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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

R. Markley Dennis, Circuit Court Judge

Appellate Case No. 2013-002665
Criminal Case No. 2011-GS-10-2074

State of South Carolina.....Respondent,

vs.

Jarret Graddick.....Appellant.

FINAL OPENING BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court commit prejudicial error in denying Appellant's motion for a directed verdict, in light of the fact that the evidence admitted at trial did not establish Appellant's guilt as charged in the indictment?

2. Did the trial court commit prejudicial error in admitting the inculpatory statement of Appellant's non-testifying co-defendant into evidence, in violation of Appellant's Sixth Amendment right of confrontation?

3. Did the trial court commit prejudicial error in consolidating the trial of Appellant's indictment with the trials of the indictments of two other defendants, in violation of Appellant's due process rights?

IDENTIFICATION OF RELATED CASE

Despite the fact that he was indicted in a separate, individual indictment, Appellant was tried jointly with two other defendants: Keenan Coakley and Kevin Smalls. The jury convicted Coakley and Appellant of armed robbery. Coakley filed an appeal of his conviction, (App. Case No. 2013-002659), and that appeal is still pending. With regard to Smalls, prior to the jury's verdict, Smalls entered a guilty plea to the charge of accessory after the fact to armed robbery. Accordingly, Smalls did not take an appeal from the disposition of his indictment.

STATEMENT OF THE CASE

This appeal arises from circumstances that provide a textbook illustration of the hazards inherently associated with trying individuals who are charged in separate indictments jointly.

On September 15, 2010, Appellant and three other individuals—Keenan Coakley, Kevin Smalls, and Brian Mazyck—were arrested on suspicion of committing an armed robbery which occurred earlier that day. Appellant was indicted for armed robbery on April 4, 2011. Notably, Appellant was indicted individually for the armed robbery in question; his indictment does not allege that he participated with Coakley, Smalls, Mazyck, or anyone else in concerted criminal action to perpetrate the armed robbery.

The trial on Appellant's indictment commenced on December 3, 2013. As referenced above, Appellant was tried jointly with Coakley and Smalls; Mazyck elected to testify as a State's witness. At no time prior to trial did the State file a motion to consolidate the indictments, or to try the separate indictments of Appellant, Coakley, and Smalls jointly.

In any event, following a four-day trial, on December 6, 2013, the jury convicted Appellant and Coakley of armed robbery; Smalls entered into a guilty plea for accessory after the fact to armed robbery before the jury's verdict was returned. Immediately following the jury's verdict, Appellant was sentenced to a twenty-year term of incarceration. Appellant's notice of appeal was filed and served on or about December 12, 2013.

Through this appeal, Appellant respectfully requests the Court of Appeals to reverse the trial court's decision to deny his motion for a directed verdict and to vacate his conviction and sentence. As explained in this brief, the State failed to establish Appellant's guilt as charged in the indictment. The State's case against Appellant was built entirely on circumstantial evidence; there were no eyewitnesses who identified Appellant's participation in the armed robbery, and there was no physical evidence—including DNA—that linked Appellant to the crime scene. Instead, the State relied on evidence of Coakley's and Smalls' statements and conduct regarding their own guilt, and then imputed that evidence against Appellant to obtain his conviction. However, the State was prohibited from attacking Appellant through evidence of other individuals' guilt, as Appellant's indictment makes no mention of his participation in a criminal scheme. The State made the tactical decision to indict Appellant separately, and as a consequence, the State's evidence does not establish Appellant's guilt as a matter of law. In fact, it is Appellant's position that the State should not have been able to consolidate the trial of Appellant's indictment with Coakley's and Smalls' trial as a matter of law.

Additionally and alternatively through this appeal, Appellant respectfully requests the Court of Appeals to vacate his conviction and sentence and remand his case to the trial court for a new trial. As discussed in this brief, Appellant's Sixth Amendment right to confront adverse witnesses was compromised by the introduction of a certain inculpatory statement made by Coakley. Coakley invoked his Fifth Amendment privilege to refrain from testifying, and was therefore unavailable as a witness. The imputation of this inculpatory statement against Appellant was not

corrected by the trial court through a proper limiting instruction; in fact, the trial court did not believe that the admission of this statement presented any Sixth Amendment issue. Therefore, the admission of the statement was a significant legal error, and it imposed a significant amount of prejudice against Appellant which resulted in his conviction. The only remedy capable of correcting the trial court's error is to vacate the conviction and sentence, and remand the case for a new trial.

STATEMENT OF FACTS

At approximately 6:30pm on September 15, 2010, a cellular phone store located at 3014 South Morgans Point Road in Mount Pleasant, South Carolina was robbed. (R. 50:18–57:22; Tr. 147:18–154:22.) Immediately prior to the time of the robbery, there were only two individuals present in the store: store employees James Blain and Harlee Lynn. Blain and Lynn saw two individuals coming for the entrance to the store. Their faces were obscured, and one was wielding a handgun. Blain and Lynn ran out of another store exit just as the assailants were entering. Blain and Lynn immediately called the police and were met a few moments later at the store by a member of the Mount Pleasant police department. (R. 67:12–22; Tr. 164:12–22.) By that time, the assailants had already left the premises.

As the robbery was occurring, a bystander outside the store heard the cries for help from Blain and Lynn. (R. 110:21–111:6; Tr. 226:21–227:6.) The bystander called 911 and, in addition to the robbery, reported that a distinctively painted Chevrolet Impala that had been parked in front of the cellular phone store had just left the scene in a suspicious manner. The bystander did not see the robbers get into the vehicle, but she gave a description of the vehicle and its license plate number to police anyway. (R. 111:11–113:22; Tr. 227:11–229:22.) The vehicle was stopped by Mount Pleasant police several moments later just a short distance from the scene of the robbery. (R. 199:12–201:15; Tr. 364:12–366:15.)

When the vehicle was stopped, there were four occupants: Kevin Smalls, the owner of the car and its driver; Brian Mazyck, who was occupying the front passenger seat; Appellant, who was sitting behind Smalls in the back seat; and

Keenan Coakley, who was sitting next to Appellant and behind Mazyck. The occupants were ordered out of the car and arrested. (R. 201:25–204:19; Tr. 366:25–369:19.)

While the traffic stop was occurring, Blain and Lynn, with the assistance of law enforcement officers, entered the scene of the robbery to determine what property had been taken. Upon investigation, they discovered that the only item of property missing was a cashbox containing approximately one thousand dollars. (R. 67:12–68:2; Tr. 164:12–165:2.) Blain informed police that there had been a uniquely marked bill in the cashbox and gave them a description of the unique markings. (R. 69:23–71:7; Tr. 166:23–168:7.)

Back at the traffic stop, law enforcement officers began to take an inventory of the contents of the vehicle. In relevant part, they discovered various items of clothing, a .45-caliber handgun, and what later proved to be almost eleven hundred dollars in cash. (R. 251:23–272:11; Tr. 434:23–455:11.) One of the bills was distinctively marked and was later identified by Blain to be the bill that had been present in his cashbox prior to the robbery. (R. 71:8–72:9; Tr. 168:8–169:9.) Additionally, the cashbox itself had been recovered at an area approximately one-quarter of a mile away from the scene of the robbery. (R. 228:8–229:14; Tr. 393:8–394:14.)

Based on the totality of evidence and circumstances, law enforcement believed that Coakley, Smalls, Mazyck, and Appellant had each participated to some degree in perpetrating the armed robbery. The chain of events was believed to have begun some time prior to 6:30pm, when Smalls drove his passengers down a dead-

end road, known as Sam Edwards Road, to let two of them out. Sam Edwards Road terminated in a cul-de-sac about a quarter of a mile from the cellular phone store. Law enforcement believed that the two individuals Smalls dropped off were Coakley and Appellant, who then proceeded on foot through overgrown woods and fields to the scene of the robbery. (R. 30:17–38:7; Tr. 127:17–135:7.) Law enforcement believed that, while Coakley and Appellant were making their way to the store on foot, Smalls relocated his vehicle to the front of the cellular phone store. Mazyck stayed with Smalls. Then, at approximately 6:30pm, Coakley and Appellant are believed to have entered the store to commit the robbery. When Smalls observed that the robbery was underway, he is believed to have then left the scene of the robbery and traveled back down Sam Edwards Road, to the cul-de-sac, so he could pick Coakley and Appellant back up. Law enforcement believed that when Coakley and Appellant retreated from the store, they followed the same path they had just taken on foot to rendezvous with Smalls and Mazyck. It was then, several moments later, that Smalls and his passengers were pulled over and arrested on suspicion of armed robbery. It must be emphasized that Appellant does not agree with these facts, but that these are the facts as law enforcement believed them to be.

In any event, a critical fact occurred during the initiation of the traffic stop. When law enforcement signaled Smalls to pull his vehicle to the shoulder of the road, Mazyck claims that Coakley pointed a gun to the back of Smalls' seat and stated something to the effect of, "Drive! I'm not going back to jail." (R. 334:20–337:14; Tr. 519:20–522:14.) Smalls did not attempt to evade police; instead, Smalls pulled

his vehicle to the shoulder and the traffic stop ensued, leading to the arrest of all four occupants. (R. 201:11–211:2; Tr. 366:11–376:2.)

Coakley, Smalls, Mazyck, and Appellant were each booked that evening on suspicion of committing armed robbery. (R. 350:25–351:2; Tr. 535:25–536:2.) Then, on April 4, 2011, Appellant was indicted for committing the armed robbery in question. (Appellant's Indictment; R. 4.) Appellant believes—but is not certain—that all four occupants were indicted at or about the same time and that each individual was indicted separately. Notably, Appellant's indictment does not mention Coakley, Smalls, or Mazyck, and does not reference the existence of a conspiracy or any concerted action in perpetrating the robbery. Appellant maintains his innocence to this day.

Appellant was brought up for trial during the December 2, 2013 term of court. A jury was selected on December 3 and opening statements commenced that afternoon. Despite the fact that Appellant was indicted separately, and despite the fact that Appellant's indictment does not charge him with participating with anyone else to commit the robbery in question, Appellant was tried jointly with Coakley and Smalls. Mazyck testified as a State's witness, despite the fact that he was still under indictment for the armed robbery in question. To Appellant's knowledge, the State never filed a motion to consolidate his indictment with the indictments for Coakley and Smalls, or a motion to consolidate the trial of his indictment with the trials for the indictments of Coakley and Smalls. Furthermore, to Appellant's knowledge, the trial court never held a hearing to determine whether it was proper for Appellant to be tried jointly with Coakley and Smalls.

In any event, at trial, the State never produced an eyewitness that identified Appellant as a perpetrator of the robbery. Neither Blain nor Lynn testified that Appellant was one of the assailants. Furthermore, neither Blaine nor Lynn, nor any witness for that matter, testified that any clothing recovered from Smalls' vehicle matched the clothing worn by the assailants during the robbery, or that the gun recovered from Smalls' vehicle was the gun used in the robbery. Additionally, the State did not produce any physical evidence, including DNA, that established Appellant's presence in the store at the time of the robbery, or that connected Appellant to any property taken from the scene of the crime. In short, the State's case against Appellant was entirely circumstantial.

During the State's case-in-chief, and in particular, during Mazyck's direct examination, the State had Mazyck testify three times within the span of a few minutes to Coakley's statement: "Drive! I'm not going back to jail." (R. 334:20–337:14; Tr. 519:20–522:14.) Prior to this statement's presentation to the jury, Appellant's counsel objected on the basis of the Sixth Amendment right of confrontation. (R. 325:17–330:25; Tr. 510:17–515:25.) It was Appellant's understanding that Coakley would be invoking his Fifth Amendment privilege against providing self-incriminating testimony, which he did invoke, (R. 506:8–509:8; Tr. 762:8–765:8), and therefore, Coakley would not be available as a witness for cross-examination. Appellant's objection was overruled because the trial court did not perceive any Sixth Amendment issue, and the statement was presented to the jury.

On December 6, 2013, the jury returned a guilty verdict against Coakley and Appellant. (R. 634:18–23; Tr. 905:18–23.) Prior to the jury's verdict on his charge,

Smalls pleaded guilty to accessory after the fact to armed robbery. (R. 662:6–667:1; Tr. 973:6–978:1.) The trial court immediately sentenced Appellant, and he received a prison sentence for a term of twenty years. (R. 658:11–14; Tr. 969:11–14.)

ARGUMENTS

I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT, IN LIGHT OF THE FACT THAT THE EVIDENCE ADMITTED AT TRIAL DID NOT ESTABLISH APPELLANT'S GUILT AS CHARGED IN THE INDICTMENT.

A verdict must be directed "in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment." Rule 19(a), SCRCrimP. In cases where the State has failed to present evidence of the offense charged in the indictment, State v. Hepburn, Op. No. 27336, *12 (Dec. 11, 2013), or if the State has presented evidence which merely raises a suspicion that the accused is guilty of the crime alleged in the indictment, State v. Cherry, 361 S.C. 588, 593–94, 606 S.E.2d 475, 478 (2004), a criminal defendant is entitled to a directed verdict.

In the instant case, Appellant was convicted on circumstantial evidence exclusively. There were no eyewitnesses who identified him as a perpetrator, and there was no physical evidence linking him to the scene of the robbery. In these types of cases, when the State seeks to establish guilt through circumstantial evidence, a directed verdict motion must be granted unless the evidence is "substantial." Id., 361 S.C. at 593–94, 606 S.E.2d at 478 (citation omitted). Circumstantial evidence is substantial when it reasonably tends to prove the guilt of the accused, or when it provides a basis from which the guilt of the accused may be fairly and logically deduced. Id., 361 S.C. at 594, 606 S.E.2d at 478 (citations omitted).

When the trial court is presented with a motion for a directed verdict, the court should review the sufficiency of the evidence presented by the State in light of the allegations of the indictment. The indictment is the notice document; its primary purpose is to put the defendant on notice of the nature and scope of what he is called upon to answer. See, e.g., State v. Fonseca, 383 S.C. 640, 646, 681 S.E.2d 1, 4 (Ct. App. 2009); State v. Gentry, 363 S.C. 93, 102–03, 610 S.E.2d 494, 499–500 (2005) (citation omitted). If the State's evidence fails to establish the facts and theories charged in the indictment, then a motion for directed verdict must be granted. See, e.g., New York v. Rubin, 474 N.Y.S.2d 348, 352 (Ct. App. 1984) ("A defendant's right to be tried and convicted of only those crimes and theories charged in the indictment is fundamental." (internal quotation and citation omitted)); West v. Texas, 572 S.W.2d 712, 713 (Tex. Ct. Crim. App. 1978) ("Wherever the indictment charges an offense, the facts and the charge of the court must conform to the charges contained in the indictment . . . ." (citation omitted)).

A. The Content of Appellant's Indictment

A copy of Appellant's indictment has been included in the record on appeal. However, for the Court's convenience, the substance of the indictment is set out below.

Armed Robbery

> That on or about September 15, 2010, in Charleston County, South Carolina, the Defendant, Jarret Graddick, while at 3014 South Morgans Point Road, Mt. Pleasant, South Carolina, by use of force, threats[,] or intimidation and while armed with a deadly weapon, or while alleging, either by action or words, was armed while using a representation of a deadly weapon or other object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, did take and carry away goods and/or monies

> from the person or immediate presence of Phone Smart employees with the intent to permanently deprive the victims of possession thereof, in violation of Section 16-11-330(A) of the South Carolina Code of Laws (1976) as amended.

(Appellant's Indictment; R. 4.)

B. Appellant's Directed Verdict Motion

At the close of the State's case-in-chief, Appellant requested a directed verdict on the basis that there was insufficient evidence to establish that Appellant was involved in the armed robbery at issue. (R. 496:20–497:8; Tr. 721:20–722:8.) The trial court denied Appellant's motion, ruling that the State had presented substantial circumstantial evidence of Appellant's involvement. (R. 427:9–22; Tr. 722:9–22.) Then, at the close of Defendants' case-in-chief, Appellant renewed his motion for a directed verdict, arguing that the State had failed to meet its burden that Appellant was one of the robbers. (R. 515:9–16; Tr. 773:9–16.) The motion was denied. (R. 515:17–24; Tr. 773:17–24.)

C. The State failed to offer evidence sufficient to establish Appellant's guilt under the indictment as charged.

For the Court's convenience, the charges set out in the indictment have been reorganized for clarity. The State's evidence, as well as the lack of State's evidence, is set out below in connection with each specific factual charge.

1. The Allegation: Jarret Graddick was at 3014 South Morgans Point Road, Mt. Pleasant, South Carolina, on or about September 15, 2010.

The State did not offer any direct evidence of this allegation. The victims of the robbery on September 15, 2010 at 3014 South Morgans Point Road did not provide any testimony that identified Appellant as one of the perpetrators. (See R. 50:13–92:8; Tr. 147:13–189:8 (testimony of James Blaine); R. 93:13–109:23; Tr.

209:13–225:23 (testimony of Harlee Lynn).) No bystanding witness identified Appellant as a perpetrator. Not even the State's key witness—Brian Mazyck—could testify that he saw Appellant at the scene of the crime, despite the fact that he was allegedly in front of the store at the time of the robbery. (See R. 300:2–433:6; Tr. 485:2–618:6 (testimony of Brian Mazyck).)

The only evidence offered by the State as to Appellant's presence at the scene of the crime was circumstantial. Mazyck testified that he was present in Smalls' vehicle when Smalls picked Coakley and Appellant up at the end of a dead-end road. (R. 319:10–323:7; Tr. 504:10–508:7.) The record is not clear about the distance of the dead-end road from the scene of the crime; but a review of information maintained by the Charleston County Property Information System indicates that the distance is approximately one-quarter of a mile. (Charleston County Property Information System, *available online at* http://ccgisweb.charlestoncounty.org (Dec. 7, 2014).) This is the closest that any witness affirmatively places Appellant to the store.

Importantly, there was no physical evidence introduced at trial that connected Appellant to being in the store at any time on September 15, 2010. The two victims—James Blain and Harlee Lynn—had conflicting recollections about what the perpetrators were wearing. One said that the perpetrators were wearing hats and sunglasses, (R. 57:7–11; Tr. 154:7–11); the other said they were wearing ski masks, (R. 95:9–19; Tr. 211:9–19). Notably, the police did not recover hats or ski masks from the Defendants. More importantly for the purposes of this appeal, the State did not connect anything that Appellant was wearing at the time of his arrest, or any item

of apparel in his possession, to anything that either victim remembers the perpetrators wearing at the time of the robbery.

The victims also testified that one of the perpetrators had a gun. (R. 57:7–12; Tr. 154:7–12.) A gun was found in Smalls' vehicle. (R. 262:8–267:16; Tr. 445:8–450:16.) However, the State did not offer any evidence that the gun recovered from Smalls' vehicle was the same as the gun used in the robbery, or even that it was of the same type of gun. Although the State offered testimony that Appellant's DNA was found on the gun, (R. 454:24–455:13; Tr. 679:24–680:13), this does not establish that Appellant was holding the gun at the time of the robbery or at the scene of the crime; it means only that, at some point, Appellant had touched the gun that was recovered from Smalls' vehicle, (see, e.g., R. 477:17–478:12; Tr. 702:17–703:12).

The victims also testified that a cashbox was taken from the crime scene. (R. 67:23–68:24; Tr. 164:23–165:24.) The cashbox was recovered by police and examined for physical evidence. (R. 229:2–14; Tr. 394:2–14.) None was found, including DNA, that could directly establish that Appellant had been inside the crime scene on September 15, 2010. Additionally, the police did not recover any perpetrator's fingerprints from the scene of the crime. (R. 274:19–22; Tr. 457:19–22.)

The State's strongest evidence that someone in Smalls' vehicle was responsible for perpetrating the robbery is, first, a statement that Coakley made after Smalls' vehicle was instructed to pull over, and second, the presence of a uniquely marked bill in Smalls' vehicle. To the first item, when blue lights were turned on Smalls' vehicle, Coakley pointed a gun into the back of Smalls' seat and instructed

him to drive. (R. 334:20–335:24; Tr. 519:20–520:24.) As to the second item, one of the victims testified that a uniquely marked bill was present in the cashbox at the time of the robbery. (R. 69:23–71:25; Tr. 166:23–168:25.) This bill was recovered from Smalls' vehicle and positively identified as the bill that had previously been in the cashbox. (R. 69:23–72:9, 270:8–272:11; Tr. 166:23–169:9, 453:8–455:11.) The presence of the uniquely marked bill is circumstantial evidence that someone from Smalls' vehicle had been inside the crime scene; and Coakley's reaction when haled by the police suggests his direct involvement.

There are no such circumstances with regard to Appellant. The State's case against Appellant is built on guilt by association. At the time of the robbery, the police were advised that there were two suspects. While Coakley's conduct and the presence of the uniquely marked bill in Smalls' vehicle may be incriminating, they should be incriminating only as to him. Apart from being in Coakley's company following the robbery, there is no evidence that connects Appellant to the crime. The State did not investigate whether there was another perpetrator—some third-party who was not present in Smalls' vehicle at the time of the arrest, and there was no evidence or testimony ruling that possibility out.

In sum, there is no proof—only conjecture—that Appellant was present at the scene of the crime at the time of the robbery.

2. *The Allegation: Jarret Graddick did take and carry away goods and/or monies from the person or immediate presence of Phone Smart employees.*

As discussed in the preceding section, there is no direct evidence that Appellant took and carried any property from the scene of the crime. The only circumstantial evidence of this allegation is predicated on the assumption—not

proof—that Appellant was involved in the crime because he was in Coakley's company.

3. *The Allegation: Jarret Graddick took and carried away such goods and/or monies with the intent to permanently deprive the victims of possession thereof.*

The State offered no evidence—direct or circumstantial—of this allegation. There was no proof that Appellant participated in the robbery, that he took property from the scene of the crime, or that he intended to permanently deprive the victims of their property. See, e.g., State v. Lee-Grigg, 374 S.C. 388, 402, 649 S.E.2d 41, 48–49 (Ct. App. 2007) ("A defendant may not be convicted of a criminal offense unless the State proves beyond a reasonable doubt that he acted with the criminal intent, or mental state, required for a particular offense." (citation omitted)).

4. *The Allegation: Jarret Graddick accomplished this by use of force, threats, or intimidation and while armed with a deadly weapon, or while alleging, either by action or words, was armed while using a representation of a deadly weapon or other object which a person during the commission of the robbery reasonably believed to be a deadly weapon.*

As explained previously, there was no direct evidence of this allegation, and the only circumstantial evidence is predicated on the assumption—not proof—that Appellant was involved in the crime because he was in Coakley's company. A felony conviction—like ambition—must be made of sterner stuff. Shakespeare, Julius Caesar, Act III, Scene 2.

D. The State did not prove the existence of a conspiracy between Appellant and Coakley through which Appellant could be held culpable for Coakley's conduct.

Proving the existence of a conspiracy among Coakley, Smalls, and Appellant was essential to the State's case against Appellant. The State could not possibly have

obtained a conviction against Appellant without introducing evidence of Coakley's and Smalls' statements and conduct, and then imputing that evidence against Appellant. However, a searching examination of the record reveals no evidence through which the existence of a conspiracy involving Appellant was established.

The existence of a conspiracy may be shown either by an express agreement of the parties, or by circumstantial evidence and the conduct of the parties. See, e.g., State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001). In a criminal case, particularly where the existence of a conspiracy is necessary for the State to prove essential elements of the crime with which the defendant is charged, the State must prove the existence of the conspiracy beyond a reasonable doubt. See, e.g., State v. Sims, 377 S.C. 598, 608, 661 S.E.2d 122, 127 (Ct. App. 2008).

In this case, the State failed to meet that burden. There was no direct evidence of the existence of a conspiracy among Coakley, Smalls, and Appellant. There was no testimony of any premeditated scheme to rob the store in question. There was no evidence of any conversation regarding concerted action. There were no text messages introduced which suggested concerted action. The only evidence offered by the State to suggest that Appellant participated in the robbery was that there were two perpetrators, and that after the robbery, Appellant emerged from the woods with Coakley at the end of the dead-end street one-quarter of a mile away from the scene of the crime. This is hardly proof that Appellant participated in a scheme to commit armed robbery, nor does it satisfy the requirement that the State prove the existence of a conspiracy beyond a reasonable doubt. As a consequence, the State failed to

carry its burden of proving a conspiracy, which was necessary to tie evidence of any of Coakley's and Smalls' acts to Appellant.

E. The State did not allege the existence of a conspiracy in the indictment; therefore, as a matter of law, the State could not at trial—and cannot now—rely on conspiratorial liability to establish Appellant's guilt.

The State's challenge in a criminal prosecution is to prove what it charges in the indictment, and to charge in the indictment what it intends to prove at trial. The State must set out in the indictment all the material facts necessary to establish a criminal defendant's guilt, and at trial, endeavor to prove the existence of those facts. The State cannot omit material facts from the indictment, and then, at trial, effectively amend the indictment to conform to the evidence that it needs to obtain a conviction. See, e.g., Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011).

But that is exactly what the State did in this case. The indictment did not allege that Appellant acted in concert with either Coakley or Smalls. On its face, the indictment alleges that Appellant acted alone in committing armed robbery. As discussed above, the State did not meet—nor could have met—its burden of proof on that charge. The only way that the State could have secured a conviction against Appellant is to couple his presence in Smalls' vehicle with Coakley's suspicious statements and conduct. Yet the indictment is silent—absolutely silent—as to the State's theory of conspiratorial liability, which means it is silent as to the State's intention to establish Appellant's guilt through evidence against other defendants.

This is impermissible. The indictment is a notice document; it exists to provide criminal defendants notice of their charge and the material facts the State reasonably anticipates relying upon to establish their guilt. An indictment that alleges

a defendant's guilt through concerted action is very different than an indictment that alleges a defendant's guilt by virtue of his own conduct. The defenses to the two types of indictments can differ dramatically; likewise, a defendant's trial strategy may differ dramatically depending on whether he is charged as an individual or as part of a criminal conspiracy. For that reason, the existence of a conspiracy is a material fact that must be alleged in the indictment, especially when the State intends to establish proof of one defendant's guilt through evidence against his co-defendant.

In any event, it is fundamentally unfair for the State to put a criminal defendant on notice that he will be tried according to one theory involving one set of evidentiary facts, and then, at trial, to announce for the first time that the State will be pursuing a different theory, and one that involves facts, circumstances, and evidence derived from unnamed conspirators. Consequently, if the indictment fails to allege the existence of a conspiracy—or at least concerted action—with regard to the commission of a criminal offense, then the State must be prohibited from relying upon evidence of conspiracy or concerted action to meet material elements of a charge brought in an indictment. In this case, this proposition requires a conviction under the State's indictment to stand or fall according to the State's evidence against Appellant and Appellant alone.

The State could have easily avoided this problem in any one of several ways. The State could have jointly indicted Coakley, Smalls, and Appellant so that they were charged in the same instrument; it chose not to. The State could have alleged in the indictment that Appellant, acting in concert with Coakley and Smalls, perpetrated the armed robbery in question; it chose not to. Before trial, the State could have filed

a motion to consolidate the indictments against Coakley, Smalls, and Appellant; it chose not to. Even at trial, the State could have filed a motion to amend the indictment to conform to the evidence; yet it chose not to. Instead, and for reasons known only to the State, Appellant was indicted separately without any notice whatsoever that he would be tried jointly, or that any evidence of Coakley's or Smalls' guilt would be imputed to him.

The State made the tactical decision to tie its own hands in offering evidence of Appellant's guilt through alleged conspirators, and it must live with the consequences of that limitation. Neither at trial nor on this appeal may the sufficiency of evidence to support Appellant's convictions be based on evidence of the actions or conduct attributable to Coakley or Smalls. Consequently, the only evidence that can be used against Appellant is evidence of Appellant's own conduct and actions.

F. The trial court's denial of Appellant's motion for a directed verdict must be reversed.

For the reasons discussed above, the State failed to prove each and every material fact necessary to establish Appellant's guilt for the crime of armed robbery as alleged in the indictment, and accordingly, the trial court's decision to deny Appellant's motion for a directed verdict must be reversed.

II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING COAKLEY'S INCULPATORY STATEMENT.

During its case-in-chief, the State called Brian Mazyck. Mazyck was also indicted for the same armed robbery at issue, (R. 340:4–17; Tr. 525:4–17), and he was present in the vehicle that Appellant, Coakley, and Smalls occupied at the time of

their arrest. During his direct examination, Mazyck testified to a statement made by Coakley that was incriminatory. However, because the State elected to pursue a theory of concerted action against all Defendants, this statement was also imputed to Appellant. This is particularly troublesome since Coakley did not testify at trial. As explained below, the admission of this statement constitutes a significant legal error, and its prejudice is substantial.

A. Coakley's Inculpatory Statement

Mazyck testified that, immediately after the robbery was alleged to have occurred, Smalls was driving around the vicinity of 3014 South Morgans Point Road. Appellant, Mazyck, and Coakley were his passengers. Suddenly, a police cruiser appeared behind them and signaled for Smalls to pull over. At this point, Coakley grabbed a gun, pointed it at the back of the driver's seat—the seat occupied by Smalls, and yelled something to the effect of, "Drive! I'm not going back to jail." (R. 334:20–337:15; Tr. 519:20–522:15.)

Appellant anticipated that the State would try to elicit this statement and objected prior to its presentation to the jury. (R. 325:17–331:17; Tr. 510:17–516:17.) The basis of the objection was that the statement, if presented to the jury, would be a violation of Appellant's Sixth Amendment right to confront witnesses against him. See, e.g., Bruton v. United States, 391 U.S. 123 (1968). The trial court overruled Appellant's objection, stating, among other things, "It's not a Bruton issue[;] it has nothing to do with Bruton." (R. 328:1–330:25; Tr. 513:1–515:25.)

B. The admission of Coakley's inculpatory statement violated Appellant's Sixth Amendment right of confrontation and was substantially prejudicial to Appellant's interests.

1. The Sixth Amendment Right of Confrontation & the Bruton Doctrine

The Sixth Amendment to the United States Constitution guarantees the right of a criminal defendant "to be confronted with the witnesses against him." U.S. Const. Amend. VI ("the Confrontation Clause"). It is well-established that "[t]he right of confrontation includes the right to cross-examine witnesses." Richardson v. Marsh, 481 U.S. 200, 206 (1987) (citation omitted). These rights are extended against the states through the Fourteenth Amendment. U.S. Const. Amend. XIV, § 1.

A Sixth Amendment confrontation issue arises whenever testimony that reasonably incriminates the defendant is offered at a criminal trial from a witness who is not available for cross-examination. Generally, in these cases, the testimony is not admissible.

However, a particularly troublesome Sixth Amendment issue arises in joint criminal trials where one defendant makes an incriminating statement that implicates his co-defendant, and the declarant-defendant is not available to testify, whether by invoking his Fifth Amendment privilege or otherwise. In these cases, the statement may be admissible against the declarant-defendant, but not as to his co-defendant. Consequently, the United States Supreme Court has established the constitutional rule that "where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand." Richardson, 481 U.S. at 206 (citation omitted).

Although the rule set out above discusses confrontation infringements in terms of pretrial "confessions," the word "confession" is not limited to circumstances in which the declarant makes an inculpatory admission to police. Instead, the sense in

which "confession" is used describes any statement that reasonably incriminates the defendant, whether the statement was made to police or to a third party. See, e.g., State v. Evans, 316 S.C. 303, 450 S.E.2d 47 (1994).

These confrontation standards were initially addressed in Bruton v. United States, 391 U.S. 123 (1968). Bruton involved the joint trial of two criminal defendants; one of the defendants had given a statement before trial that reasonably incriminated himself as well as his co-defendant. The declarant-defendant did not testify at trial, and the trial court allowed his statement to be admitted into evidence. The co-defendant did not have an opportunity to cross examine the declarant-defendant; however, the trial court ruled that any prejudice that may have resulted to the co-defendant was mitigated by the fact that the jury was instructed to consider the statement only as evidence against the declarant-defendant. The co-defendant was convicted.

On appeal, the Supreme Court held that the admission of the declarant-defendant's statement into evidence was a violation of the co-defendant's Sixth Amendment right of confrontation. Regardless of any limiting or curative instruction the trial court may have given, the prejudicial effect of admitting the declarant-defendant's statement was powerfully adverse to the co-defendant. In essence, the declarant-defendant had become a witness against his co-defendant, and the co-defendant had no opportunity to confront the adverse testimony. Consequently, in light of the "devastating" nature of the evidence, the Supreme Court reversed the co-defendant's conviction and remanded the case for a new trial.

The Bruton rule was further refined through Richardson v. Marsh, 481 U.S. 200 (1987). Like Bruton, Richardson was a joint criminal trial that involved a pretrial confession of one defendant that implicated both defendants. However, the declarant-defendant's confession was redacted so that there was no reference to the co-defendant. The Supreme Court held that, under these circumstances, where there is no facial implication of his co-defendant, a defendant's pretrial confession does not place the declarant-defendant in the position of being a witness against his co-defendant; therefore, there is no Sixth Amendment confrontation issue. All that is necessary under the Sixth Amendment in these circumstances is that the trial court instruct the jury that the declarant-defendant's statement may only be used as evidence against the declarant-defendant; it may not be used as evidence against his co-defendant. Richardson, 481 U.S. at 206. "This accords with the almost invariable assumption of the law that jurors follow their instructions . . . ." Id. (citation omitted).

Therefore, following Bruton and Richardson, the confrontation analysis among jointly tried co-defendants begins with the basic question, *Has one defendant made a statement that reasonably incriminates his co-defendant?* If so, the next question is whether the declarant-defendant will testify. If the declarant-defendant does not take the stand and is therefore unavailable for cross-examination, then the question is whether the declarant-defendant's statement incriminates his co-defendant expressly or by implication. If it is expressly incriminatory and it cannot be reasonably redacted, then Bruton prohibits the statement's admission into evidence. See also Gray v. Maryland, 523 U.S. 185 (1998). If, however, the statement is incriminating by implication only such that redaction is not necessary, then one final

question must be asked: *Did the trial court give a limiting instruction that the jury may not consider the declarant-defendant's statement as evidence against his co-defendant?* If a limiting instruction was given, then no one's Sixth Amendment confrontation rights have been adversely affected. If, however, a limiting instruction was not given, then the non-declarant-defendant's Sixth Amendment rights were violated. See also State v. Jackson, Op. No. 5278 (Ct. App. Nov. 5, 2014); State v. Henson, Op. No. 27354 (Jan. 22, 2014); State v. McDonald, 400 S.C. 272, 276, 734 S.E.2d 167, 169 (Ct. App. 2012); State v. Page, 378 S.C. 476, 482, 663 S.E.2d 357, 359 (Ct. App. 2008).

2. *Appellant's Sixth Amendment confrontation right was infringed.*

Coakley's statement—"Drive! I'm not going back to jail."—reasonably incriminates Appellant. From the outset of trial, the State argued that Appellant, Coakley, and Smalls participated jointly in the commission of the armed robbery. (R. 30:17–38:7; Tr. 127:17–135:7.) Both Appellant's and Coakley's trial strategy focused on the lack of any direct evidence linking them to the alleged crime scene. (R. 38:11–44:14; Tr. 135:11–141:14.) Therefore, the State could have had only one purpose in offering Coakley's statement: To provide evidence that, in the immediate aftermath of the armed robbery he allegedly did not participate in, Coakley was acting exactly as the perpetrator would by trying to flee the area of the crime and evade the police.

To this point, the State may claim that this statement is evidence of Coakley's conduct only, not Appellant's. However, to accept this proposition, the Court would have to turn a blind eye to the State's entire theory at trial. The State presented

evidence that two people actively committed the armed robbery; despite the fact those perpetrators were never positively identified, the State argued it was Coakley and Appellant. Therefore, when the State offered Coakley's self-incriminating statement into evidence, through its theory of conspiratorial liability, the State was also effectively pointing Coakley's finger at Appellant. This is sufficient to trigger further inquiry into whether Appellant's Sixth Amendment rights were violated and to engage in the Bruton analysis.

The second and third steps of the analysis are easily resolved. Coakley did not testify at trial, having exercised his Fifth Amendment privilege against providing self-incriminating testimony. Therefore, he was unavailable as a witness. As for the content of Coakley's statement, it does not incriminate Appellant by express reference.

The final step of the analysis is to examine whether the trial court instructed the jury that Coakley's statement could only be used against him and not against Appellant. A searching examination of the record reveals that no such instruction was given; not at the time that Coakley's statement was elicited, (R. 335:8–337:15; Tr. 520:8–522:15), nor at the time when the jury was charged, (R. 600:2–624:15; Tr. 858:2–882:15). In fact, as noted above, the trial court did not believe a Sixth Amendment issue was presented at all in connection with Coakley's statement. Consequently, and consistent with the state and federal authorities cited previously, Appellant's Sixth Amendment right of confrontation was infringed.

3. The infringement of Appellant's Sixth Amendment confrontation right was not harmless error.

Violations of the right of confrontation are subject to a harmless error analysis. See, e.g., State v. Holder, 382 S.C. 278, 285, 676 S.E.2d 690, 694 (2009) (citation omitted). "A Confrontation Clause error is harmless if the evidence is overwhelming and the violation so insignificant by comparison that [the Court] is persuaded, beyond a reasonable doubt, that the violation did not affect the verdict. Considerations include the importance of the witness's testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case." Id. (internal citations, quotation, and alterations omitted). In light of these considerations, it cannot be said that the error was harmless, and certainly not beyond a reasonable doubt.

How important was Coakley's testimony against Appellant? Critical. Given the content of Coakley's statement and its close proximity in both time and geography to the commission of the armed robbery, the statement can easily be construed as an admission of Coakley's guilt. Furthermore, as noted above, the State's emphasis on the theory that Appellant was Coakley's accomplice almost certainly resulted in the imputation of Coakley's admission to Appellant. As the Supreme Court has observed, a non-testifying co-defendant's "incriminations [are] devastating to the defendant." Bruton, 391 U.S. at 136.

Was the testimony cumulative, and was there corroborating evidence? No. No eyewitness positively identified either Appellant or Coakley at the alleged scene

of the robbery, and there was no physical evidence recovered from the store or from property taken from the store that connected Appellant to the scene or the crime.

What was the extent of cross-examination permitted? None. Coakley invoked his Fifth Amendment privilege against offering self-incriminating testimony and was therefore unavailable as a witness.

What was the overall strength of the State's case? The State's case against Appellant was entirely circumstantial, and as discussed throughout this brief, there was no physical evidence that linked either Appellant to the scene of the crime or the robbery itself.

In light of the evaluation of the foregoing factors, it cannot be said that the violations of Appellant's Sixth Amendment confrontation right were harmless beyond a reasonable doubt. However, in addition to the foregoing factors, there are other circumstances which bolster the prejudicial character of Coakley's statement as against Appellant's interests.

4. *As to Appellant, the admission of Coakley's inculpatory statement is substantially more prejudicial than probative and is impermissible propensity evidence.*

Rule 403 of the South Carolina Rules of Evidence allows for the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. Somewhat rephrased, evidence of propensity cannot be used to establish guilt.

In the instant case, Coakley's inculpatory statement—that he was "not going back to jail"—represents the very type of statement that Rules 403 and 404 were intended to exclude. The reason why is obvious. For a person to declare that he is not going "back" to jail necessarily implies that the declarant has been to jail previously. In a case such as this one, where the State's evidence is entirely circumstantial, there is a significant probability that an ordinary, reasonable juror—upon hearing testimony that an accused said, "I'm not going back to jail"—could decide the defendant's guilt based on the fact of his prior criminal history; at the very least, a juror's knowledge of a defendant's prior criminal history could easily end up as a factor in the juror's decision-making process, especially in a case built entirely on circumstantial evidence.

The prejudicial nature of such evidence is compounded under the circumstances of this case. The jury heard Coakley's inculpatory statement three times from the same witness within the span of a few minutes. Suffice to say, the fact of Coakley's prior criminal history was brought home to the jury.

The prejudice that Coakley incurred is relevant to this appeal because Appellant's liberty interests were collateral damage which he was hapless to defend against. As discussed in the preceding section, the State proceeded under a theory of concerted criminal action. To that end, the State argued that "the hand of one is the hand of all," and the jury was so charged. By logical extension, the mouth of one is the mouth of all. Cf. Rule 801(d)(2)(E), SCRE. Consequently, in a joint trial, it is inescapable that the prejudicial effect of one defendant's improvident statement is imputed to, and inures to the detriment of, his co-defendants.

And so it is with Appellant. When the ordinary, reasonable juror hears—three times, no less—that a defendant who denies committing the crime in question has a prior criminal history for which he served jail-time, there is a reasonable likelihood that not only will the juror believe it is more likely that the defendant committed the crime of which he is accused, the juror is also more likely to be convinced of the co-defendant's guilt.

5. As to Appellant, the admission of Coakley's inculpatory statement is impermissible character evidence.

There is also a significant risk that Appellant's conviction was based, at least in part, on an impermissible character inference arising from Coakley's statement. As discussed above, when Coakley states, "I am not going back to jail," this is tantamount to him saying, "I have a criminal history." At that point, there is a substantial risk that Coakley would be labeled by an ordinary, reasonable juror as "a criminal." And this gives rise to the impermissible inference: If Coakley is a criminal, and Appellant socializes with and was arrested with Coakley, then Appellant must at least also have a criminal disposition. After all, conventional wisdom—for whatever it's worth—teaches that *birds of a feather flock together.* In any event, Appellant was additionally prejudiced by the wrongful admission of Coakley's statement into evidence because of the statement's reasonably foreseeable tendency to adversely impact Appellant's character.

C. The only remedy capable of correcting a constitutional error with prejudice of this magnitude is to vacate Appellant's conviction and remand the case for a new trial.

Appellant's Sixth Amendment right of confrontation was violated by the admission of Coakley's inculpatory statement without a corresponding limiting

instruction. The risk that Appellant's conviction was achieved, at least in part, through unfair prejudice is substantial. Accordingly, the only remedy capable of curing the infringement of Appellant's constitutional rights is to vacate Appellant's conviction and remand the case for a new trial.

III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN CONSOLIDATING THE TRIAL ON APPELLANT'S INDICTMENT WITH THE TRIAL ON THE INDICTMENTS FOR COAKLEY AND SMALLS, IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS.

It is well-settled that criminal defendants who are facing charges for all but the most minor offenses are entitled to legal representation. That right is established in the federal constitution, U.S. Const. Amend. VI, and is extended against the states through the due process clause of the Fourteenth Amendment, U.S. Const. Amend. XIV, § 1. See, e.g., Alabama v. Shelton, 535 U.S. 654 (2002). It is equally well-settled that the right to legal representation necessarily implies that counsel have a reasonable opportunity to prepare for trial. Powell v. Alabama, 287 U.S. 45 (1932).

Powell's legacy is that it is the case through which the United States Supreme Court directed trial judges—state and federal—to safeguard the integrity of the judicial process by appointing legal counsel for incompetent criminal defendants facing serious charges, regardless of whether those defendants actually request counsel. But there's more to Powell than its popular legacy. The decision notes that, in the underlying criminal case, the time from which the defendants were indicted until the time of trial was six days. Id. at 53. As of the morning of trial, no one represented the defendants, despite the fact the defendants were facing capital charges. Id. at 52–58. Two attorneys reluctantly appeared on their behalf. However, "[n]o attempt was made to investigate [the facts]. No opportunity to do so was given.

Defendants were immediately hurried to trial." Id. at 58. And, not surprisingly, the defendants were convicted.

Powell chastised the trial judge for failing to appoint counsel for the defendants from the outset of proceedings. In addition, Powell expresses the Court's deep concern with how swiftly the prosecution moved and how little time there was to investigate the facts and prepare a defense. The mere act of appointing counsel prior to the morning of trial would not have rectified the constitutional infirmities associated with the proceedings. Therefore, in addition to holding that trial judges must protect the integrity of judicial process by appointing counsel, Powell is a recognition that the right to counsel necessarily requires counsel be given a reasonable opportunity to prepare a defense; the right of preparation is part and parcel of due process and the right to counsel.

While the circumstances of the instant case are not so egregious as Powell, they are no more constitutional. Appellant was arrested on suspicion of armed robbery on September 15, 2010; he was indicted on April 4, 2011. Appellant was not brought up for trial until December 3, 2013. During the two years, seven months, and twenty-nine days between the indictment and jury selection, Appellant was proceeding under one indictment that named him and him alone as the perpetrator of an armed robbery. Similar indictments had been issued for Coakley and Smalls, respectively. Yet, on the morning of jury selection, it became apparent that all three indictments would be tried together.

The record does not indicate that the State ever filed a motion to consolidate the indictments into one case, or alternatively, for the indictments to be tried together.

See, e.g., State v. Jones, 325 S.C. 310, 314, 479 S.E.2d 517, 519 (Ct. App. 1996) (suggesting that the State may consolidate indictments of separate defendants for one trial only pursuant to a timely motion). Nor does it appear that the trial court consolidated the indictments for trial on its own motion. Perhaps more importantly, the transcript does not reveal any discussion among counsel and the court as to whether consolidation was even legally appropriate. It is well-settled that indictments of separate defendants should not be tried together if there is a serious risk that the joint trial will compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt. See, e.g., State v. Halcomb, 382 S.C. 432, 440, 676 S.E.2d 149, 153 (Ct. App. 2009) (discussing joint trials from the perspective of motions to sever). In this case, no such hearing was held. It seems as though consolidation *just happened.* At a minimum, the trial court should have engaged the parties in a fact-finding hearing prior to consolidating separate indictments for a joint trial, specifically to determine whether the anticipated evidence was likely to result in unfair prejudice, and providing the co-defendants with a meaningful opportunity to contest consolidation.

These circumstances constitute legal error, and they were prejudicial to Appellant's interests. To begin with, there is presumptive prejudice. It should not be controversial to presume that a lawyer, who has been preparing his client's defense under a belief that the client will be tried individually and that the State will not be proving his client's guilt through evidence of other unnamed conspirators' statements and conduct, would be prejudiced by discovering—on the eve of trial—that not only was his belief about the State's trial theory, strategy, and evidence mistaken through

no fault of his own but because the indictment did not put him on notice of the State's true intentions, but also, that he would be required to overhaul his own defensive strategy as he is picking the jury. That, frankly, is unconscionable.

There do not appear to be any South Carolina cases directly on this point. However, in a line of cases coming out of Florida, the appellate courts of that state have consistently held that the act of consolidating indictments of separate defendants on the eve of trial is presumptively prejudicial and requires the reversal of any resultant conviction. The seminal case is Brown v. Florida, 424 So.2d 950 (Fla. Ct. App. 1983). In Brown, two defendants were charged in separate criminal informations for the crime of burglary. On the same day that jury selection was commenced, prosecutors moved to consolidate the cases. The trial court granted the motion, and opening arguments began two days later. Both defendants were convicted.

However, their convictions were reversed. The appellate court held that the decision to consolidate the cases two days before trial was prejudicial error implicating the right to counsel: "The constitutional right to be represented by counsel necessarily carries with it the right to have a reasonable time in which to prepare for trial. In this case, appellants were clearly denied their due process right to have a reasonable opportunity to prepare for [a joint] trial" by having only two days to do so. Id. at 954 (citation omitted). The court went on to explain that "the test for determining whether a defendant has been prejudiced by an untimely motion to consolidate is whether the defendant has been given a reasonable period after consolidation to prepare for the consolidated trial. When the period between

consolidation and trial is so short that the defendant is denied a reasonable opportunity to prepare a defense for a joint trial, such a defendant has clearly been prejudiced by the denial of substantial procedural rights." Id. In Brown, the court viewed the two-day period between consolidation and trial to be presumptively unreasonable, and therefore, presumptively prejudicial. The remedy in Brown was that the defendant's conviction was reversed. See also Williams v. Florida, 600 So.2d 540 (Fla. Ct. App. 1992) (reversing convictions where trials of defendants under separate criminal informations were consolidated on the day of trial for the reasons articulated in Brown).

In this case, the State may contend that, if Appellant really thought he were prejudiced by consolidation on the day of trial, Appellant should have filed a motion for a continuance. But this would be manifestly unfair. Not only does a criminal defendant have the right to counsel who have had a reasonable opportunity to prepare to meet the State's evidence and theories, he also has a right to a speedy trial. At the point that Appellant's trial began, he had already been waiting two-and-a-half years for his day in court. A criminal defendant should not be forced to elect between a speedy trial and an adequate opportunity to prepare for trial, particularly when the State's conduct is responsible for creating the dilemma.

But there is more than presumptive prejudice here; there is also actual prejudice. As described above, the consolidation of Coakley's, Smalls', and Appellant's indictments for trial resulted in the circumstance where Appellant's Sixth Amendment right of confrontation was infringed. It is easy to call balls and strikes long after the game is over; and certainly, there are many things that happen during

the course of trial that no one could have foreseen. But in this case, the fact that Mazyck was likely to testify to Coakley's inculpatory statement in violation of Appellant's Sixth Amendment right of confrontation was known to not only Appellant's counsel, it was known to the State. (R. 352:15–357:7; Tr. 537:15–542:7.) Had there been a reasonable opportunity to contest consolidation prior to the commencement of trial, perhaps a hearing on consolidation could have been held; perhaps consolidation would have not happened at all; or, perhaps, the trial court could have issued an order in advance prohibiting the State from eliciting the statement. There were a number of ways that the violation of Appellant's Sixth Amendment rights could have been prevented, but none of them were practicable once consolidation *just happened* on the morning of jury selection.

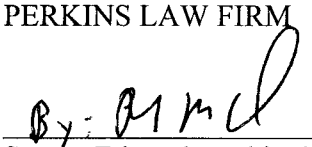
Consequently, it was prejudicial error for the trial on Appellant's indictment to be consolidated with the trials on the indictments for Coakley and Smalls, and as a consequence, the only appropriate remedy is to reverse Appellant's conviction and remand the case for a new trial.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Court issue an order which reverses the trial court's denial of Appellant's motion for a directed verdict, or alternatively, which vacates the conviction and sentence imposed by the court below and remands the case for a new trial, and which provides for any such other and further relief as the Court deems just and proper.

Respectfully submitted,

PERKINS LAW FIRM

By: 

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CERTIFICATION OF COUNSEL

The undersigned counsel for Appellant hereby certifies that this final principal brief complies with Rule 211(b), SCACR.

I SO CERTIFY.

By: M M D

Steven Edward Buckingham

May 13, 2015

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

R. Markley Dennis, Circuit Court Judge

Appellate Case No. 2013-002665
Criminal Case No. 2011-GS-10-2074

State of South Carolina.....Respondent,

vs.

Jarret Graddick.....Appellant.

APPELLANT'S PROOF OF SERVICE

The undersigned counsel for Appellant hereby certifies that a true copy of the Appellant's Final Opening Brief for the above-referenced case has been served upon Deborah R.J. Shupe, Esq., at Rembert Dennis Building, Post Office Box 11549, Columbia, SC 29201, this 13th day of May, 2015.

[Signature Block Follows]

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SUBSCRIBED AND SWORN TO before me
this 13th day of May, 2015.

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Notary Public for South Carolina
My Commission Expires: July 24, 2022.