STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2013-002455

THE STATE, ...RESPONDENT

v.

KENNETH G. BUTLER, SR. .....APPELLANT.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Did the trial court properly deny Appellant's motions for directed verdict when sufficient evidence was presented by the State to submit the case to the jury and may this Court consider arguments respecting the trial court's failure to apply the correct standard of review when the arguments were never presented to or ruled upon by the trial court?

STATEMENT OF THE CASE

Appellant was indicted at the March 2012, term of the grand jury for Cherokee County for assault and battery in the first degree (12-GS-11-0173). On November 13 – 14, 2013, Appellant proceeded to trial before the Honorable Keith Kelly and a jury. Appellant was found guilty as charged. He was sentenced by the Judge Kelly to imprisonment for seven years suspended upon the service of two years and probation for five years. Appellant filed and served notice of appeal and subsequently submitted a brief of Appellant. This brief of Respondent follows.

STATEMENT OF FACTS

Kenneth Butler drove into Brandon Holcomb with his truck, pinning Brandon's leg between the truck and Brandon's car, which resulted in Brandon's permanent scarring and disfigurement.

On January 12, 2012, Brandon Holcomb was driving home from Gaffney High School with his brother, Austin Bratton. R. 19, line 22 – R. 18, line 12. In the car behind Brandon was his girlfriend, Kelly Stanford, along with Kelly's brother, Triston Austin. Id. Both cars were headed on Ellis Ferry Avenue towards Cresthaven Drive, a no-outlet road where Brandon and Austin lived. R. 18, line 12 – R. 20, line 23; p. 41, lines 1 – 10; p. 47, lines 13 - 19. Butler pulled his truck out in front of Brandon's vehicle onto Ellis Ferry Avenue, and Brandon moved to the right lane to avoid hitting Butler and blew his horn to ensure Butler knew not to move over. R.18, line 24 – R. 19, line 5; p. 41, lines 13 – 20; p. 45, lines 3 – 17; p.48, lines 1 – 19; p,.63, lines14 - 25. Brandon returned to his original lane of travel with Kelly following him. Tr. p. 41, lines 1 – 7. Butler then began to follow the students home with the intent of "giving them a piece of [his] mind." R. p 88, lines 20 – 22; p. 91, line 25 – p. 92, line 2; p. 97, line 24 – Tr. 98, line 1. Brandon's car was in front of Kelly's, and Butler was following closely behind Kelly's bumper, causing Kelly to run off of the road at one point. R. 19, lines 8 – 9; p. 48, line 3 – p. 50, line 13; p.56, lines 2 - 5. Kelly's brother, who was a passenger in Kelly's car, "flipped off" Butler. R. p. 54, lines 15 – 25; p. 64, lines 1 – 2; p. 66, lines 2 - 5.

Brandon turned onto Cresthaven Road. He did not want Butler to follow them to his house, so Brandon stopped his car to get out and ask Butler why he was following them. R. 21, line 21 – R. 22, line 2. Brandon stopped his car in the road on Cresthaven Drive, a road which begins after a curve from Ellis Ferry Avenue. Brandon pulled as

close to the curb as he could and was located away from the curve in the road. R. p. 35, lines 1 – 4. After walking to the back of his car, Brandon waved Kelly to continue driving to his house. R. 22, lines 5 – 9; p. 51, lines 1 – 21; p. 56, line 19 – p. 57, line 6. Brandon never stepped across the yellow line while outside of his car. R. p.22, lines 12 – 16; p. 51, lines 19 - 24. Brandon threw up his hands in a questioning gesture ". . . like what's the problem." R. p 53, line 4 – 6; p. 64, lines 3 – 8; p. 67, lines 9 - 11.

Butler drove around the curve, swerved into the opposite lane, and then jerked his truck back over the lane directly toward Brandon and hit Brandon, pinning Brandon between his truck and Brandon's car. Butler's actions were directly observed by Brandon, Kelly, Kelly's brother, Triston Austin, and a neighbor. R. p.22, line 9 – p. 24, line 15; p. 52, lines 2 – 25; p.57, lines 10 – p. 58, line 12; p. 64, lines 3 – 10; p. 66, line 6 – p. 67, line 3; p. 75, lines 1 - 5. Brandon thought Mr. Butler was pulling over to park but travelled toward him instead. SROA. p.1, lines 6 – 11. Brandon was behind his car trying to avoid being hit. His leg was crushed between Butler's truck and his car. Not only was Brandon's leg severely and permanently injured but the impact was so great that it also damaged both vehicles and moved Brandon's car. R. p.22, line 5 – p. 25, line 20; p. 69, lines 2 – p. 70, line 24. Kelly saw Brandon's body jerk with the impact. R. p. 52, lines 13 – 16; p. 53, lines 12 – 9 - 12. Brandon's brother who was the front seat passenger in Brandon's car felt the impact and saw Brandon pinned behind the left tail light of the car. R. p. 42, lines 6 – 22; p. 43, lines 14 – 15.

Brandon stated that he turned to Mr. Butler after being pinned between the two vehicles and Butler had his truck in "park." R. p. 26, lines 1 – 2. Butler eventually backed up when Brandon's brother approached and motioned for Butler to do so. R. p.

26, lines 4 – 6; p.43, line 1 – p.44, line 20; p. 43, line 17 – p. 44, line 15. Butler pulled his truck onto the curve and got out. R p. 26, lines 5 - 6. Brandon asked Butler to call an ambulance and Butler responded, "No, you flipped me off," and returned to his truck, not offering any aid, despite seeing Brandon's injury. R. p.26, lines 1 – 13; p. 31, line 24 – p. 32, line 2; p.37, lines 5 - 10. Butler admitted stating that, upon exiting his truck, he told Brandon, "You see what your horn blowing and flipping people off leads to?" R. p. 92, lines 2 – 11; p. 103, lines 4 – 6; p. 103, lines 20 - 23. He also acknowledged that he refused to call 911. R. p. 92, lines 6 – 11.

Police arrived at the scene and Butler told Officer Hyatt that he was following them to give them a piece of his mind. R. p.13, lines 8 – 11. When Brandon's stepfather inquired of Butler about the incident at the scene, Butler's responded, "[h]e flipped me off." R. p. 78, lines 1 – 22. A neighbor working in his yard nearby saw Butler's truck drive straight toward Brandon and testified he saw nothing to cause the truck to swerve into Brandon. R. p. 81, lines 4 – 19. An ambulance rushed Brandon to be airlifted to Spartanburg Regional Hospital. R. p.26, lines 16 – 23. Brandon's leg was severely damaged, requiring several surgeries, and a steel rod was permanently placed in his leg. R. p.24, line 22 – R. p.25, line 20.

At the close of the State's case, Butler moved for a directed verdict asserting the State's failed to show that he intentionally hit Brandon, reasoning that it was speculation to assume so. R. p.84, lines 4 – 11. The Court denied the motion, stating that three witnesses testified to Butler's truck swerving in the left lane and back to the right lane before hitting Brandon. R. p.85, lines 2 – 12. Appellant renewed the request for a directed verdict at the close of all of the evidence, and the Court denied motion for the reason

stated earlier. R. p.106, lines 15 – 19. At the close of trial, Appellant moved for a new trial on the same ground, and the Court denied it. R. p.139, lines 5 – 9.

ARGUMENT

The trial court properly denied Appellant's motions for directed verdict because sufficient evidence was presented by the State to submit the case to the jury and any issue respecting the trial court's failure to apply the correct standard of review is not preserved for appeal because the issue was never raised to or ruled upon by the trial court.

Appellant argues that the trial court erred in denying his directed verdict motions arguing the State failed to present substantial circumstantial evidence that he intentionally ran his vehicle into Brandon. Appellant also argues that "the judge applied the wrong standard for a directed verdict when he stated that only a "'scintilla' of evidence was needed." (Appellate Brief, p. 10, lines 4 – 5). Appellant never presented argument to the trial court respecting substantial circumstantial evidence or the judge's use of the word "scintilla." Therefore, the arguments are not properly before this Court on appeal. State v. Dunbar, 356 S.C. 138, 587 S.E. 2d 691 (2003) (stating that in order to properly preserve an issue for review on appeal, the defendant must present the argument to the trial court and receive a ruling); State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct.App. 1998) (stating that arguments not presented to the trial court in support of directed verdict are not preserved for review on appeal). The State submits that the trial judge employed the proper standard of review and correctly denied Appellant's motions.

"When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of the evidence, not its weight. State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. McCombs, 367 S.C. 489, 493, 629 S.E.2d 361, 362 - 63 (2006). However, the trial judge should deny a directed verdict motion and submit the case to the jury if there is **any direct** or substantial circumstantial evidence reasonably tending to prove the guilt of the accused or from which guilt may be

fairly or logically deduced. State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004) (emphasis added). "[A] trial [court] is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." State v. Zeigler, 364 S.C. 94, 102 – 13, 610 S.E.2d 859, 863 (Ct. App. 2005). In State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004), the Court described circumstantial evidence and direct evidence as follows:

> There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Where the State relies exclusively on circumstantial evidence, the trial court must submit the case to the jury if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001). A case is considered a direct evidence case, rather than circumstantial, when the State relies upon direct evidence to prove the acts of the crime and the identity of the perpetrator, and circumstantial evidence was merely corroborative or offered to demonstrate intent. State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001) (stating the officers' personal observations and opinions of the defendant's actions, appearance, and condition constitute direct evidence of DUI because it is based on the officers' actual knowledge of the situation and requires no inference from the jury) (citing State v. Carroll, 277 S.C. 306, 286 S.E.2d 382 (1982); State v. Jenkins, 270 S.C. 365, 242 S.E.2d 420 (1978); State v. Simmons, 269 S.C. 649, 239 S.E.2d 656 (1977)).

In State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971), the South Carolina Supreme Court examined criminal intent:

> The question of criminal intent with which an act is done is one of fact and is ordinarily for jury determination except in extreme cases where there is no evidence thereon. The intent with which an act is done denotes a state of mind, and **can be proved only by expressions or conduct**, considered in the light of the given circumstances. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred.

(emphasis added) (citations omitted); see also State v. Meggett, 398 S.C. 516, 728 S.E.2d 492 (Ct.App. 2012). Thus, the issue of whether a defendant possessed the requisite intent at the time a crime was committed is typically a question for jury determination because, without a statement of intent by an actor, proof of intent must be determined by inferences from conduct. State v. Haney, 257 S.C. 89, 91, 184 S.E.2d 344, 345 (1971). A case is not considered one of circumstantial evidence when the evidence is introduced only to show intent. Intent is seldom shown by proof of direct evidence and, when all the salient facts of the prosecution's case, including the facts upon which intent may be inferred, are established by direct evidence, the prosecution is not relying on circumstantial evidence. State v. Carroll, 277 S.C. at 308, 286 S.E.2d at 383.

On appeal from the denial of a directed verdict, an appellate court must view the evidence and all reasonable inferences in light most favorable to the State. State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). If there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." State v. Cherry, 361 S.C. at 588, 593 – 94, 606 S.E.2d 475, 478. "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a

directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

"A person commits the offense of assault and battery in the first degree if the person injures another person or. . . offers or attempts to injure another person with the present ability to do so, and the act is accomplished by means likely to produce death or great bodily injury . . . ." S.C. Code Ann. 16-3-600 section (C) (Supp. 2013); State v. Middleton, 497 S.C. 312, 755 S.E.2d 432 (2014).

Based upon the evidence presented at trial and the reasonable inferences arising therefrom taken in the light most favorable to the State, there is no question that the evidence presented of Butler's intent was sufficient with withstand the motions for directed verdict. Butler was clearly very angry and admitted he wanted to confront Brandon. Butler's intent also was established through the direct testimony of eyewitnesses that Butler immediately began driving his large truck near the bumper of Kelly's much smaller car, creating a very dangerous situation and causing Kelly to run off of the road. Butler's intent was further established through the testimony of four witnesses who saw Butler suddenly and inexplicably swerve and speed directly into Brandon as Brandon stood at the back of his car. The skid marks created by Butler's truck and the damage to Brandon's leg and car left a trail of intent.

Moreover, Butler's actions and express statements of intent after driving his truck into Brandon constitute evidence of intent. After pinning Brandon with his truck and despite the impact that occurred, Butler placed his truck in "park" and sat there with Brandon injured and pinned between the vehicles. Butler made direct expressions of intent when he stated to Brandon as Brandon stood injured immediately after impact,

"You see what your horn blowing and flipping people off leads to?" R. p. 92, lines 2 – 11; p. 103, lines 4 – 6; p. 103, lines 20 - 23. Butler also refused Brandon's request for an ambulance and failed to render any aid even though assistance was requested by Brandon. Instead, Butler sat in his truck and explained that the incident occurred because Brandon "flipped him off."

This evidence and inferences arising therefrom were sufficient to withstand the directed verdict motions as to intent. On appeal, Butler argues the weight of the evidence and suggests other inferences that could arise from the evidence. However, the trial court properly looked at the existence of the evidence and its reasonable inferences when denying the motions for directed verdict. The weight of the evidence, credibility of the witnesses and conflicts in the testimony between Butler and the State's witnesses were properly left to the jury as the finder of fact. McDill v. Mark's Auto Sales, Inc., 367 S.C. 486, 626 S.E.2d 52 (2006). That task is not undertaken by the trial judge when ruling on a motion for directed verdict. Although not preserved for appellate review, the State also submits the trial court's use of the word "scintilla" did not indicate the use of an improper standard of review. In the context of a criminal case, "scintilla" has been defined as material. State v. Small, 82 S.C. 93, 63 S.E. 4 (1908). Nevertheless, the evidence was sufficient despite the reference to "scintilla."

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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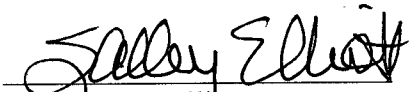
BY: 
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Columbia, South Carolina
December 29, 2014

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CERTIFIATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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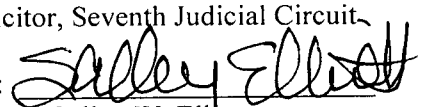
BY: 
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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated December 29, 2014, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

LaNelle C. DuRant, Appellate Defender
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I further certified that all parties required by Rule to be served have been served. This 29th, day of December, 2014.

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Re: The State v. Kenneth Gerald Butler
Appellate Case No. 2013-002455

Dear Counsel:

I am enclosing two (2) copies of the Final Brief of Respondent in the above-referenced case.

Sincerely,

Salley W. Elliott
Senior Assistant Deputy Attorney General
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SWE/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original & 9 enclosed)
Victim Services