THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM LANCASTER COUNTY
R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2014-000594

The State, ... Respondent,

v.

Devatee Tymar Clinton, ... Appellant.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The trial court abused its discretion in failing to admit the statements of Victim's four-year-old son to first responders.

The primary issue raised in the Appellant's Brief relates to the trial court's failure to apply clear precedent from our State Supreme Court that is directly on point to the issue of the oldest son's statements to first responders. While first half-heartedly arguing against the preservation of this issue on appeal, despite the trial court's clear ruling on the record denying the admittance of the statements, the State's Respondent's Brief avoids any meaningful analysis of State v. M. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002) altogether. Instead, the State advocates for a standard of admissibility for an excited utterance that is impossible to attain, while not addressing the merits, at all, of Clinton's argument as to the admission of the oldest child's statements as present sense impressions. Finally, the State engages in improper speculation as to the source of the oldest child's statements, creating facts and theories out of whole cloth that have no basis or support in the record. For all of these reasons, the State's Brief fails to overcome or justify the trial court's clear error of law and abuse of discretion in excluding the oldest child's statements and the trial court should be reversed.

a. The statements were raised to and ruled upon by the trial court and are therefore preserved for this Court's review.

To start, the State devotes an unenthusiastic single page to its argument that Clinton's excited utterance argument on appeal is unpreserved for this Court's review. See Resp. Br. at 7-8. However, this argument is deserving of the tepid support it was given. In order for an argument to be preserved for appellate review, it must be raised to and ruled upon by the trial court. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (describing the "long-established preservation

requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments") (citing Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995) (appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court) (additional citations omitted)); see also State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) (stating an issue must be raised and ruled upon in the trial court in order to be preserved for appellate review). Notwithstanding, "[s]o long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon ... counsel to harass the judge by parading the issue before him again." State v. McDaniel, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) (internal quotations omitted).

Here, Clinton's contention that the trial court abused its discretion in excluding the oldest child's statements to first responders is clearly preserved for review. As discussed extensively in the Brief of the Appellant, the issue of these statements was first raised to the trial court by way of the Solicitor's pre-trial motion *in limine*. **(R. pp. 14-36).** The trial court and the Solicitor were initially distracted by a discussion as to whether an additional, but inapplicable, element of competency was required in the evaluation of the excited utterance hearsay exception.[1] **(R. pp. 18-20).** Upon further consideration, however, the trial court correctly concluded in the *in limine* hearing that no finding of competency was required and the oldest child's statements could be admitted as excited utterances, assuming the elements of the exception and sufficient foundation were met. **(R. pp. 34-36).**

[1] See discussion, infra, regarding the preservation and merits of Clinton's present sense impression argument.

However, when Clinton's counsel cross examined Officer Ken Taylor, one of the officers to whom the oldest child made his statements, the trial court inexplicably reversed course and sustained the State's renewed objection to the oldest child's statements coming into evidence. **(R. p. 259).** As the colloquy between Officer Taylor and Clinton's counsel demonstrates, **(R. pp. 258-59)** (included in its entirety in the Brief of the Appellant at 15-16), foundation for the child's statements was laid and when Clinton's counsel sought to elicit the hearsay statement, the Solicitor immediately renewed his previous, *in limine* objection **and the trial court sustained the objection and directed Clinton's counsel to ask his next question. (R. p. 259).**

The State's argument that an "adequate" proffer was not made by Clinton's trial counsel widely misses the mark and misstates the applicable standard.[2] The trial court was under no misconception as to the content of the proffered hearsay statement, which is the purpose of an appellate court's review of the "adequacy" of the proffer.[3] See, e.g., Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 435 n.1, 472 S.E.2d 612, 613 n.1 (1996) (discussing the sufficiency of a proffer in the context of whether or not the record is clear as to the content of the rejected testimony, holding "[w]e find the proffered testimony fairly shows what the rejected testimony would have been") (citing State v. Roper, 274 S.C. 14, 260 S.E.2d 705 (1979)). The record is unquestionably clear

[2] By imposing an additional layer of review related to the "adequacy" of the proffer, the State seeks to lay and spring a trap on unwitting trial counsel. But see Elam v. SC Dep't of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004) (holding that court rules and preservation requirements "should not be written or interpreted to create a trap for the unwary lawyer or party"). Moreover, even though Clinton raised the issue and received an adverse ruling thereon by the trial court, the State implies that his trial counsel should have harassed the trial court about a change of mind, a practice this Court has expressly protected trial counsel from having to undertake. See McDaniel, supra.

[3] The State's supporting case law on this point is therefore not relevant to the situation that occurred in this case. See Resp. Br. at 7.

as to the content of the hearsay statements, based on the *in limine* hearing. **(R. pp. 14-36).** Here, the proffer of the hearsay testimony was made through the attempted elicitation of the statement from Officer Taylor. Under the case law of this State, that was a proffer of the excited utterance; therefore, the issue was **raised** to the trial court. As stated above, the trial court thereafter sustained the Solicitor's renewed objection. Consequently, the record is unequivocal that this issue was **ruled upon** by the trial court. And so it is preserved for this Court's review.

b. The State fails to refute the controlling precedent of the Supreme Court in *State v. M. Sims*, 348 S.C. 16, 558 S.E.2d 518 (2002).

Beyond challenging the preservation of the argument and the adequacy of the proffer, the State does not refute the Supreme Court's decision in Sims, the facts of which are startling similar to this case and whose holdings as to the excited utterance exception are controlling. Initially, the State concedes the first element of the excited utterance test as to the oldest child's statements relating to a startling event or condition. Resp. Br. at 10 ("As to the first requirement, Respondent does not dispute that the child's statements "relate to a startling event or condition."). Instead, the State contends that Clinton failed to demonstrate that the oldest son was under the stress of excitement when the statements were given to first responders.[4]

The focus of the State's brief is on the demeanor of the child when he provided the statements to first responders. Yet, in Sims, the Supreme Court expressly **de-emphasized** the analysis of the person's demeanor in the context of an excited utterance where the declarant is a child. 348 S.C. at 22, 558 S.E.2d at 521. The child's age and the

[4] However, as argued in the Brief of the Appellant, see n.15, the State did not contend at trial that the length of time between the incident and the child's statements was too great to meet the temporal restrictions traditionally applied to an analysis of excited utterances, thus that argument has been waived.

severity of the startling event were given more probative value than the child's "demeanor" with first responders. Id. Thus, the State's focus on the fact that there is "no evidence that the four year old declarant was crying, despondent or even upset by the time he made the declarations at issue" is the incorrect standard applicable under the express holdings of Sims.

Moreover, the totality of the circumstances clearly demonstrates that the oldest child had personal knowledge to support the statements he made to first responders. As described in the Initial Brief, it is unrefuted that the oldest child was in the mobile home, and after seeing his mother in that condition, he is the person who went next door to notify neighbors. **(R. pp. 19; 23-24; 258).** According to the testimony of Officer Taylor, the oldest child had his mother's blood on his clothing, as did his siblings. **(R. pp. 257-58).** His actions are what precipitated the police and first responders coming to the mobile home in the first place. **(R. pp. 19; 23-24).** Moreover, the statements that the oldest child made to police officers and first responders on multiple occasions were in the form of declarative sentences—*i.e.*, "Shi's daddy shot my Momma," "Shortycake shot my Momma," and "Jamia's Daddy hurt[5] my Momma"— with no question but that the oldest child perceived the event and is reporting what he saw. **(R. pp. 15-19).**

Moreover, the State's emphasis on the oldest child witnessing the event ignores the clear holding in Sims, which, ironically, the State quotes in its brief. Resp. Br. at 9 (quoting Sims, 348 S.C. at 21, 558 S.E.2d at 521 ("because it relates to the startling event

[5] Additionally, while the State focuses its attention on the oldest child's statements that declared Shi's Daddy/Shortycake to have "shot" his mother, the State ignores the additional statement that Jamia's Daddy "hurt" his mother, which arguably does not require the oldest child to have witnessed the fatal shot in order for the statement to come in under the excited utterance.

of the son seeing his mother **after she was attacked and possibly while she was being attacked**.") (emphasis added)). Thus, under Sims,[6] the declarant is under no absolute requirement to have witnessed the attack, see n.5, supra; the personal knowledge element stressed by the State on appeal can be met based on the totality of the circumstances. Indeed, the State's contention that witnessing the event is the only manner in which a child might be under the stress of the excitement from the situation is absurd. Seeing your mother lying on a couch and unresponsive, shot in the head, profusely bleeding and likely already dead, is an extremely startling event or condition, in and of itself. Any statement made after witnessing such circumstances would independently meet the elements of an excited utterance. Thus the State's absolute focus on witnessing the shooting here is misplaced, and the oldest child's statements are clearly based on his personal knowledge.

c. The State's conjectural musings as to why the four-year-old made the statements to first responders are highly inappropriate and should be disregarded by the Court.

Briefly, on multiple occasions, see Resp. Br. at 9, 12, and n.14, the State's Respondent's Brief speculates and theorizes as to evidence and facts that have no basis in this case, were not presented below, and are therefore not a proper part of the record on appeal. For example, the State purports to hypothesize as to why the oldest child made the statements to first responders. See Resp. Br. at 9 ("In other words, it cannot be determined whether (1) this was something that he thought he saw, (2) he dislikes Shi's father for some unstated reason, (3) he dreamed this, or (4) the suggestion that Rashad

[6] There is no indication in Sims that the child actually witnessed his mother being attacked, as demonstrated by the Supreme Court making a point of stating it was possible for the child to be under the stress of excitement from having seen his mother *after* she was attacked.

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."). Later, the State suggests that "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." Resp. Br. at 12.

Beyond being irrelevant, the State's inclusion of this conjecture was inappropriate and should be disregarded by the Court, as there is **no evidence in the record** to support any of these theories. See, generally Rule 210, SCACR (stating that the record on appeal may not contain any "matter which was not presented to the lower court" and the appellate court is restricted from considering "any fact which does not appear in the Record on Appeal"); C.f. In re Crawford, 205 S.C. 72, 30 S.E.2d 841, 848 (1944) (rejecting unsubstantiated theories "not related to a single fact or circumstance" in the case that "cannot under the circumstances ... be regarded as anything else than surmise, conjecture, or speculation"); Collier v. Varco–Pruden Bldgs., 911 F.Supp. 189, 192 (D.S.C. 1995) (finding an affidavit "amount[ed] to nothing more than his speculation as to what 'most likely' happened, and has no support in the record"). It should give this Court pause that the State, who bears the absolute burden of proving guilt beyond a reasonable doubt, particularly on a charge of murder carrying a sentence of life in prison, is relegated to inventing facts and alternative theories on appeal to justify and sustain a conviction.

d. The State concedes the merits of Clinton's present sense impression argument regarding the four-year-old's statements to first responders.

In its initial brief, Appellant advanced the argument that the oldest son's statements to the first responders should have been admitted by the trial court under the

present sense impression exception to the rule against hearsay, in addition to or in the alternative of their admittance as excited utterances. App. Br. at 25-26. As described in the brief, the basis for that argument is the trial court's holding that the oldest child's statements did not qualify under the traditional *res gestae* exception to hearsay.[7] **(R. pp. 24; 652)**; App. Br. n.9. By virtue of the trial court's express discussion and holding under *res gestae*, the trial court **ruled** that the oldest child's statements did not qualify as present sense impressions.

Notwithstanding, in the Brief of the Respondent, the State contends that Clinton's present sense impression argument was neither raised to nor ruled upon below and is therefore unpreserved for this Court's review. Resp. Br. at 13. In rushing to proclaim the argument unpreserved, however, the State fails to address the Court's *res gestae* ruling and its implication on the arguments that are preserved for review. More importantly, the State does not address, at all, the merits of whether the oldest child's statements qualify as present sense impressions. The State's failure to contest the merits of this argument should be deemed an admission. See Jean Hoefer Toal, et al., Appellate Practice in South Carolina 232 (2d ed. 2002) (citing First Union Nat. Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) reversed in part on other grounds, 328 S.C. 290, 494 S.E.2d 429 (1997) (holding that if a respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct)).

[7] Again, the former *res gestae* exception to hearsay is a traditional, common law concept used to describe the totality of circumstances surrounding a crime and has been replaced by two modern day exceptions to the rule against hearsay: present sense impression (Rule 803(1)), SCRE and excited utterance (Rule 803(2)), SCRE).

Thus, if the Court agrees, as it should, that the trial court's *res gestae* holding preserves Clinton's present sense impression argument on appeal, then such argument should be deemed conceded as true by the State and warrants reversal as an abuse of discretion by the trial court. See 5 Am. Jur. 2d Appellate Review § 512 ("[A Respondent]'s response to an issue must consist of more than a conclusory statement that the appellant's proposition has no merit. If a [Respondent] fails to respond to an issue in its brief, the court may treat the failure to respond as a confession that the appellant's position is correct, reverse the judgment on that issue if the appellant establishes prima facie error, or determine the issue on the merits."); Toal, et al., *supra,* at 232; First Union Nat. Bank, supra (citing same).

e. The trial court's exclusion of the four-year-old's statements was not harmless, as they reasonably could have affected the jury's verdict in a case lacking any direct evidence of Clinton's guilt.

Predictably, given the clear precedent of Sims, the State contends that the trial court's legal error and abuse of discretion in failing to allow the oldest child's statements into evidence was harmless error. However, harmless error is unavailing here given the lack of any direct evidence[8] and the high probative value[9] of the oldest child's statements. Statements made by a witness who was present during or immediately after the commission of this crime, which identify someone other than the persons charged with the crime, is a significant piece of evidence that goes to reasonable doubt of Clinton's

[8] See discussion, infra, on the trial court's failure to grant Clinton's motion for a directed verdict.

[9] The State is critical of Clinton's Rule 403, SCRE analysis that was included in the Brief of the Appellant, suggesting such an analysis is not preserved for this Court's review. This argument is nonsensical, however, as the trial court excluded the oldest child's statements on the basis that they did not meet the elements of *res gestae* and did not reach the subsequent analysis of whether the statements' probative value outweighed any prejudicial effect.

guilt. This is particularly true given the dearth of evidence presented by the State and its own almost-exclusive reliance upon Wayne Blakeney's testimony and the alleged hearsay statement of Clinton[10] that was relayed to the jury.

The State's strained argument that admittance of the oldest child's statements would be improperly prejudicial to the State's case is similarly unavailing. The possibility of prejudice by the oldest child's statements might be presumed if Shi's Daddy/Shortycake/Rashad Johnson was on trial for the Victim's murder, but he is not. It is hard to imagine a more relevant and probative piece of evidence to the defense of Mr. Clinton than testimony that someone else committed the charged offense.[11] It is precisely because the statements speak to reasonable doubt of Clinton's involvement in the murder that causes the probative value of the statements to far outweigh any prejudicial effect to the State's case.[12]

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[10] While Clinton's alleged statement that "I killed that bitch" was admitted as a statement against interest or an admission by a party opponent, it is nonetheless clearly an out of court statement proffered for the truth of the matter asserted. The State's reliance on a hearsay statement for this murder conviction cuts in favor of a finding that the exclusion of the oldest child's statements was not harmless; if the basis for a conviction is a hearsay statement, then how can it be said that the exclusion of a competing hearsay statement tending to disprove the alleged confession is harmless? It cannot.

[11] The probative value of the oldest son's statements becomes clearer when put in the context of other testimony elicited at trial. As provided in the Brief of the Appellant, co-defendant Al Green, Green's girlfriend, the Victim, **and her children**, including the oldest son, lived together in an apartment only months before the Victim was murdered. The fact that the oldest son identified Shi's Daddy/Shortycake/Rashad Johnson as the person who killed his mother, but did not mention seeing Green, with whom he had lived just a few months prior to this incident, is significant, impactful, and most definitely not harmless. This fact also renders the State's citation to State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) inapt and irrelevant. See Resp. Br. at n.4.

[12] The fact that these statements were proffered by the Defendants in this case weighs heavily in favor of a finding that the trial court erred and that the court's abuse of discretion was not harmless.

II. The circumstantial evidence presented at trial did not rise to the level of surviving Clinton's motion for a directed verdict.

a. Despite numerous references to the existence of "direct evidence" linking Clinton to the crime, none was presented at trial and the State fails to identify any direct evidence in its brief.

Appellant's Initial Brief sets out in explicit detail[13] the reasons why the trial court's denial of his motion for a directed verdict constituted an error and an abuse of discretion under the Supreme Court's recent explication of the directed verdict standard under Rule 19, SCRCrP. See State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 408-09 (2013). While a significant portion of the State's brief is devoted to repackaging[14] and, in some cases, overstating the facts and evidence introduced below, the evidence admitted at trial fell woefully short of amounting to substantial circumstantial evidence required to prove the elements of the crime charged. Clinton's motion for a directed verdict should have been granted.

Two points, in particular, from the Respondent's Brief on this issue require a rebuttal in this reply. First, although the Respondent's Brief states no less than five times that Clinton's motion for a directed verdict was properly denied on the basis of "direct evidence," see, e.g., Resp. Br. at 14, the State fails to identify a single piece of direct evidence linking Clinton to the Victim's murder. In fact, as discussed in the Brief of the Appellant, there was no direct evidence presented below, and the State's case against

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[13] Mr. Clinton does not intend on rehashing his argument on the trial court's failure to grant his directed verdict motion, as the State provides no meaningful rebuttal to the Solicitor's failure to present competent evidence of his guilt on the charge of murder. Mr. Clinton relies upon and reiterates each of the points made in his Brief of the Appellant.

[14] Indeed, entire pages are devoted to recitations of facts that in no way link Clinton to and/or are irrelevant to the crime charged. See, e.g., Resp. Br. at 17-18.

Clinton is based entirely on circumstantial evidence. While the State is certainly capable of obtaining a conviction based solely on circumstantial evidence, the lack of direct evidence changes the calculus of this Court's analysis of Clinton's directed verdict motion,[15] and the State must demonstrate the existence of substantial circumstantial evidence that did more than raise a suspicion of Clinton's guilt. C.f. State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011); State v. Odems 395 S.C. 582, 782 S.E.2d 48 (2011). It is also misleading to continually overstate the character and amount of evidence that was presented below, particularly where the State carries the absolute burden of proof in a criminal case; no matter how many times evidence is called direct evidence, it does not make it true if it does not meet the definition of direct evidence.[16] See State v. Rogers, 405 S.C. 554, 563, 748 S.E.2d 265, 270 (Ct. App. 2013) ("Direct evidence is based on personal knowledge or observation and ..., if true, proves a fact ***without inference or presumption***.") (emphasis added).

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[15] While the existence of any direct evidence may be sufficient to sustain a trial court's denial of a directed verdict, a purely circumstantial case requires the demonstration of substantial circumstantial evidence. Hepburn, 406 S.C. at 429, 753 S.E.2d at 409 (citing Cherry, 361 S.C. at 593–94, 606 S.E.2d at 478; Mitchell, 341 S.C. at 409, 535 S.E.2d at 127). For instance, the State places tremendous significance on the testimony of Wayne Blakeney, and his testimony that he drove Clinton, co-defendant Green, and an uncharged third person, Delrico McDow to the Roseanna Lane mobile home community and thus the scene of the crime. However, the State conveniently ignores the evidence that Clinton lived in that same mobile home community with his Grandmother, in the mobile home immediately adjacent to Victim's. Therefore, it is entirely reasonable for Clinton to have been in the mobile home community on the night of Victim's murder, and equally reasonable for Clinton to have stated a need to go to the mobile home community to "get some money," **(R. p. 417)** from the home in which he was living. **(R. pp. 418; 455; 561).**

[16] Even Clinton's alleged hearsay statement to Blakeney that "I killed that bitch," setting aside the understandable insensitivities that it invokes, does not constitute direct evidence of Clinton's involvement in the Victim's murder, as it requires additional information, inference, or presumption to determine its subject.

With respect to the DNA evidence, despite the State's best efforts to couch the evidence in a manner that would suggest otherwise, the DNA collected in this case does not support the State's theory of Clinton's guilt. Indeed, in the Respondent's Brief, the State says that, "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." Resp. Br. at 38. Which is a dressed up way of saying the DNA in this case was worthless. The State's contention that the DNA evidence corroborates other evidence in the case is simply unsupported by the evidence; none of the samples collected and tested by the State provided a direct match or link between Clinton and the Victim's murder. In fact, the DNA in this case failed to match anyone to anything.[17]

In sum, none of the evidence put forward by the State did anything more than raise a mere suspicion of Clinton's guilt. See State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001) ("Accordingly, a trial judge should grant a directed verdict

[17] Contrary to the State's representation that the DNA evidence "corroborated other evidence presented by the State," no such corroboration was ever identified. In fact, it is worth emphasizing that an "inability to exclude" a particular person from a tested sample is not the same thing as evidence of contact with that piece of evidence or presence of that person at the scene of the crime. The State's reliance on this inconsequential DNA evidence on appeal is telling as to the lack of any real competent evidence of Clinton's guilt. In fact, the one example of corroboration provided in the Respondent's Brief is inaccurate and misleading. The State contends that "[t]he DNA profile on a swab of the screen door handle ... was a mixture of individuals and neither the victim nor co-defendant McDow could be excluded from that mixture." Resp. Br. 38. However, there is no evidence in the record that Delrico McDow was ever arrested or charged with Victim's murder and therefore was not a "co-defendant" to anyone on this matter. In fact, during the sentencing phase of the trial it was represented on the record that McDow was on probation at the time of Victim's murder and was wearing a GPS tracking device which, when checked by the police, revealed that McDow was nowhere near the scene of the crime on that evening. **(R. pp. 661-62).** Thus, this fact actually contradicts Blakeney's testimony, rather than corroborates it.

motion when the evidence merely raises a suspicion the accused is guilty.") (citing State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000)). While lacking any evidence linking Clinton to the Victim's mobile home, see Brief of the Appellant at 29-30 (listing the inadequacies of the State's evidence at trial), the State's case was instead built around the self-serving testimony of Blakeney, who was also charged with the Victim's murder and stood to gain (and did subsequently gain) significant favor by providing incriminating testimony about Clinton and Green. However, Blakeney's testimony, even if believed and at most, demonstrates that he drove Clinton to the Roseanna Lane mobile home complex on the night of the murder to get some money. **(R. pp. 417-19).** Of course, this testimony proves nothing, as Clinton also lived in that same mobile home complex with his grandmother in the mobile home directly next door to the Victim. **(R. pp. 418; 455; 561).**

Taken as a whole, Blakeney's testimony did not establish any precise fact that impacts an element of the murder charge against Clinton, see Rogers, 405 S.C. at 563, 748 S.E.2d at 270 ("Direct evidence is based on personal knowledge or observation and ..., if true, proves a fact ***without inference or presumption***.") (emphasis added), and does not rise to the level of substantial circumstantial evidence required to overcome Clinton's motion for a directed verdict. See Lollis, 343 S.C. at 584, 541 S.E.2d at 256 ("'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.") (citing (State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963)); see also State v. Littlejohn, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955) ("It is not sufficient that they create a probability, though a strong one....").

Because the State presented no direct evidence, and the circumstantial evidence did nothing more than raise a mere suspicion of Clinton's involvement in Victim's murder, the trial court erred as a matter of law in failing to direct a verdict for Clinton.

CONCLUSION

For the reasons set forth above, in addition to those advanced in the Initial Brief, the trial court should be reversed. The trial court erred as a matter of law, under the Sims case, in excluding the statements of Victim's four-year-old son, which qualified as both excited utterances and present sense impressions. The trial court's exclusion of the statements constituted an abuse of discretion that was not harmless and warrants reversal. Moreover, the State failed to present any direct evidence, and the circumstantial evidence presented was insufficient as a matter of law, as it failed to raise more than a mere suspicion of Clinton's guilt. Consequently, the trial court erred in failing to direct a verdict in favor or Clinton and his conviction should be reversed.

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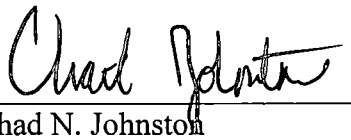
Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Briefs of Appellant Devatee Clinton comply with Rule 211(b), SCACR.

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PROOF OF SERVICE

This is to certify that I, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **Final Brief of Appellant and Final Reply Brief of Appellant** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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This 15th day of June 2015

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June 15, 2015

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *The State v. Devatee Clinton*;
Appellate Case No. 2014-000594

Dear Ms. Kitchings:

Enclosed for filing please find the original and fifteen (15) copies of the **Final Brief of Appellant and Final Reply Brief of Appellant** in the above-referenced matter. I would appreciate your acknowledging receipt of these documents by date-stamping the extra copies enclosed and returning them to me via our courier.

By copy of this letter, I am serving counsel of record and enclose a Proof of Service to that effect. If you have any questions or if you need any additional information, please do not hesitate to contact me.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.

Chad Johnston

Enclosures
cc: Robert M. Dudek, Esquire (via hand delivery with enclosures)
William E. Salter, III, Esquire (via hand delivery with enclosures)
Devatee Clinton (via U.S. Mail with enclosures)