstantial evidence, Respondent submits that the State presented overwhelming evidence of Clinton's guilt, including his admission to his cousin, Wayne Blakeney, that "I shot that bitch." **Tr. p. 749, lines 16-17**. Because any error was harmless, this issue lacks merit.

II. The trial judge properly denied Appellant Clinton's motion for a directed verdict on the charge of murdering Jenika Jones because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt, either individually or under a theory of accomplice liability.

Clinton also contends that the trial judge erred by denying his motion for a directed verdict. Respondent submits that the trial judge properly denied Clinton's motion because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove that he was guilty of murdering Jenika Jones, either individually or under a theory of accomplice liability.

A. The prosecution's evidence.

The direct and circumstantial evidence presented at trial, viewed in the light most

favorable to the State, is that, in January 2012, Jenika Jones (the murder victim) lived in a Lancaster County trailer park with her three minor children, ages four, two and one. **Tr. pp. 216; 218-19; 221-26; 264-65**. Unfortunately for Jenika, Devatee "Tate" Clinton's grandmother was her next door neighbor and Clinton was living there at the time. **Tr. pp. 740; 751; 793.**[5]

On the night of January 19, 2012, officers with the Lancaster County Sheriff's Office, responding to a dispatch for a home invasion at Jenika's residence, found her dead from a single gunshot wound to the head. Her minor children were also still in the house. The only information that authorities had at that time was that three unnamed black males were seen running from the trailer. **Tr. pp. 215-27; 233; 235-40.**[6]

Latoya Green testified that she is Al Martinez Green's sister. Also, she had been both friends with and a cousin of Jenika Jones. Jenika and her children had shared an apartment with Latoya and Green at one time. When Jenika moved out, she moved into an apartment with the man she was dating, "Nard" Roseboro. Jenika had only lived in the trailer park for several weeks before her death. Ms. Green testified that her brother and Clinton were friends. **Tr. pp. 261-67.**

Dominique Davis was living in a Lancaster apartment complex in January 2012. On the morning of January 18, 2012, Ms. Davis and her daughter went to the apartment of her friend and neighbor, Y'eisha Tinsley, in the same complex. Ms. Tinsley was Green's girlfriend at the time and Green was at her apartment that morning. Clinton and Ms. Tinsley's brother, Madrey

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[5] Jenika's back door opened to the same area as the front door on the trailer owned by Clinton's grandmother. **Tr. p. 793, lines 5-15.**

[6] Although EMS responded to the residence, the victim was already dead from her wound and, after examining the body, the Lancaster County Coroner requested an autopsy of Jenika's body. **Tr. pp. 255-60.** Dr. Janice Ross, the forensic pathologist who performed the autopsy, opined that the cause of death was "[a] laceration of the brain due to the gunshot wound to the head." This wound "was right in front of the left ear on the left cheek." The bullet then travelled "backward[,]slightly upward and slightly toward the right, slightly toward the middle of the skull and it was found inside the skull just in the back just toward the right midline." Dr. Ross removed this bullet (State's Exhibit 34) and explained that the wound caused by it was the only injury found at autopsy. **Tr. p. 357-64.**

Tinsley, were also there. **Tr. pp. 268-71.**

While Ms. Davis and Ms. Tinsley were talking, Ms. Davis overheard Clinton and Green discuss doing a "lick," or robbing someone. She also heard Clinton say that "he had Taz's gun and he wasn't going to give it back to him." Further, Ms. Davis heard Green ask whether "she" drove "a black car." However, the men never mentioned an intended victim by name or location and Ms. Davis did not know whom the friends planned to rob. **Tr. pp. 271-79.**

Jamal Twitty lived in the same apartment complex as Ms. Davis and Ms. Tinsley in January 2012. Also, he knew both women, Clinton and Green. He did not know the victim. Mr. Twitty saw Green at Ms. Tinsley's apartment on the morning of January 18, 2012. Mr. Twitty did not see Clinton there that morning, but he did not stay at the apartment very long. **Tr. pp. 281-84.**

Sometime between 10:00 and 11:00 p.m. on the 18th, Mr. Twitty had a conversation with Clinton while the men were standing in the area outside Ms. Tinsley's apartment.[7] Teeshan Harris and Maleek Moore were also present. Clinton asked Twitty if Twitty wanted "to go on a lick with him." Mr. Twitty explained that a "lick" was slang for robbery. Mr. Twitty told Clinton, "yeah, whatever." **Tr. pp. 284-86; pp. 287-88; 291-92.**

In response to Mr. Twitty's question of where it would take place, Clinton said, "Not far." Twitty changed his mind about participating in the robbery and talked Clinton out of doing it on the 18th when Clinton asked if Twitty could get a car because Twitty did not have a car and his girlfriend had told him that her car was parked for the night. **Tr. pp. 286-88; 292-93.**

Green walked up a few minutes after that conversation, and Clinton asked Green whether Green "want[ed] to go on a lick." Green replied, "yeah, whatever," indicating that "he was down

[7] The location where the conversation occurred was between Tinsley's apartment and Dominique Davis' apartment. **Tr. p. 284.**

for it. ...[H]e was like, yeah, he's ready." After these conversations, the men went their separate ways. While Twitty did not see Clinton with a gun that night, he had previously seen Clinton with one. Twitty was not with either Clinton or Green on January 19th. **Tr. pp. 286-89; 292-94.**

Lt. Christy Rogers, of the Lancaster County Sheriff's Office, testified that she supervises the Office's crime scene investigators. In the early morning hours of January 19th, Lt. Rogers, Inv. Ken Taylor and Inv. Jeff Steel processed the victim's residence pursuant to a search warrant. There were no signs of forced entry on the front door and the back door was locked. In the den and kitchen area, they found the victim with the gunshot wound to her head. They also found a .380 cartridge casing (State's Exhibit 41) behind the couch on which they found the victim and between the couch and the wall. Further, a picture had been knocked off of a wall near the front door and onto the floor. **Tr. pp. 402-10; 413-15; 424-25; 434-35; 439; 452-54; 456-65.**

There was a great deal of blood covering the victim's face, head, upper arms and on the couch under her body. (*See* State's Exhibit 11). Blood also pooled on the floor in that area. There were bloody footprints that had apparently made by Jenika's children and the only blood elsewhere in the residence had apparently been transferred by the children. There did not appear to be any bloody footprints made by adults. **Tr. pp. 409; 416-18; 422-25; 456-61; 498-501; 503; 517-19.**

The only other area of the residence that had been disturbed was the master bedroom, and it had been "ransacked." No fingerprints of evidentiary value were recovered from the residence, there was no sign of forced entry and the front door was open when the officers arrived. Nevertheless, Inv. Taylor took swabs from underneath the exterior and interior door handles to the screen door (State's Exhibit 42) and the main door (State's Exhibit 43), to see if touch DNA could be developed. **Tr. pp. 409-12; 430-31; 456-61; 466-74.**

Shakela Montgomery and her cousin, Tameca Nelson, testified that they dined at Applebee's on the night of January 19th. They returned to the trailer park where the crime occurred between 9:30 and 10:30 p.m. because they were planning to stay there that night with Shakela's brother. As soon as they turned onto the road going into the trailer park, they were almost run off of the road by a white car coming out of the trailer park without its lights on and traveling fast. Neither woman saw EMS, law enforcement or a crowd present at the time, and neither learned that a murder had occurred until the next day. **Tr. pp. 242-52; 295-301**.

Shakela could not tell anything about the other vehicle's occupants. However, she described the car as a late model vehicle, and indicated that it was "an Oldsmobile, Buick, [or] Cadillac style." **Tr. pp. 247; 250; 252**. Tameca likewise could not tell anything about the other car's occupants, but she testified that the car "was a white Cadillac with a rag top." **Tr. pp. 297-98**. She saw the same car parked at a nearby Piggy Wiggly the next day. It had a flat tire at that time. **Tr. pp. 298-301**.

As it turns out, the white car that they described was owned by fifty year old Pomp Blackmon. Mr. Blackmon testified that he had lived in the city of Lancaster, South Carolina for all of his life. On January 19th 2012, he owned an "[e]ggshell white" 1991 Cadillac Seville "rag top." *See* State's Exhibits 16-18 (photographs of vehicle). While his car was not a convertible, it looked like one. Mr. Blackmon would give a ride to others on occasion, but it was unusual for anyone to ask that he loan it to them. **Tr. pp. 380-81; 383-84**.

"A little after seven" on the night of January 19th, a black male, who was approximately 5' 8" tall and wearing a "bluish black" jumpsuit came to Mr. Blackmon's house and asked Mr. Blackmon to give him a ride to the store or let him use the Cadillac. Mr. Blackmon would not drive the car because he had been drinking beer and he would not let the man borrow the car

because he knew that the man did not have a driver's license. This man said that his cousin had a license. The man momentarily left and returned with his cousin. When Mr. Blackmon saw that the cousin had a license, he let the men borrow his vehicle. After the car pulled out of Mr. Blackmon's driveway and sopped at a stop sign, two more men wearing hoodies got into the car. **Tr. pp. 382-86**.

Mr. Blackmon had expected that his Cadillac would be returned within ninety minutes and that he would receive beer and cigarettes in exchange for letting the men use his car. However, neither of these occurred. He reported his car missing to the City of Lancaster Police Department the next morning and set out, on foot, to find his car. He found it in the parking lot of Piggly Wiggly located roughly a mile from the crime scene around 5:00 p.m. on January 20th. It had a flat tire on the front, driver's side, and it was almost out of gas. Mr. Blackmon called police and let them know that he had found the car; however, he did not take it home until Saturday, January 21st. **Tr. pp. 386-91; 397-98; 455**.

When Mr. Blackmon got his car on Saturday, the key to the car was missing, the car had red mud on it, a piece of molding was missing, and a blue jumpsuit (State's Exhibit 37) and an ID card had been stuffed on the floorboard behind the passenger seat. Mr. Blackmon testified that the car was not muddy and the molding had not been missing when he loaned it on the 18th; that the ID card had not been in the car when he loaned it; and that the jumpsuit was not his. So, he called law enforcement to report what he had found, and he was later interviewed by Inv. Fred Thompson. **Tr. pp. 391-401**.

Frederick Thompson testified that he was employed as an investigator in the Lancaster County Sheriff's Office in January 2012. As part of his duties in this case, he spoke to Mr. Blackmon on January 23rd, 2012. Inv. Thompson seized the blue jumpsuit (State's Exhibit 37)

and the ID card from the trunk of the Cadillac. Upon learning that a piece of the car's molding was missing, Inv. Thompson went to the road leading into the trailer park, to see if he could locate the missing piece of molding. He found some molding in the area of that road and subsequently verified that it was the missing piece by comparing it to the space on the car that did not have molding. **Tr. pp. 534-40; 546-47**.

Additionally, Lt Rogers, Inv. Taylor and Inv. Steel processed Mr. Blackmon's Cadillac. Inv. Taylor first processed the car on January 23rd, 2012, at Mr. Blackmon's residence. No identifiable latent prints were found, either inside or outside of the vehicle. All three officers processed it on March 7th, 2012, at a building owned by the Sheriff's Office. The officers re-searched it in the hopes of finding evidence of blood in it. They used a "blue star chemical" that reacts positively to the presumptive presence of blood to help locate possible areas of human blood. Because the chemical reacted positively in several areas of the car, the officers took three swabs of reddish brown stains from the rear seat (State's Exhibit 46); cuttings from the front driver's seat (State's Exhibit 47) and front passenger's seat (State's Exhibit 48); and cuttings from the front passenger's seat belt (State's Exhibit 49). **Tr. pp. 440-42; 476-84**.

Vivian Stradford testified that she has lived in Lancaster for thirty years and that she had known Jenika Jones for three or four years. Also, she knows Clinton and she "knows of" Green. Someone called Ms. Stradford and informed her of Jenika's death around 10:30 p.m. on January 18th. After going to her aunt's house to discuss what she had heard with her aunt and cousin, Ms. Stradford drove to the Crenco convenience store, which is located on Main St. in Lancaster. A nightclub known as the Hole in the Wall was across the street from Crenco in January 2012. **Tr. pp. 625-29**.

Ms. Stradford saw Clinton walk up to Crenco before she went inside. He was wearing the

blue jumpsuit later found in the Cadillac (State's Exhibit 37), and he was coming from the Hole in the Wall. Clinton asked her for a cigarette and Ms. Stradford said that she did not have any but was going into the store to get some. When she told Clinton that "Somebody just killed my home girl," Clinton was uninterested in talking about the topic. Ms. Stradford went inside and purchased cigarettes. After she gave two to Clinton, he walked out of the store. By the time that she reached her vehicle, he was gone. **Tr. pp. 628-34**.

Y'eisha Tinsley testified that she was Green's girlfriend and that she was pregnant with his child in January 2012. Ms. Tinsley also knows Clinton. She corroborated that Green, Clinton, Dominique Davis, and Jamal Twitty were all at her apartment during the day on January 18th. **Tr. pp. 618-22**.

Ms. Tinsley and Latoya Green learned about Jenika's death on the 19th. Ms. Tinsley and Green thereafter talked about where he had been on the night of the 18th. He told her that he had been at the Hole in the Wall and that he met up with Clinton there. **Tr. pp. 622-24**.

Wayne Anthony Blakeney, Jr., testified that he was arrested on March 8, 2012, and charged with murder in this case. He was facing between thirty years and life on that charge and the State had not made any promises in exchange for his testimony.[8] Clinton is his cousin and friend, and they hung out together sometimes. Blakeney also knows Green and he knew Delico McDow by nickname. He was not close to Green or McDow, the latter of whom he had met through Clinton. **Tr. pp. 725-29; 732-34**.

Clinton did not have a driver's license at the time and Blakeney drove Clinton places "a few times." Each time, Clinton provided the car. Mr. Blakeney testified that he was with Clinton

[8] Following his testimony in this trial, Blakeney' s murder charged was reduced to accessory after the fact to a felony, under the Youthful Offender Act. He received a sentence of six years, suspended on time served and probation for 18 months. The disposition date for his case was not until April 17, 2014. *See* http://publicindex.sccourts.org/lancaster/publicindex/ (Under search "Blakeney Jr, Wayne Anthony").

Green and McDow on the night of January 19th, 2012. They met up in the Newton area. They later went to a residence, where they borrowed the white Cadillac shown in State's Exhibit 16. After Clinton spoke to the Cadillac's owner, the men got the car and Blakeney drove them to the Hole in the Wall. **Tr. pp. 731-32; 734-38.**

Blakeney drank beer while there, but he did not think that Clinton drank anything while there. He did not pay close attention to Green or McDow and he did not know whether or not they drank anything. The men left the Hole in the Wall when Clinton said that he needed for Blakeney "to drive him to get some money." Clinton did not indicate who owed him the money or where they were going in order to get it. However, he promised to give Blakeney some money for taking him to get it. **Tr. pp. 738-39.**

So, the four men got into the white Cadillac, with Blakeney driving and Clinton in the passenger seat. Following Clinton's directions, Blakeney drove to the trailer park where Jenika was murdered. As they rode to the trailer park, Blakeney saw that Clinton had a gun at his side. When they reached the trailer park, Blakeney parked the Cadillac in a location selected by Clinton. **Tr. pp. 739-42; 744-45; 761-62.**

Blakeney stayed in the car, but Clinton, Green and McDow got out of it. The three men then went behind a trailer and disappeared. They came running back to the Cadillac about ten minutes later. Although Clinton told Blakeney to "just chill," Green and McDow told him to "go." So, Blakeney drove "pretty quick[ly]" out of the trailer park and back to the Hole in the Wall. The four men hung out at the nightclub for thirty or forty minutes before leaving. **Tr. pp. 743-47; 762-63; 774-75.**

When they left this time, two men whom Blakeney did not know also got into the car with them. Mr. Blakeney dropped off Green, McDow and the two strangers in the Newton area.

He then took Clinton home. Following Clinton's directions, Blakeney drove Clinton back to the trailer park where they had been earlier and to the mobile home of Clinton's grandmother, where Clinton was staying. **Tr. pp. 740; 747-49; 755; 764.**

Along the way there, Clinton told Blakeney, "I shot that bitch."[9] By the time Clinton got out, it was well into the morning of January 19th. Clinton told Blakeney that he had left his gun in the glove compartment and he asked Blakeney to "hold it for him." **Tr. pp. 749-50; 755.**

Blakeney left the trailer park but soon realized that the car was low on gas. Also, it had a flat tire. So, Blakeney parked it in the parking lot of the Piggly Wiggly. He left the car unlocked with the key in it, and he walked home . He took Clinton's handgun with him. **Tr. pp. 750-52.**

Blakeney sold the gun to his cousin, Marcus Barnes several weeks later. His arrest was prompted by a friend telling law enforcement that Blakeney had admitted involvement in the crime. After his March 2012 arrest, Blakeney gave a statement to the Sheriff's Office. While he was not completely truthful at first, he soon was completely honest about what had occurred. Also, both he and Inv. Thompson unsuccessfully tried to get the weapon from Barnes. However, Barnes would not cooperate. **Tr. pp. 752-57; 759; 793-94.**

Also, following Clinton's arrest, Inv. Thompson also had three conversations with him concerning his whereabouts on the night of January 19th. The first conversation occurred on January 27th 2012 and was initiated by Clinton, who was in his jail cell. Clinton told Inv. Thompson that he had gone to "the Hole in the Wall nightclub on Market Street" and that his cousin, Tony Cunningham, had taken him there. **Tr. pp. 795-97.**

On February 23rd, 2012, Inv. Thompson interviewed Clinton in a break room at the

[9] Blakeney did not believe Clinton at first because he did not know to what Clinton was referring. Blakeney started to believe that Clinton had been serious when he found out about Jenika's death a couple of days later.

Sheriff's Office. Clinton's trial attorney, William P. Frick, Esquire, was also present, as was Capt. Craig Bailey. Before they discussed the case, Inv. Thompson advised Clinton of and secured a written waiver of his *Miranda* rights,[10] with the exception of his right to counsel in light of counsel's presence. (State's Exhibit 61). The purpose of this lengthy interview was another attempt to establish where Clinton had been on the night of January 19th. **Tr. pp. 797-807; 819-20.**

Clinton claimed that he had been "[a]t the Self Controlled Brothers or at the Hole in the Wall." He also claimed that he had worn "a camouflage jumpsuit." Clinton brought up the topic of a blue jumpsuit. He admitted that he owned one but claimed that he would occasionally loan it to others. One person that he supposedly loaned it to was his roommate at the trailer park, Reggie Stover. Another was a person named "Wayne," but he did not give a last name for Wayne. **Tr. pp. 808-09; 820-21.**

Even though Jenika Jones lived in a mobile home immediately adjacent to the one in which Clinton was staying, he claimed that "[h]e didn't know that she lived in the mobile home right beside his." When asked about Pomp Blackmon and a white "rag top" Cadillac, Clinton initially claimed that he did not know Mr. Blackmon and that he had not seen such a car. However, he later admitted knowing Mr. Blackmon. He likewise admitted having seen Mr. Blackmon in various places and knowing both that Mr. Blackmon lived in the Newton area and that Mr. Blackmon owned a white "rag top" Cadillac. **Tr. pp. 809-11.**

Clinton denied that he had ever been in the white Cadillac. When asked whether it would be possible for his DNA to be in the Cadillac, he said that he had leaned into it once while talking to a girl. This occurred at the Hole in the Wall on January 19th, 2012. He explained that

[10] *See Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966).

his DNA would be on the blue jumpsuit because he had touched it when he moved it in his residence and when he loaned it to people. **Tr. pp. 811-12.**

Inv. Thompson's third conversation with Clinton occurred on March 9, 2012. He first met with Clinton in the detention center and did not advise him of his *Miranda* rights at that time. Later that same day, however, Clinton initiated another conversation with Inv. Thompson and he was interviewed at the Sheriff's Office. Inv. Thompson advised Clinton of his *Miranda* rights and secured a written waiver of those rights before speaking to him. (*See* State's Exhibit 62). Inv. Thompson was especially careful to emphasize Clinton's waiver of his right to counsel because Mr. Frick represented him, but Clinton wanted to speak to Inv. Thompson without Mr. Frick present. **Tr. pp. 812-16; 822-23.**

The resulting interview lasted "probably less than an hour." This time, Clinton admitted that he had seen Wayne Blakeney at the Hole in the Wall on January 19th. He also said that Blakeney was in the white Cadillac. **Tr. pp. 816-17.**

Capt. Michael Greene, of SLED, was likewise involved in the investigation of Jenika Jones' murder, and he interviewed Green on January 25th, 2012 at the Lancaster County Sheriff's Office. Green had already been arrested for murder. Before they spoke, Capt. Greene used a Lancaster County Sheriff's Office advice of rights form (State's Exhibit 63) to advise Green of his *Miranda* rights, and Green made a signed, written waiver of his rights. Capt. Bailey, of the Lancaster County Sheriff's Office was also present. Green was not restrained and was in street clothes. **Tr. pp. 827-33.**

In the interview, Green claimed the witness that he had been at the Hole in the Wall, starting around 11:30 p.m. on the night of January 19th. **Tr. p. 834.**

At various points during the investigation, investigators collected a known blood sample

of the victim taken at autopsy (State's Exhibit 35), as well as buccal swabs from Clinton (State's Exhibit 38), Pomp Blackmon (State's Exhibit 50), Wayne Anthony Blakeney, Jr. (State's Exhibit 51), Delico Lamar McDow (State's Exhibit 52), and Green (State's Exhibit 53). This evidence was subsequently used for DNA testing by SLED. **Tr. pp. 363-64; 418-21; 438-39; 484-88; 530-32.**

A SLED DNA analyst took fourteen cuttings from the blue jumpsuit. SLED items 6.1 through 6.5 were introduced as State's Exhibit 56, and SLED items 6.6 through 6.14 were introduced as State's Exhibit 57. A presumptive test for the presence of blood was positive for each of these cuttings. **Tr. pp. 570-73.**

Maryann Boehm, another SLED DNA analyst, testified that she had received the victims known blood standard, as well as the buccal swabs from Clinton, Mr. Blackmon, Wayne Blakeney, Jr., McDow and Green. She was able to develop DNA profiles for each of these individuals. She also received a number of items of evidence and tested those items against the known standards. Specifically, she received the .380 shell casing; the swabs from the underside of the exterior storm door handle; swabs from the exterior doorknob on the main door; twelve cuttings from the blue jumpsuit; a swab from the jumpsuit and debris from the jumpsuit; cuttings from a portion of the passenger side seat belt; a cutting from a stained fabric from the front passenger seat; a cutting from stained fabric from the front driver's seat; and swabs of reddish brown stains from the rear seat, which she sub-categorized as swabs of reddish brown stains from the rear seat, seat section, and swabs of reddish brown stains from the rear seat back rest. **Tr. pp. 585-87; 591-94; 596-97.**

The DNA profile developed from the .380 shell casing found at the murder scene (State's

Exhibit 41) matched the victim.[11] **Tr. pp. 594-95**. Agent Boehm did not get a match on the swabs from the storm door and the doorknob (State's Exhibits 42-43). Although Clinton, Green and Blakeney could be eliminated from the DNA found in the swab of the screen door handle (State's Exhibit 42), the co-defendant McDow could not be eliminated. With respect to the swab of the door handle (State's Exhibit 43), "no conclusive statement could be made regarding inclusion or exclusion of Jenika Jones or Devatee Clinton as contributor to the mixture." **Tr. pp. 597-99**.

Agent Boehm did not find human blood on any of the cuttings from the jumpsuit, State's Exhibits 56-57. She also tested for the presence of touch DNA. The DNA profile developed on item 6.1 was a mixture of at least three people. The victim, Mr. Blackmon and the four defendants – Clinton, Green, McDow and Blakeney – were excluded as possible contributors to this mixture. Also, the DNA profile developed on item 6.2 was from an unidentified male. However, the DNA profile developed on item 6.3 was a mixture of at least two individuals and "Clinton could not be excluded as a possible contributor to this mixture. The probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in 580." Also, Agent Boehm opined that "[n]o conclusive statement can be made regarding the inclusion or exclusion of Jenika Jones as possible contributor to this mixture."[12] **Tr. pp. 599-603; 610**.

As to the DNA profile developed SLED item 6.4, a swab from the blue jumpsuit, Agent Boehm found a "mixture of at least four individuals." Again, Clinton could not be excluded as a

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[11] Agent Boehm opined that "[t]he probability of randomly selecting an unrelated individual having a DNA profile matching this item is approximately one and 8.9 quadrillion." **Tr. p. 595**.

[12] She later explained that this means that "[t]here is not enough information to either include them or exclude them from that mixture." **Tr. p. 615**. Also, she was able to exclude all other individuals that she had compared as contributors. **Tr. p. 603**.

possible contributor to the mixture. "The probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in 12." Also, she could not make a conclusive determination as to whether the victim, Green or McDow were contributors to the mixture found. Agent Boehm performed more specific testing for the presence of human blood on one of the cuttings from the Cadillac's passenger side seatbelt and the other cuttings and swabs taken from the Cadillac, but she did not find human blood. **Tr. pp. 603-07**.

SLED Agent Suzann Cromer, a firearms and tool mark examiner employed in SLED's forensic services laboratory, was qualified as an expert in firearms identification, without objection. **Tr. pp. 705-07**. Agent Cromer examined the fired bullet recovered from the victim's head at autopsy (State's Exhibit 34) and the .380 cartridge casing found at the scene. (State's Exhibit 41). Unfortunately, she did not have a firearm with which to compare these items because both items had markings on them that would have potentially allowed her to identify the items to a particular weapon. The .380 caliber casing was marked "CBC or Magtech ammunition." Agent Cromer opined that the bullet had "nine [lands] and grooves and it was going to go spin to the left coming ... out of the barrel of the gun. At this time there is only one known manufacturer that uses nine left rifling and that is High Point firearms." She also explained that a .380 caliber bullet could be fired by a 9 mm. firearm because it is the same size as a 9 mm. Luger bullet. **Tr. pp. 708-16**.

B. Clinton's directed verdict motion and the trial judge's denial of it.

Clinton moved for a directed verdict at the close of the State's case. He argued that even when the evidence was viewed "in the light most favorable to the State I do not believe there is enough evidence for the jury to consider it." He further contended that, although the prosecution had presented "a lot" of evidence, it was a circumstantial evidence case and the State had failed

to prove substantial circumstantial evidence. As a result, he was entitled to a directed verdict. **Tr. p. 846, lines 4-16.**

Green likewise moved for a directed verdict. **Tr. p. 846, line 19 – p. 850, line 11**. The State responded and opposed both motions, arguing that the evidence was sufficient to go to the jury. **Tr. p. 850, line 14 – p. 852, line 17**.

The trial judge denied both motions as follows:

> Well, as I review the evidence and the standard that I must apply at this stage it appears there have been 22 witnesses presented, or actually 21. One of those [witnesses testified] twice. That being Mr. Thompson.
>
> If you start with the analysis of the testimony of Dominique Davis hearing the conversation on 1-18-12 that Green and Clinton were talking about doing a lick. That Clinton said he still had Taz's gun and was not going to give it back. That was on the a.m. of the 18th. And then on the p.m. of the 18th there's multiple individuals outside of these same apartments; Mr. Twitty [and] Mr. Clinton having a conversation. There [are] others around also -- about Clinton recruiting someone to do a lick. He asked Twitty. He ... responds, yeah whatever, and then when Al Green came up he asked Al Green and Twitty's indication was he said yeah, whatever. That he was down for it.
>
> There's ... multiple witnesses that talk about the relationship between Clinton and Green. So within 24 hours, 36 hours of the homicide you have two separate and distinct individuals. One hearing a conversation between Green and Clinton about doing the lick. Another having that conversation with Clinton about doing a lick and then hearing Clinton ask Green and Green being down for it in that regard.
>
> Now, you also have then I guess as you progress in time, you have different testimony from ...one of the individuals about the neighborhood of Newtown and that two individuals, black males, go to Newtown and borrow a vehicle from Pomp Blackmon; a white ragtop Caddy that they are going to bring back within an hour and a half, two hours.
>
> Now, you have witnesses ...circumstantially and by more direct witnesses placing that Cadillac on [the trailer park road]. That would be the testimony of Shakela Montgomery and her cousin Tameca Nelson [who were] coming home from Applebees and saw the vehicle coming out being driven in a fast, reckless manner, a white ragtop caddy. Both of them describe it as a white caddy and then Tameca Nelson further goes to say she saw that same car the next day over at the Piggly Wiggly. They further state that when they drive in there that night and they

see that car coming out that they don't see police. They don't see EMS. They don't see a crowd. They don't see parties in there where something had potentially already occurred. When that car is both reported to Lancaster police and then recovered by Mr. Pomp Blackmon he testified he kept his car clean. Its got some red clay mud-type on it, it's kind of messy inside and further it was missing a piece of molding. I think that's by the 23rd when Detective [Thompson] is ... out there at Pomp Blackmon 's house, and on that same day on the 23rd, Detective [Thompson] goes out and locates the what appears to be molding off of the Cadillac on [the trailer park road]. So, you got witnesses identifying it out there at particular time saying they saw it the next day -- one of them saying they saw it the next day at Piggly Wiggly. Then you have a piece of a car I would say, or at least just it's jury issue as to whether it is a piece of the car or not found on [the trailer park road].

Going all the way back to Pomp Blackmon too, he did not identify anyone in this case however he does say four black males; one [is] the driver, one passenger and two in the back. That is the same indication that Mr. Blakeney testifies to that he is driving. Mr. Clinton is in the front. He is saying what he [had] done earlier that day. Mr. Green and a person that he does not know at that time who is later identified as being ... Mr. McDow is in the back seat. So, they got mode of transportation. They got the planning in mind to do a lick. They got tools in which to do a lick and I submit not only are the tools to do a lick but also the fact that ... at least one of them is wearing a jumpsuit. When the car is recovered by Mr. Blackmon and the police go out there and ... he has already found the jumpsuit and [I] think there is the ID also from Tyson. Now, when you get to that jumpsuit and you get to the DNA analysis[,] [and] perhaps some of the numbers aren't very great, but there is some corroboration of Mr. Blakeney in the DNA analysis. DNA profile developed from item two is mixture of at least three individuals; Jenika Jones and Delrico McDow [cannot] be excluded as a possible contributor to the mixture. That is swabs from the [underside] of the storm door handle exterior. ... [R]egardless of what the numbers are that corroborates Blakeney.

Item three profile -- item three swab from doorknob, DNA profile developed from item three is a mixture of at least two individuals. No conclusive statement can be made regarding the inclusion or exclusion of Jenika Jones and Devatee Clinton as possible contributors. ...Pomp Blackmon, Wayne Blakeney, Delrico McDow and Al Martinez Green can be excluded.

Item 6.1 which is a cutting from the jumpsuit excludes all parties. Item 6.2 is an unidentified male individual. Item 6.3 -- and I will note 6.2 is an unidentified individual. I do not see that Reggie the roommate that they got buccal swabs from him, unless I am incorrect in that regard. Item 6.3 Clinton can't be excused as a contributor. All this is coming from the jump suit. Item 6.4 is mixture of four individuals. Clinton can't be excluded. No statements can be made about inclusion or exclusion of ... Jones, McDow — I should say Miss Jones, McDow, and Green

in that mixture. That is a corroborating testimony as to Mr. Blakeney, where you have this mixture of individuals, again I say regardless of the numbers. Further from the statements given Green, Clinton and Blakeney were at the Hole in the Wall on the 19th.

Testimony of Miss Stradford that she was at ... Crenco. And she was approach by Clinton wanting cigarettes and he was wearing that blue jumpsuit. The blue jumpsuit in evidence. Her testimony is he was wearing that blue jumpsuit .... She told him oh, this friend of mine did you hear what happened to Jenika and ... he is not interested. Well, he is not interested in this Court's opinion because he already knows what has [happened] to Jenika or that can be an inference that could be drawn ... from the evidence.

Y'eisha Tinsley also [testified] concerning the Hole in the Wall on the 19th. Again Mr. Clinton gives conflicting statements. Mr. Frick wants out on the cross examination of Mr. [Thompson], but it is not usual for someone not to tell the truth, the whole truth and nothing but the truth on [their] first statement to the police. The cross examination of Mr. Blakeney well, why didn't you tell him the truth on the first statement. So you have all this corroborating circumstantial evidence, and I would further add whether there is blood, whether there is fingerprints, whether there is hair, whether there is fiber, whether there is someone's driver's license at the scene, the absence of evidence is not evidence of absence. You have the testimony of Mr. Blakeney that says he was driving. Two individuals that he knew he identified. Three of them got out of the car, went in down there [at the trailer park], came back in a hurry within ten minutes. The one with the gun appeared to be cool, calm and collected. He says chill. The other ones, lets go, lets go, lets go. I think that shows his manner in which he is driving that I don't know if he skimmed something, hit a rut or what, and that molding comes off. But I think there is both direct and substantial circumstantial evidence as to both Mr. Clinton and Mr. Green and I would be remiss if I didn't point out also the direct statement by Mr. Clinton to Mr. Blakeney that I killed that individual. Not by name but by expletive.

Tr. p. 852, line 19 – p. 858, line 25.

Both defendants rested without presenting additional evidence. Clinton then renewed his directed verdict motion. **Tr. p. 868, lines 9-12**. Green also renewed his prior motions. **Tr. p. 868, lines 15-17**. The trial judge renewed his ruling on the directed verdict motion. **Tr. p. 868, lines 18-19**.

C. The trial judge properly refused to grant a directed verdict.

South Carolina defines "murder" as the "killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). *See also State v. Blakely*, 402 S.C. 650, 742 S.E.2d 29 (Ct.App. 2013). "Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." *State v. Wilds*, 355 S.C. 269, 276-77, 584 S.E.2d 138, 142 (Ct.App. 2003); *Kelsey*, 331 S.C. at 62, 502 S.E.2d at 69 (same). "It is the doing of a wrongful act intentionally and without just cause or excuse." *Tate v. State*, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002). Alternatively, "malice" has been defined as "something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief." *Arnold v. State*, 309 S.C. 157, 163, 420 S.E.2d 834, 837 (1992). *See also State v. Fennell*, 340 S.C. 266, 275 n. 2, 531 S.E.2d 512, 517 n. 2 (2000) ("[m]alice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it").

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. A defendant is entitled to a directed verdict [only] when the state fails to produce evidence of the offense charged." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). "In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." *State v. Irvin*, 270

S.C. 539, 543, 243 S.E.2d 195, 197 (1978) (citing *State v. Massey*, 267 S.C. 432, 229 S.E.2d 332 (1976)). *See also State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 408-09 (2013); *State v. Martin*, 340 S.C. 597, 602, 533 S.E.2d 572, 574 (2000).

Applying the above principles to the facts of this case, Respondent submits that the trial judge properly denied Clinton's motion because the direct and circumstantial evidence presented at trial, viewed in the light most favorable to the State, reasonably tended to prove his guilt or was such that his guilt could be fairly and logically deduced. *Kelsey*, 331 S.C. at 62, 502 S.E.2d at 69. As Clinton acknowledges, the State proceeded under a theory of accomplice liability.[13] The Court explained in *State v. Gibson*, 390 S.C. 347, 701 S.E.2d 769-70 (Ct.App. 2010), that:

> Under the "hand of one is the hand of all" theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense. [However, m]ere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. [Rather,] presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal.
>
> *State v. Thompson*, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct.App.2007) (internal quotations and citations omitted).
>
> "Under an accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.' " *See State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct.App.2002) (quoting *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999)). In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a

[13] "It is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." *State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (citations omitted); *State v. Leonard*, 292 S.C. 133, 355 S.E.2d 270 (1987); *State v. Cox*, 258 S.C. 114, 187 S.E.2d 525 (1972); *State v. Hicks*, 257 S.C. 279, 185 S.E.2d 746 (1971); *State v. Hunter*, 79 S.C. 73, 60 S.E. 240 (1908). Accordingly, the State may present an indictment charging a defendant as a principal based on information of aiding and abetting the crime charged. *Id. See also State v. Fley*, 2 Brev. 338, 4 S.C.L. 338,1809 WL 338, 7 (S.C. Const. 1809) ("The distinction, however, of principal in the first and second degree being merely nominal, and no ways essential, it seems to be useless to preserve it in indictments").

> formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties. *Id.* at 193, 562 S.E.2d at 324 (stating that under the hand of one is the hand of all theory, "[a] formally expressed agreement is not necessary to establish the conspiracy" which brings the accomplice to the scene of the crime).

Gibson, 390 S.C. 347, 354, 701 S.E.2d 766, 769-70. *See also* **Tr. pp. 982-84 (Jury charge).**

As the trial judge correctly observed, the State presented evidence from several witnesses that Clinton and Green were friends and associated with one another. Further, Clinton lived with his grandmother in a trailer adjacent to the one in which Jenika lived and where the murder occurred. When later questioned by the Sheriff's Office after his arrest, however, he denied knowing that she lived next to him. **Tr. p. 809.**

On the morning of January 18th, Dominique Davis overheard Clinton and Green discuss doing a "lick" or robbing someone. Ms. Davis also heard Clinton say that "he had Taz's gun and he wasn't going to give it back to him." Further, Ms. Davis heard Green ask whether "she" drove "a black car." However, the men never mentioned an intended victim by name or location and Ms. Davis did not know whom the friends planned to rob. **Tr. pp. 268-79.**

On the night of the 18th, Jamal Twitty had a conversation with Clinton in the presence of two other men, in which Clinton asked if Twitty wanted "to go on a lick with him." Twitty told Clinton, "yeah, whatever." **Tr. pp. 284-86; pp. 287-88; 291-92.** Clinton did not give an address of the place he wanted to rob but said that it was "Not far." Twitty changed his mind about participating in the robbery and talked Clinton out of doing it on the 18th when Clinton asked if Twitty could get a car because Twitty did not have a car and his girlfriend had told him that her car was parked for the night. **Tr. pp. 286-88; 292-93.**

Green walked up a few minutes later, and Clinton asked Green whether Green "want[ed] to go on a lick." Green replied, "yeah, whatever," indicating that "he was down for it. ...[H]e

was like, yeah, he's ready." While Twitty did not see Clinton with a gun that night, he had previously seen Clinton with one. **Tr. pp. 286-89; 292-94.**

Thus, there was evidence of a conspiracy by Clinton and Green to commit an armed robbery, which supports an inference of malice. This evidence also established an undeniable motive for the subsequent murder. Although "motive is not an element of murder and ... the State need not prove motive, *State v. Smith*, 307 S.C. 376, 385, 415 S.E.2d 409, 414 (Ct.App. 1992), this evidence provides a reason for the subsequent murder of Jenika Jones. *Accord Williams v. State*, 363 S.C. 341, 611 S.E.2d 232 (2005) (circumstantial evidence showed defendant's motives for murdering his wife and child were financial gain and elimination of his domestic problems); *State v. Rice*, 368 S.C. 610, 615-16, 629 S.E.2d 393, 395-96 (Ct.App. 2006) (trial court did not err by refusing to sever murder and trafficking in cocaine charges where State's theory as to the motive for victim's murder involved the drugs victim stole from Rice when he stole Rice's car, as well as the drug-related argument the two recently had involving the marijuana); *Commonwealth v. Pacell*, 497 A.2d 1375, 1378 (Pa.Super.Ct.1985) (finding evidence that defendant struck common-law wife five days before the murder of wife's paramour was relevant to defendant's motive, and remoteness did not vitiate relevance given incident was part of the sequence of events leading directly to the homicide).

More importantly, Wayne Blakeney's testimony, various parts of which were corroborated by testimony from other witness' and DNA, provided further evidence that both defendants were guilty of murdering the victim. Blakeney testified that he is Clinton's cousin and friend, and that they sometimes hung out together. Blakeney also knows Green and McDow. Clinton did not have a driver's license at the time. So, Blakeney occasionally drove him places, if Clinton provided the transportation.

On the night January 19th, Blakeney met up with Clinton, Green and McDow in the Newton area. They later went to a residence in the same part of town, where they borrowed the white Cadillac shown in State's Exhibit 16. Blakeney did not know the name of the man from whom they borrowed the Cadillac, but Pomp Blackmon's testimony confirms that it was his 1991 eggshell white Seville. Although Mr. Blackmon did not identify the persons to whom he loaned his vehicle, his testimony was that he did not loan it to the first person who asked to borrow it because that man did not have a license. Rather, Mr. Blackmon only loaned the car after he was certain that the first man's cousin had a license.

Additionally, Mr. Blackmon saw the car stop after these two men left his driveway in it and two more men got into it. He thus corroborated Blakeney's testimony that there were four people in the Cadillac: Blakeney, Clinton Green and McDow. Blakeney also testified that the four men first went to the Hole in the Wall. They all got into the Cadillac and left when Clinton asked Blakeney to take him to get some money.

Following Clinton's directions, Blakeney drove the Cadillac to the trailer park where the murder occurred and where Clinton lived with his grandmother. Along the way there, Blakeney saw that Clinton was armed with a gun. Once they reached the trailer park, Blakeney parked the Cadillac at a location selected by Clinton. Clinton, Green and McDow then get out of the car. Together, they walked behind a mobile home and disappeared for about ten minutes. When they returned, they were running. Clinton, who was armed, told Blakeney to chill. On the other hand, Green and McDow told Blakeney to "go" and were anxious to leave the scene. Blakeney's testimony that they were running is corroborated by information in the 911 call that three men were seen running from the scene.

Also and as the trial judge correctly observed, Blakeney's testimony that he quickly

drove out of the trailer park is circumstantially corroborated by cousins Shakela Montgomery and Tameca Nelson. When they turned on the road to go into the trailer park, a white car headed in the opposite direction almost ran them off of the road. The car's headlights were not on and it was being driven fast. A clear inference from their testimony is that this occurred shortly after the murder because neither woman saw police or EMS.

Shakela testified that the car was "an Oldsmobile, Buick, [or] Cadillac style." **Tr. pp. 247; 250; 252**. Tameca described the car as "a white Cadillac with a rag top." **Tr. pp. 297-98**. Tameca saw the same car the next day over at the Piggly Wiggly with a flat tire. This corroborates Blakeney's testimony of where he left the car and the condition it was in, as well as Blackmon's testimony about the condition of the vehicle when he found it the next day.

Blakeney's testimony that he quickly drove out of the trailer park is also circumstantially corroborated by testimony that a missing piece of molding that was on the Cadillac when Mr. Blackmon loaned out the car on the 19th was found by Inv. Thompson on January 23rd, in the area of the road leading to the trailer park. Blakeney's testimony is likewise corroborated by evidence that there was red mud on the Cadillac that previously had not been on it.

Blakeney also testified that he drove back to the Hole in the Wall after leaving the trailer park. Both Green and Clinton admitted that they were at the Hole in the Wall on January 19th, and Ms. Stradford saw him there. Blakeney later dropped of Green, McDow and two strangers in the Newton area before he took Clinton home: *i.e.*, back to the mobile immediately adjacent to the victim's. As they were headed to Clinton's residence, Clinton said, "I shot the bitch." This is express evidence of malice. *E.g.*, Salazar v. State, 397 S.W.2d 220 223 (Tex. Cr.App. 1966) ("Statements made by a slayer before, at the time of, and after the homicide are pertinent evidence to show express malice"); *Hinton v. People*, 169 Colo. 545, 551, 458 P.2d 611, 613

(Colo. 1969) (in light of defendant's statement to victim, "'Bitch, I'll kill you,'" promptly followed by defendant delivering a staggering blow and the fatal stabbing, "the jury could find that defendant killed [the victim] with deliberation and premeditation, and hence, with express malice"); *Hopkins v. State*, 190 Ga. 180, 185, 8 S.E.2d 633, 636 (Ga. 1940) (un-contradicted evidence that defendant cursed victim and called him a "vile and vulgar name" immediately before striking the fatal blow was sufficient to show express malice). Also, Clinton left the murder weapon in the glove compartment of the Cadillac and asked his unsuspecting cousin, Blakeney, to hold it for him.

Additionally, Mr. Blackmon testified that there was a blue jumpsuit in his car when he retrieved it on January 23rd that had not been in it when he loaned it out on the 19th. So, he turned the jumpsuit over to the Sheriff's Office. Vivian Stradford testified that she was at Crenco after 10:30 p.m. on the 19th when Clinton approached her and asked for cigarettes. He was coming from the Hole in the Wall and he was wearing the same blue jumpsuit that Mr. Blackmon later found in the Cadillac. (State's Exhibit 37). Ms. Stradford tried to discuss what she had heard about the victim with Clinton, but he was not interested in discussing the matter. Once again, the trial judge correctly reasoned that a reasonable inference from her testimony is that the reason he did not want to discuss the victim's death is because he already knew what had occurred: either he, Green or McDow had murdered her.

Furthermore, even though the DNA evidence in this case did not yield the type of statistical analyses that often identify a criminal wrongdoer(s) with virtually unerring precision, it nevertheless corroborated other evidence presented by the State. The DNA profile on a swab of the screen door handle (State's Exhibit 42, SLED item 2) was a mixture of individuals and neither the victim nor co-defendant McDow could be excluded from that mixture.

This provides circumstantial evidence of his presence at the crime scene and thereby circumstantially corroborates Blakeney's testimony. Again, Clinton's statement that "I shot that bitch" tends to prove that he was the triggerman and thus establishes his presence when the crime was committed. Further, in light of Blakeney's testimony as to what occurred at the trailer park, a reasonable inference is that both Green and McDow were with him when he shot her.

With respect to the touch DNA testing of the blue jumpsuit, the DNA profile developed on SLED item 6.3 was a mixture of at least two individuals and "Clinton could not be excluded as a possible contributor to this mixture. The probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in 580." Also, there was not enough information to either include or the victim from that mixture. **Tr. pp. 597-603, 610; 615**.

The DNA profile developed SLED item 6.4, a swab from the blue jumpsuit, was a "mixture of at least four individuals." Again, Clinton could not be excluded as a possible contributor to the mixture. "The probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in 12." Also, Agent Boehm could not make a conclusive determination as to whether the victim, Green or McDow were contributors to the mixture found. **Tr. pp. 603-07**.

In addition, the murder in this case was committed with a deadly weapon and malice may be inferred or implied from the use of that weapon. *See State v. Belcher*, ("The permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill)"); *In re Walter M.*, 386 S.C. 387, 391 & n. 2, 688 S.E.2d 133, 135 & n. 2 (Ct.App. 2009) (finding that "[b]ecause the family court could infer malice from

a defendant's use of a deadly weapon or from the evidence that the discharge of the weapon was likely not accidental, this evidence was sufficient to overcome Appellant's motion for a directed verdict" and concluding that *Belcher*'s disapproval of the instruction where there is evidence supporting a lesser-included offense of self-defense was not dispositive of reliance upon inference at directed verdict stage). *See also* **Tr. pp. 885 (Solicitor's closing argument); 981 (jury charge)**. Finally, Clinton and Green both admitted that they had been at the Hole in the Wall on the night of the 18th and Clinton made the inconsistent statements to law enforcement discussed, *supra*.

Notwithstanding Clinton's contrary argument concerning perceived deficiencies in the prosecution's proof of his guilt, Respondent submits that the trial judge properly refused to grant a directed verdict because there was sufficient direct and substantial circumstantial evidence of Clinton's guilt submit the murder charge to the jury. *E.g.*, *Kelsey*, 331 S.C. at 62, 502 S.E.2d at 69; *Irvin*, 270 S.C. at 543, 243 S.E.2d at 197; *Martin*, 340 S.C. at 602, 533 S.E.2d at 574.

Many of the arguments presented by Clinton on appeal are not properly before this Court because they were not presented to the trial judge in support of the directed verdict motion made at trial. *See Bailey*, 298 S.C. at 5-6, 377 S.E.2d at 584 (a party cannot argue one theory in support of directed verdict motion at trial and a different theory on appeal). *See also State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"); *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court

will not be considered on appeal"). For instance, he did not argue in the trial court the various matters that he felt the State was required to prove but did not, he did not attack Blakeney's testimony as self-serving and he did not cite any of the cases now referenced in his brief.

Moreover, none of his arguments demonstrate error by the trial judge in refusing to grant a directed verdict. First, his analysis of perceived shortcomings in the State's evidence is without merit. For instance, his suggestion that the State did not prove that he was present inside the victim's home ignores both the reasonable inferences discussed from Blakeney's testimony and the DNA from the screen door handle discussed above, as well as his admission to his cousin that "I shot that bitch." Also, the State was not required to produce the murder weapon. However, the State's evidence explained that the reason it was unable to locate the murder weapon was because Clinton gave the gun to Blakeney when he got out of the Cadillac at his grandmother's house and asked Blakeney to hold it for him.[14]

Similarly, his complaint about the prosecution's failure to connect the blue jumpsuit to the victim or her home is a red herring. It ignores that Clinton could not be excluded as a possible contributor to the DNA profile developed SLED item 6.4, a swab from the blue jumpsuit. His argument in this regard likewise ignores that the State's evidence was that Ms. Stradford saw him wearing this jumpsuit on the night of the 18th and he later left it in the Cadillac, whereas he lied to Inv. Thompson when asked about that jumpsuit. In his interview with Inv. Thompson, he claimed that he wore a camouflage jumpsuit on the 19th and that he loaned the blue jumpsuit to others. Also, his DNA would only be on the blue jumpsuit from

[14] A reasonable inference from this evidence was that he was attempting to dispose of the weapon or, at the very least, he was attempting to hide it until he was certain that he was not a suspect in the murder. Moreover, when considered with statement that he made to Inv. Thompson on March 9th, 2012, a reasonable inference is that he may have tried to set up his cousin to take the rap for the murder. Specifically, he told Inv. Thompson that he had seen Wayne Blakeney at the Hole in the Wall on January 19th, and that Blakeney was in the white Cadillac. **Tr. pp. 816-17.**

handling it.

The attack on Blakeney's credibility only goes to the credibility that he felt the jury should assign to the testimony and has no bearing on whether the trial judge should grant a directed verdict. *E.g.*, *Weston*, 367 S.C. at 292, 625 S.E.2d at 648 ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. A defendant is entitled to a directed verdict [only] when the state fails to produce evidence of the offense charged"); *McHoney*, 344 S.C. at 97, 544 S.E.2d at 36 (same).

Respondent submits that the State's evidence in this case is a far cry from the circumstantial evidence cases where this Court or the Supreme Court has found that a directed verdict should have been granted. *See*, *e.g.*, *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011); *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011); *State v. Bennett*, 408 S.C. 302, 758 S.E.2d 743 (Ct.App. 2014).[15] Unlike *Bostick*, *Odems*, *Bennett* and *State v. Schrock*, 283 S.C. 129,

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

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

322 S.E.2d 450 (1984), this was not a purely circumstantial evidence case. Rather, there was direct evidence of Clinton's presence at the crime scene. Also unlike *Bostick*, there was express malice and evidence of motive in this case, all of which pointed directly at Clinton, Green and their co-defendants.

Based upon this record, Respondent submits that the directed verdict motion was properly denied.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that his Court should affirm the judgment, as well as Appellant's conviction of and sentence for murder.

Respectfully submitted,

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Likewise, *Bennett* was purely a circumstantial evidence case. This Court held that, at most, the evidence presented merely raised a suspicion that defendant committed the crimes. Therefore, this evidence – including evidence (1) that the defendant's fingerprint was found on a community room television set that may have been manipulated by the burglar in an attempt to remove the television, and (2) that two small droplets of blood matching his DNA were found below the space where a stolen television once sat in the computer room, where he had frequently been - was insufficient to support the defendant's convictions for burglary in the second degree, petty larceny, and malicious injury to real property. 408 S.C. at 307-08, 758 S.E.2d at 745-46.

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April 24, 2015.

By: 
WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
APR 24 2015
SC Court of Appeals

Appeal from Lancaster County
Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case No. 2014-000594

THE STATE,

Respondent,

vs.

DEVATEE TYMAR CLINTON,

Appellant.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for Respondent, certify that I have served two (2) copies of the within Initial Brief of Respondent on counsel for the Appellant by depositing same in the United States mail, first class, postage prepaid, and addressed as follows:

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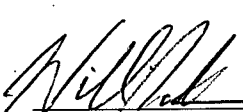
This 24th day of April, 2015.



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April 24, 2015

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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Re: *The State v. Devatee Tymar Clinton*
Appeal from Lancaster County
Appellate Case No. 2014-000594

Dear Ms. Kitchings:

Enclosed for filing in your office is the original Initial Brief of Respondent, Designation of Matter and Certificate of Service in the above-captioned matter.

Thank you for your assistance in this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES/dmd
Enclosures
cc: Chad Johnston, Esq. (w/two copies of encls.)
Robert M. Dudek, Esq. (w/two copies of encls.)
The Honorable Randy E. Newman, Jr., Solicitor, 6th Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Services (w/copy of encls.)