

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge

C.A. No. 2012-GS-26-2938

Appellate Case No.: 2013-000336

The State of South Carolina:Respondent,

v.

Kareem S. HarryAppellant.

**FINAL BRIEF OF APPELLANT
KAREEM S. HARRY**

Meliah Bowers Jefferson
WYCHE, P.A.
44 East Camperdown Way
Greenville, South Carolina 29601
(864) 242-8200

AND

Robert M. Dudek
South Carolina Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

Attorneys for Appellant Kareem Harry.

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STATEMENT OF ISSUES PRESENTED

Did the Circuit Court err in failing to direct a verdict of acquittal in favor of Appellant Kareem S. Harry where the record lacked direct or substantial circumstantial evidence proving Harry guilty of murder under the “hand of one is the hand of all” theory of accomplice liability?

STATEMENT OF THE CASE

The Horry County grand jury indicted Appellant Kareem S. Harry ("Harry") for the offense of murder on July 26, 2012. *See* Indictment. His case was tried before a jury on February 11-14, 2013, with the Honorable Steven H. John presiding. Ed Chrisco represented Harry. Assistant Solicitors Brad Richardson and Joshua Holford prosecuted the case.

The jury found Harry guilty of the offense of murder, under the hand of one hand of all theory of accomplice liability. Judge Stevens sentenced Harry to Thirty-One (31) years imprisonment. This appeal followed.

STATEMENT OF THE FACTS

The State's case against Harry was entirely circumstantial and rooted in an absurd theory that Harry masterminded an elaborate plan or scheme to kill Kevin Bowens ("Bowens") in retribution for stealing Harry's television. The evidence presented by the State consisted of testimony from three co-defendants charged in connection with Bowen's murder, none of which testified as to any knowledge of a plan concerning stealing, assaulting, or otherwise engaging in any illegal activity, or Harry's involvement in Bowens' death. The State also submitted testimony and evidence gathered by law enforcement during their investigation of the shooting, which support no more than Harry's mere presence during the shooting. Finally, the State submitted testimony from several witnesses who did not witness the actual shooting, unable to provide any evidence to substantiate the State's theory of the case.

Ashley Bledsoe

Ashley Bledsoe ("Bledsoe") was indicted as a co-defendant in this matter and

testified in the State's case against Harry under a proffer agreement. Bledsoe had an on-again-off-again relationship with Harry. He occasionally helped her financially, stayed in her apartment from time to time, and stored some of his belongings there including a plasma screen television. (R. p. 46, line 19.); (R. p. 52, lines 10-13.); (R. p. 53, lines 4-23.)

Bledsoe met the victim, Kevin Bowens ("Bowens"), on February 27, 2011. He picked her up at a gas station, and spent a night out on the town with Bledsoe and her roommate. (R. p. 50, line 15-p. 89, line 1.) Bowens slept at Bledsoe's apartment that night and, on the following morning, Bledsoe gave Bowens Harry's plasma screen television. (R. p. 52, line 7.); (R. p. 53, lines 9-19.) She testified that she gave Bowens the television with the intention of selling it after getting permission from Harry to do so. (R. 53, lines 17-24.) However, Bledsoe admitted that Harry did not know Bowens at the time of the transaction and was unaware that she was selling the television to Bowens. (R. p. 54, lines 2-7.) In fact, Bledsoe initially misled everyone in telling Harry that she sold the television to a girl and telling Bowens that the television belonged to one of her girlfriends. (R. p. 66, lines 16-21.) She further perpetrated her deception in text messages to Bowens pleading for the return of the television because "the girl was going to call the cops on me if I didn't get the TV back." (R. p. 67, lines 7-8.) She also texted to Bowens that she was "homeless. Please give me the money." (R. p. 67, line 19.) It was not until Harry sought return of the television or the money that she admitted to Bowens that the television belonged to Harry and that she needed to get it back. *Id.*

By March 1, 2011, Bledsoe and her roommate had moved out of their apartment and she had returned all of Harry's belongings to him with the exception of the television

or any proceeds from the sale of the television. (R. 53, lines 4-11.) At that point, Harry called Bledsoe about the television and they met at Waccamaw Hospital in Murrells Inlet, South Carolina, where Bledsoe first told Harry the truth that Bowens had possession of his television and where Bowens lived. (R. p. 54, line 20-p. 55, line 23.)

At trial, Bledsoe testified that, instead of going directly to retrieve the television from Bowens in Kings Grant, Harry went to his friends Tommy Byrne ("Byrne") and Saire Castro's ("Castro") apartment in Myrtle Beach immediately after picking her up from Waccamaw Hospital. (R. pp. 56-58.) Once they arrived at the apartment in Myrtle Beach, Bledsoe said that Harry went into the apartment alone for approximately five minutes and returned with Byrne and Castro in tow. *Id.* She acknowledged that she was not privy to any conversation between Harry, Byrne, and Castro. *Id.* She further testified that Byrne and Castro traveled in a different vehicle than she and Harry, and that they had no knowledge of where she was directing Harry to go. *Id.*

Bledsoe noted that Harry talked to Bowens prior to arriving at his home about getting the television back. (R. p. 58, lines 14-18.) When they arrived at Bowens' home, Harry, Byrne, and Castro got out of the vehicles within a minute of each other and, at Bowens' invitation, walked into his yard while Bledsoe remained. (R. p. 58, line 19-p. 59, line 1.) Bledsoe later got out of the vehicle and talked to Bowens about the details of the transaction, at which point Bowens indicated that Bledsoe had been lying about the situation. (R. p. 59, lines 2-10.) Bledsoe also admitted on cross-examination that she had texted Bowens prior to their arrival at his home accusing him of stealing money from her because he did not pay for the television. (R. p. 76, lines 1-9.)

Bledsoe next testified that Castro instructed her to return to the vehicle, and she

then heard gunshots as she did so. (R. 59, lines 12-14.) She and Harry ran to their vehicle and left Bowens' home. (R. p. 59, lines 14-17.) They were pulled over by the police shortly thereafter, and Harry ran away from the vehicle. (R. p. 60, lines 23-25.)

Tommy Byrne

Co-defendant Tommy Byrne was also indicted for Bowens' murder and testified in the State's case against Harry under a proffer agreement. He indicated that he and Castro resided in the same apartment. (R.. p. 134, lines 14-22.) He further testified that Castro stored a revolver in the kitchen of the apartment above the cabinets. (R. p. 139, lines 8-20.) However, when additionally questioned about Castro's firearm, Byrne could only discuss the general "common knowledge" concerning whether Castro was known to carry a weapon, and could not specifically acknowledge that Harry knew Castro carried weapons or had the weapon on the day of the incident. (R. p. 143, line 19–p. 144, line 13.)

During his testimony, Byrne recalled Harry stopping by the apartment on the day of the shooting and having a conversation with Castro. Byrne admits that he did not hear the substance of the conversation, but estimated that Harry and Castro talked for approximately five to eight minutes. Then, Castro went over to the kitchen to ask Byrne if he wanted to take a ride with them. (R. p. 152, line 2–p. 156, line 14.) Byrne next testified that Harry left the apartment prior to the time Castro retrieved his firearm.

Q. So, Kareem and Saire [Castro] have had some kind of conversation for five to eight minutes?

A. Yes, Sir.

Q. How does that end?

A. As in Saire [Castro] comes up to me and asks me I want to take a ride.

Q. Okay, and you're still at the table at this point?

A. Yes, sir.

Q. And what do you do?

A. Get up and start heading out.

- Q. Does Saire [Castro] go out in front of you?
A. No, sir.
Q. Where is he whenever you start to go outside?
A. Walking into the kitchen.
Q. So, he keeps on going into the kitchen ---
A. Yes, sir.
Q. ---where he's got his gun?
A. Yes, sir.
Q. How about Kareem [Harry], is he still in the house at this point?
A. No, sir, he's in front of me going down the steps.
Q. Okay, so you're heading towards the steps already and Kareem [Harry]' s in front of you?
A. Yes, sir.

(R. p. 156, line 9-p. 157, line 10.)

According to Byrne, he learned that they were going to get Harry's television while on the drive to Bowens' home. (R. p. 160, lines 15-24.) When they arrived, the gentlemen exited the vehicles at approximately the same time and walk into the yard where Bowens joined them. (R. p. 165, lines 2-25.) Byrne then described the chaos that ensued over the following minutes. According to Byrne, Harry and Bowens were having a calm conversation until Bledsoe came over and confronted Bowens about the transaction. After a heated exchange between Bledsoe and Bowens, Harry told Bledsoe to return to the vehicle, and then Castro suddenly shot Bowens. (R. p. 168 line 20-p. 172, line 15.) Everyone ran back to the vehicles and left the scene of the shooting. While leaving, Byrnes recalled Castro acting anxiously and saying "What'd I just do." (R. p. 177, lines 6-9.)

Sage McPhail

Sage McPhail ("McPhail") was indicted for accessory to Bowens' murder after the fact and testified in the State's case against Harry under a proffer agreement. (R. p. 2233, line 18-p. 225, line 20.) McPhail indicated that he had a long-standing friendship

with Byrne and knew Castro well because he lived with Byrne. However, McPhail described his relationship with Harry as merely acquaintances, occasionally interacting since 2011. (R. p. 215, line 8-p. 223, line 12.) Although McPhail admitted his knowledge of Castro's possession and storage of firearms, he did not provide any evidence regarding Harry's knowledge of the matter. (R. p. 226, lines 9-24.) McPhail also recalled that he assisted Bledsoe in moving Harry's belongings out of her apartment and that he left his vehicle with Harry for his use on the day of the shooting because McPhail was performing maintenance on Harry's vehicle. (R. p. 227, line 10-p. 229, line 1.)

McPhail was not present at the scene of the incident and did not see Harry until after the shooting occurred. Harry had asked McPhail to replace the brakes on a vehicle earlier in the day, and McPhail was waiting at Harry's residence to return it. Harry was not there when McPhail arrived, so he fell asleep waiting for Harry to return. McPhail further testified that he was startled when Harry returned because Harry tapped on the window, informed McPhail that the police were in possession of his vehicle, and then Harry's brother dropped McPhail off at Byrne's residence. (R. p. 235, line 3-p. 242, line 1.) McPhail later assisted Castro in fleeing the area. (R. p. 243, line 14-p. 245, line 12.)

Law Enforcement and Other Witnesses

In its case in chief, the State also presented evidence regarding the police investigation of the shooting and other witness testimony. William Muldoon was one of the police officers that stopped the vehicles on the night of the shooting. He testified that Harry fled when he pulled the vehicle over, but he could not recall whether or not

Bledsoe explained that Harry fled because he had warrants. (R. p. 29, line 19-p. 30, line 2.) Jill Domogauer, a crime scene investigator with the Horry County Police Department, testified generally regarding the crime scene including the existence of a firearm inside the Bowens' residence. (R. p. 109, lines 6-23.) However, she admitted that the police did no forensic testing on Bowens' weapon. *Id.*

The other witnesses presented by the State consisted of neighbors and Bowens' girlfriend, none of whom witnessed the shooting. Shantel Lehman, a neighbor of Bowens, was taking out the trash and noticed Bowens talking with some people in his yard, but "didn't think anything of it." Then, she heard gunshots. (R. p. 117, lines 1-8.) She specifically clarified that Bowens was merely talking with the people in his yard, not arguing with anyone. (R. p. 125, lines 21-24.)

Brian McGarrahan testified that he was inside his home when he heard gunshots. (R. p. 204, lines 17-19.) He, then, went outside to assist Bowens and was joined by another unidentified person shortly thereafter. (R. p. 208, line 14-p. 209, line 4.) Although he could not recall whether he told the police at the time of the incident, McGarrahan testified that Bowens possessed a firearm that fell out of his waistband on the night of the shooting. (R. p. 209, lines 5-9.)

Christina Patterson and Bowens were in a romantic relationship. (R. p. 288, line 13.) She acknowledged that Bowens brought a television to their home on February 28, 2011, and indicated that he had purchased it from someone for a combination of cash and drugs. (R. p. 306, lines 17-23.) She further testified that, on March 1, 2011, Bowens received text messages from Bledsoe that he described as causing "drama" between him and Harry over the television. (R. p. 316, lines 3-24.) Although she was inside her

home when Harry and the others arrived, Patterson recalled the two vehicles pulling into the yard at a fast speed. She then acknowledged that Bowens invited Harry and the others into his yard with the firearm visible in his waistband. (R. p. 320, lines 20-22.); (R. p. 323, line 5-p. 324, line 13.) Patterson did not witness the entire event, but returned to her front yard when she heard gunshots. (R. p. 328, lines 19-25.) She attempted to assist Bowens and, at some point, removed his firearm, money, and drugs from the scene of the incident before the police arrived. (R. p. 332, line 2-p. 334, line 5.) She did not disclose this information to the police until August 2011, five months after the shooting. (R. p. 336, line 22-p. 337, line 24.)

Directed Verdict Motion

At the close of the State's case, Defense counsel moved for a directed verdict of acquittal based on the State's failure to present substantial circumstantial evidence of Harry's guilt of murder, under the hand of one hand of all theory of accomplice liability. Particularly, defense counsel argued that the State had not demonstrated that Harry aided Castro in any way in shooting Bowens, that there was no evidence in the record to fulfill the illegal purpose element of the charge, and that the State had not proven a common design and purpose. (R. p. 353, line 18-p. 354, line 3.)

The State argued that it had proven a common design or scheme by showing that Harry knew the location of the television, but went to Byrne's apartment first to get Castro and Byrne instead of going straight to Bowens' residence to get the television by himself. (R. p. 354, line 12-p. 359, line 12.)

The trial court determined that the State's case against Harry was circumstantial. (R. p. 361, lines 1-2.) The trial court found that the State had demonstrated substantial

circumstantial evidence in showing that Harry had an urgent need for the television or the money because he was on probation. The trial court further found that Harry went out of his way to recruit Castro, "a person common knowledge was that he carried a weapon," to accompany him to get the television. Additionally, the trial court found that after Castro shot Bowens in Harry's presence, Harry fled the scene. Accordingly, the trial court denied Harry's motion. (R. p. 361, line 6-p. 362, line 15.)

The Defense's Case

Saire Castro testified for the defense. Castro pled guilty to voluntary manslaughter for the shooting of Bowens and was sentenced to Thirty years imprisonment. (R. p. 365, lines 14-20.) In contrast to Byrne's testimony, Castro testified that it was Harry and Byrne who engaged in a conversation at the apartment, and that he only went with the two of them as a convenience so Byrne would have a ride home later that night. (R. p. 366, line 16-p. 367, line 2.) Castro explained that he did not find out where they were going or that they were going to get a television until they were driving over to Bowens' home. He further admitted that he shot Bowens without any prior discussion with Harry. (R. p. 367, line 3-p. 368, line 12.)

Harry testified in his own defense. He explained that Bledsoe sold his television without collecting any money and he met with her at Waccamaw Hospital to figure out how to resolve the situation. (R. p. 442, line 25-p. 444, line 23.) While Harry was with Bledsoe, he contacted Byrne to buy marijuana. (R. p. 445, line 22-p. 446, line 8.) However, before he could go to Byrne's apartment, Harry talked to Bowens and they discussed the television. (R. p. 447, lines 5-10.) Because Harry was not in a rush to get the television, he proceeded to Byrne's apartment where he got marijuana and made

arrangements for Byrne to help him return McPhail's vehicle later that night. (R. p. 447, line 10-p. 448, line 22.) Castro just happened to join them – Harry did not, specifically, invite him to come along. (R. p. 447, line 22-p. 449, line 1.)

When they arrived at Bowen's residence, the conversation was initially calm. Then, Bledsoe confronted Bowens about the television and the conversation escalated in intensity, at which point Castro told Bledsoe to get back into the vehicle. Harry turned to escort Bledsoe back to the vehicle, and then he heard the gunshots and saw Bowens fall to the ground. (R. p. 449, line 20-p. 457, line 1.) Harry further explained that they all left the scene of the incident in their vehicles, and when they were pulled over by the police, he ran because he did not want to face a probation violation. (R. p. 459, line 22-p. 460, line 3.) Harry's uncontroverted testimony was that he did not know Castro had a gun until he shot Bowens. (R. p. 499, line 15-p. 500, line 4.); (R. 506, lines 11-12.)

At the close of the defense's case, Defense counsel renewed the motion for directed verdict. (R. p. 514, lines 17-19.) Despite the State's failure to present substantial circumstantial evidence to prove the existence of any plan or scheme to commit an illegal purpose and its further failure to present substantial circumstantial evidence of Harry's participation in Bowen's shooting, the trial court again denied Harry's renewed motion for directed verdict at the close of his defense. (R. p. 514, line 23-p. 515, line 18.)

The jury convicted Harry of murder under the theory of hand of one hand of all accomplice liability. (R. p. 518, lines 9-15.); The trial court sentenced him to Thirty-one years imprisonment. (R. p. 528, lines 13-25.); Sentence Sheet (R. pp. 4-5.) This appeal followed.

ARGUMENT

Summary of Argument

Kareem Harry should have never been convicted of killing Kevin Bowens. Saïre Castro confessed to the tragic shooting of Bowens and admitted that he acted alone without any plan or cooperation from anyone else. The State knew these uncontroverted facts. Yet, on February 11, 2013, it proceeded to prosecute Kareem Harry for the very crime to which Castro confessed.

In its case, the State offered no direct evidence of Harry's involvement in the shooting. The State's case was purely circumstantial and failed to demonstrate essential elements of the offense, including the lack of evidence showing any common design and purpose to commit any illegal act when Harry met Bowens at his residence to discuss the return of a television. At the most, the State only presented scant circumstantial evidence indicating little more than Harry's mere presence during the commission of the crime by Castro. When defense counsel initially moved for directed verdict at the close of the State's case against Harry, the evidence before the trial court represented a mere suspicion of guilt. Defense counsel again sought a directed verdict of acquittal at the close of all evidence in the case. The trial court erred in denying each motion without a sufficient finding of substantial circumstantial evidence.

On February 14, 2013, Kareem S. Harry was convicted for a crime he did not commit by a jury that should have never had the opportunity to deliberate his fate. Instead, the trial court should have directed a verdict of acquittal in favor of Harry due to the State's failure to prove its case by substantial circumstantial evidence. For these reasons and the others discussed further below, the Court should reverse Harry's

conviction, and remand the matter back to the trial court with instructions to enter a directed verdict of acquittal.

The Circuit Court erred in failing to direct a verdict of acquittal where there was a lack of direct or substantial circumstantial evidence proving Harry guilty of murder under the “hand of one is the hand of all” theory of accomplice liability.

Where the State relies solely on circumstantial evidence, the trial court should submit the case to the jury only if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. *State v. Bostic*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (citing *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). “The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict. Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt.” *Id.* (citing *State v. Schrock*, 283 S.C. 129, 133-34, 322 S.E.2d 450, 452–53 (1984)). It is wholly insufficient to take the case to the jury when the evidence raises no more than a “mere suspicion” of guilt. *State v. Lewis*, 403 S.C. 345, 353, 743 S.E.2d 124, 128 (Ct. App. 2013). “Suspicion’ implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.” *State v. Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001) (citing *State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254 (2001)). If the State does not demonstrate substantial circumstantial evidence that the defendant committed the particular crime, the defendant is entitled to a directed verdict. *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). “In reviewing the denial of a motion for a directed verdict, [the appellate court] must view the evidence in the light most favorable to the State.” *State v. Smith*,

359 S.C. 481, 490, 597 S.E.2d 888, 893 (Ct. App. 2004) (citing *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998)).

It is well settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense. Under the “hand of one is the hand of all” theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. Under accomplice liability theory, a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act. In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct. Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime. Mere presence at the scene is not sufficient to establish guilt as an aider or abettor. [Indeed, the] mere association with admitted members of a conspiracy is insufficient to tie other persons to the conspiracy.

State v. Mattison, 388 S.C. 469, 479-80, 697 S.E.2d 578, 584 (2010) (citations and quotation marks omitted).

This Court has repeatedly found that the showing of substantial circumstantial evidence is essential prior to submitting a case to the jury. Recently, in *State v. Rogers*, the Court examined the type of substantial circumstantial evidence required to warrant the denial of a directed verdict motion by a defendant charged with murdering his lover's husband. See *State v. Rogers*, 405 S.C. 554, 557, 748 S.E.2d 265, 267 (Ct. App. 2013). In affirming the trial court's denial of the defendant's motion for directed verdict, the Court noted that the State's evidence, although entirely circumstantial, was substantial enough to warrant sending the case to the jury. Particularly, the Court noted that the evidence against the defendant included (1) testimony of an ongoing affair; (2) detailed testimony concerning the defendant's plans with his lover to kill the husband; (3) eye witness testimony placing a truck of the color and model driven by the defendant at the

scene of the crime; (4) cell phone records indicating use of defendant's phone in the vicinity of the crime at the relevant time; (5) the co-conspirator's testimony regarding the defendant's involvement in the implementation of the plan to kill her husband; (6) phone records corroborating the co-conspirator's testimony regarding calls had with the defendant to set up her husband for the murder and to confirm that the murder had been accomplished; (7) the co-conspirator's testimony that the defendant cleaned his truck with bleach after the incident; (8) evidence that the defendant painted his truck after the incident; and (8) evidence that the defendant was in possession of the victim's watch. *Id.* at 565-67, 748 S.E.2d at 271-73. The evidence presented by the State against Rogers, while circumstantial, was such that his guilt could be fairly and logically deduced. Accordingly, the trial court's denial of the directed verdict motion in that case was appropriate and affirmed.

Conversely, in *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011), the South Carolina Supreme Court reversed the trial court's denial of Bostick's directed verdict motion finding that the State "only raised a suspicion of guilt" that the defendant murdered his neighbor, Ms. Polite, and set her house on fire. *Id.* at 136, 708 S.E.2d at 775. The evidence presented at trial indicated that Ms. Polite served as her church secretary and frequently brought the Sunday collection funds to her home, which she shared with her son, for the bank deposit on Mondays. *Id.*

Ms. Polite's home caught fire one Sunday and she was found dead in her home. She had been stuck in the head, but officially died from the carbon monoxide cause by the fire. *Id.* Ms. Polite's son testified that he left the house and returned to see the house in flames. Investigators determined the fire originated in the son's bedroom using a

gasoline accelerant. *Id.* at 137, 708 S.E.2d at 776. Specifically as to Bostick, the State presented evidence that investigators found personal items belonging to Ms. Polite, including a watch and two sets of car keys in a burn pile on Bostick's next door property. The State also showed that Bostick had a pattern of gasoline on his shoes and gasoline was the accelerant used to start the fire at the Polite home. *Id.* However, DNA analysis of blood found on Bostick's jeans was inconclusive as to whether it came from Ms. Polite. *Id.* In its analysis of the case, the Court found that the evidence presented by the State was only of such quality as to merely raise a suspicion that Bostick may have committed the crime but it was not sufficient for the trial court to have submitted the case to the jury, and the Court reversed the trial court's denial of a directed verdict. *Id.* at 142, 708 S.E.2d at 778.

Similarly to the conclusion in *Bostick*, in *State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000), the South Carolina Supreme Court held that the State's presentation of circumstantial evidence was insufficient to withstand a directed verdict motion. In *Martin*, the State's case focused on placing the defendant near the scene of the murder through circumstantial evidence. The State presented a witness to establish that a car resembling the one that the defendant borrowed from his girlfriend was parked in front of the victim's apartment. *Id.* at 600, 533 S.E.2d at 573. The State also presented evidence that, on the morning after the murder, a manager of a restaurant found several bags of garbage containing items belonging to the victim near the bar where the defendant had been the prior night. Most interestingly, the defendant's girlfriend testified that, upon questioning his tardiness in picking her up from work, the defendant replied "some shit happened" and the co-defendant added "someone may have died tonight." Reversing the

trial court's denial of the defendant's motion for directed verdict, the Court held that the standard for substantial circumstantial evidence required more than a theory and coincidence amounting to no more than mere suspicion of guilt, but a showing of proof of the defendant's involvement in the crime to take the case to the jury.

The instant case does not approach the level of substantial circumstantial evidence found to be required to warrant the denial of a directed verdict motion as affirmed by this Court in *Rogers*. More interestingly, the evidence presented by the State in the instant case also fails to reach the evidence presented in *Bostic* and *Martin* – cases in which the South Carolina Supreme Court found the State's evidence to be qualitatively insubstantial to justify sending the cases to the jury for deliberation.

Instead, this Court now reviews a case where the State presented no evidence, substantial or otherwise, to support its outlandish theory that Harry masterminded a plan to murder Bowens over a television. At most, the State demonstrated that Harry and his friends went to talk to Bowens about returning or paying for the television that Bledsoe had given him, which by all accounts, undisputedly belonged to Harry. Even assuming that Harry and the other defendants actively engaged in this alleged plan, at no point in the trial did the State provide any proof that the plan involved a common design, plan, or purpose to commit any illegal act. The State's only evidence concerning this threshold element of the crime consisted of testimony from two co-defendants, Bledsoe and Byrne. Bledsoe could only testify that Harry went into Byrnes apartment for approximately five minutes. Byrne, however, indicated that Harry and Castro engaged in a five to eight minute conversation while in the apartment. However, neither witness could testify as to the substance of the conversation. Harry and Castro denied that they engaged in any

conversation, much less one related to Harry's intention to steal from, assault, or kill Bowens over a television. Instead, they both testified that Harry only held a conversation with Byrne when he entered the apartment.

Additionally, the State failed in its effort to submit substantial circumstantial evidence that Harry had any knowledge that Castro had a reputation for violence or that he was armed at the time of the incident. Although the State attempted to establish some general knowledge among their peer group regarding Castro's past incidents and propensities for firearms, the only evidence presented in the State's case in chief as to Harry's specific knowledge on the subject consisted of testimony establishing that Castro obtained his firearm that evening without Harry's knowledge. Byrne testified that Harry exited the apartment first, and that Castro did not enter the kitchen to retrieve the firearm until after Harry left the apartment. Furthermore, both Harry and Castro later testified that Harry did not know about the firearm until the actual shooting occurred.

Although the State attempted to establish Harry as the leader of an elaborate plan, the evidence at trial demonstrated that Harry simply got caught in the middle of a bad situation created by the dishonesty of Bledsoe and the unfortunate decision by Castro to carry and ultimately use a weapon. Here, "[t]he circumstantial evidence relied upon by the State is not substantial and merely raises a suspicion of guilt." *Buckmon*, 347 S.C. at 322, 555 S.E.2d at 405. The appellate courts of South Carolina have repeatedly recognized that the State fails to meet its burden of proof by showing evidence raising only the suspicion of guilt. Instead, the State must present substantial circumstantial evidence implicating the defendant in the crime to get past a directed verdict motion. The

evidence presented by the State at Harry's trial fell far below the standard showing of substantial circumstantial evidence required to withstand a directed verdict motion.

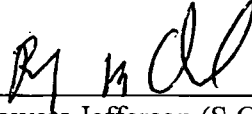
Although the State may have presented a large quantity of testimony and other evidence, the evidence failed to meet the requirements of substantial circumstantial evidence to withstand a directed verdict motion for acquittal. Unlike in *Rogers*, there is no evidence of a plan or scheme to commit any crime in Harry's case, much less a murder. Instead, like in *Bostic* and *Martin*, the evidence presented against Harry by the State can only be said to raise a mere suspicion of guilt insufficient to justify deliberation by a jury. Accordingly, the trial court erred in denying Harry's direct verdict motion.

CONCLUSION

In the instant case, the State presented no evidence – circumstantial or otherwise – of any plan or scheme to accomplish an illegal purpose involving Harry. The State presented no evidence regarding the substance of any conversation between Harry and Castro. The State attempted to establish some level of general knowledge on Harry's part regarding Castro's proclivities to firearms, however, there was no evidence presented at trial suggesting that Harry had any knowledge of Castro's possession of a firearm when they went to meet Bowens. Most significantly, Castro's unrefuted testimony was that he acted alone, without having collaborated in any plan or scheme to commit any illegal act with Harry, and that Harry had no knowledge Castro was even armed until after the shooting occurred.

For the foregoing reasons, Kareem S. Harry respectfully requests reversal of his conviction, and remand with instruction for entry of a directed verdict of acquittal.

Respectfully submitted,

By: 

Meliah Bowers Jefferson (S.C. Bar No. 74064)
WYCHE, P.A.
44 East Camperdown Way
Greenville, SC 29601
Telephone: 864-242-8200
Telecopier: 864-235-8900
E-Mail: mjefferson@wyche.com

and

Robert M. Dudek
South Carolina Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

December 8, 2014

Attorneys for Appellant Kareem Harry.

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge

C.A. No. 2012-GS-26-2938

Appellate Case No.: 2013-000336

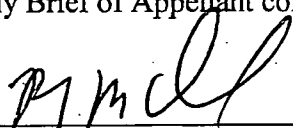
The State of South Carolina.Respondent,

v.

Kareem S. HarryAppellant.

Certificate of Counsel

The undersigned counsel for respondent certifies that the final Brief of Appellant and the final Reply Brief of Appellant complies with Rule 211 (b), SCACR.



Robert M. Dudek
December 8, 2014

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge

C.A. No. 2012-GS-26-02938

Appellate Case No.: 2013-000336

The State of South CarolinaRespondent,

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Kareem Harry.....Appellant.

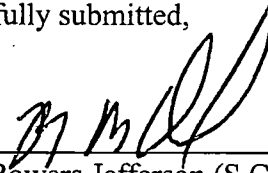
CERTIFICATE OF SERVICE

The undersigned counsel for Appellant certifies that Appellant's Final Brief has been served upon other counsel of record addressed as follows:

:

J. Anthony Mabry, Esq.
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

Respectfully submitted,

By: 

Melah Bowers Jefferson (S.C. Bar No. 74064)
WYCHE, P.A.
44 East Camperdown Way
Greenville, SC 29601
Telephone: 864-242-8200
Telecopier: 864-235-8900
E-Mail: mjefferson@wyche.com

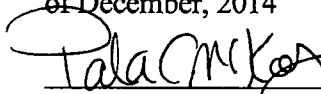
and

Robert M. Dudek
South Carolina Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

December 8, 2014

Attorneys for Appellant Kareem Harry.

SWORN TO BEFORE ME this 8th day
of December, 2014

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

December 8, 2014

J. Anthony Mabry, Esquire
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

Re: The State v. Kareem Harry

Dear Anthony:

Enclosed are two copies of the Final Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/pcm

Enclosure

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Horry County
Steven H. John, Circuit Court Judge

Appellate Case No. 2013-000336

THE STATE,

Appellant,

v.

KAREEM HARRY,

Respondent.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

JIMMY RICHARDSON
Solicitor, Fifteenth Judicial Circuit
P. O. Drawer 1276
Conway, SC 29528-1276
(843) 915-5460

ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

1. Did the Circuit Court err in failing to direct a verdict of acquittal in favor of Appellant Kareem S. Harry where the record lacked direct or substantial circumstantial evidence proving Harry guilty of murder under the "hand of one is the hand of all" theory of accomplice liability?

RESPONDENT'S COUNTER-STATEMENT OF ISSUE

Judge John did not err in denying the motion(s) for a directed verdict of acquittal where there was direct and substantial circumstantial evidence proving Harry guilty of murder under accomplice liability.

STATEMENT OF THE CASE

Appellant, Kareem Harry, along with a co-defendant, Saire Castro, murdered Kevin Bowens on March 1, 2011 in Horry County. Appellant was arrested two (2) days later on March 3, 2011 and charged with Bowen's murder. On July 26, 2012, appellant was indicted by the Horry County grand jury for the murder. (Ind. # 2011-GS-26-2938). Ed Chrisco, Esquire, represented appellant on the charge. Appellant proceeded to a jury trial on February 11, 2013 before the Honorable Stephen H. John, Circuit Court Judge. At the conclusion of the trial on February 14, 2013, the jury found appellant guilty of murder. Judge John sentenced appellant to thirty one (31) years confinement for Bowen's murder.¹ (R. pp. 15-16, 409-10, 516, 528, 3 Indictment). This appeal followed.

¹ Appellant's co-defendant Saire Castro pled guilty before appellant's trial to voluntary manslaughter and received a sentence of thirty (30) years. Appellant chose to proceed to trial and was convicted of murder and sentenced to thirty-one (31) years.

RESPONDENT'S STATEMENT OF FACTS

In February of 2011, appellant Kareem Harry ("Harry") was a drug dealer [primarily in cocaine] and an aspiring rap musician and record producer. Harry was also on probation for a previous criminal conviction. At that time, Harry had a romantic relationship with and was cohabiting with Ashley Bledsoe ("Ashley") in Ashley's apartment in Myrtle Beach. Harry and Ashley had been involved romantically for approximately ten (10) months. Harry also had a relationship with another woman, the mother of his four (4) children, who lived in a mobile home ("the mobile home") Harry purchased for her on Hwy. 544 in Horry County. (R. pp. 46-83, 183 219-20, 222-23, 433-509).

At the end of February, 2011, Harry's relationship with Ashley was ending because Harry had become physically abusive to Ashley, and a warrant had been issued for Harry's arrest for criminal domestic violence (CDV) on February 26, 2011. Police actually tried to arrest Harry on the night of February 26th, but Harry fled from Ashley's apartment complex. Police had also previously raided the apartment Harry shared with Ashley several days prior to February 26th and recovered drugs [cocaine]. As a result, Ashley was charged with trafficking. The apartment complex evicted Ashley, and she was forced to move into a new apartment in a different apartment complex. At this same time, Harry was moving out of Ashley's original apartment and was moving all of his personal items into *the mobile home* in which the mother of his children lived with Harry's four (4) children. Except for one (1) item, all of Harry's personal things were moved to *the mobile home* on February 28th with the assistance of Sage McPhail ("McPhail") who owned a small red truck. Harry left a forty-seven (47) inch flat screen plasma television ("the T.V.") at Ashley's. (R. pp. 46-83, 226-28, 436, 438, 440-41, 470-72, 475-76).

Unknown to Harry, Ashley had met a new man, the victim in this case Kevin Bowens ("the victim"), and engaged in a short romantic relationship with him beginning on the night of February 27, 2011. That night, Ashley and the victim spent some time at a night club, and the victim eventually spent the night at Ashley's apartment. According to Ashley, the following morning she allowed the victim to take *the T.V.* with the promise he pay her for it.² The victim physically carried the flat screen T.V., which was not heavy, to his vehicle without any assistance from anyone else, including Ashley, and placed it in his car. When the victim arrived at his residence, he also carried the flat screen T.V. into his home without any assistance and placed it in his bedroom. (R. pp. 46-83, 53-54, 304-05, 442-43, 483).

Appellant Harry was not aware Ashley had given the T.V. to the victim. At some point after moving out of Ashley's original apartment, Harry began demanding of Ashley that she return his T.V. or pay him for it, because Harry needed the money for an upcoming probation hearing. Initially, Ashley misled Harry and told him she had given the T.V. to a girlfriend who was going to pay her for it, because Ashley was afraid of what Harry would do to her if he found out about the victim. Eventually, on the afternoon of March 1, 2011, Ashley admitted to Harry she had given the T.V. to another man. (R. pp. 46-83; 53-56; 442-43, 403, 485).

On the night of March 1, 2011, Harry contacted Ashley, who was riding in a car with her friend Evelyn, and Harry demanded Ashley pull over wherever she was and meet him regarding the T.V. Ashley pulled into the parking lot of Waccamaw Hospital *in Murrell's Inlet* and waited. Once Harry arrived there, Ashley got into the vehicle Harry was operating, McPhail's red truck, and Harry told Ashley to give him [Harry] the identity of the man she had given the T.V. to, i.e. the victim, and directions to his residence. Ashley, who had previously been assaulted by Harry,

² According to Ashley, Harry had previously given Ashley permission to sell the T.V. if she could.

complied. Ashley informed Harry that the victim Kevin Bowens had the T.V. and lived in Kings Court subdivision. Harry knew exactly where Kings Court subdivision was located. (R. pp. 53-56).

Harry indicated to Ashley they were going to the victim's residence, also in *Murrell's Inlet*, to get his T.V. back. Instead of traveling directly to the victim's residence, which was just 2.9 miles away, Harry intentionally went out of his way and drove to another apartment complex, approximately a thirty-four (34) minute drive away, where an associate and friend, Saire Castro ("Castro"), resided. Castro was also a drug dealer. Castro had recently been arrested in possession of two (2) pistols and drugs, and had moved into another friend's apartment on Burcale Road, in *Myrtle Beach*. In addition to the two (2) handguns, which were seized by police, Castro was known to carry a .357 magnum revolver. The .357 was kept on top of the kitchen cabinet in the apartment in which Castro now resided. (R. pp. 46-83; 131-157; 186-87; 226; 400).

Ashley testified that on the night of March 1st, Harry did not drive immediately to the victim's residence, which was just a couple of minutes away, but drove *the red truck* to the aforementioned apartment complex on Burcale Rd. in *Myrtle Beach*. Once there, Harry got out of the vehicle and went into an apartment and stayed approximately five (5) minutes while Ashley remained in the truck. When Harry returned, he had two (2) men with him, one (1) of whom was Castro. Castro was carrying the .357 revolver, which was secreted on his person. (R. pp. 53-56; 102-03; 131-171).

The named lessee of the apartment Harry entered, Tommy Byrne ("Byrne"), also a close friend and associate of Harry, and also a drug dealer [primarily marijuana], testified that on the night of March 1, 2011, Harry came into his [Byrne's] apartment and asked to speak with Castro,

who was sitting at the kitchen table.³ Harry did not ask to speak with anyone else in the apartment, only Castro. Castro immediately got up and went into the living room with Harry and the two (2) men [Harry and Castro] spoke privately for anywhere from five (5) to eight (8) minutes. Byrne could see the two (2) men talking, but could not hear what Harry and Castro were discussing because the men kept their voices low. At the end of their conversation, Castro came over to Byrne and asked Byrne if he wanted to "go for a ride." Byrne agreed to go with Castro. Castro then immediately went into the kitchen where the .357 revolver was kept over the kitchen cabinet as Byrne headed out the door of the apartment. Castro retrieved the loaded .357 revolver. (R. pp. 131-159).

Byrne immediately followed Harry out of the apartment, down the apartment steps, and out to Harry's vehicle, which belonged to the aforementioned McPhail. When Byrne reached the parking lot, he saw that Ashley was in the passenger's seat of the truck. Castro eventually came out of the apartment alone, and Castro and Byrne got into a separate vehicle, a car, with Castro driving. Harry, driving the red truck, led the way out of the apartment complex with Castro and Byrne following in Castro's vehicle. When Byrne asked Castro what was up, Castro stated they were going to get Harry's T.V. Neither Byrne nor Castro knew the victim. (R. pp. 131-161).

Except for a brief stop at a gas station, where the three (3) men got out for a brief time together, Harry, driving the red truck, led Castro and Byrne to the victim's residence in King's Court subdivision, which was approximately a thirty (30) minute drive away from the apartment in which Castro had retrieved his .357 revolver. It was dark as the two (2) vehicles drove into Kings Court subdivision. (R. pp. 161-63, 194-201).

The victim's longtime girlfriend, Christina Patterson ("Christina"), who resided with the

³ Byrne allowed Castro to move into his apartment after he was arrested with the guns and drugs.

victim in Kings Court subdivision, testified that shortly before the murder, she and the victim were eating dinner in the dining room of their home when the victim received a text message from Ashley accusing him of stealing the T.V. The victim was exasperated and told (texted) Ashley to stop texting him. The victim communicated to Christina that he had purchased the T.V. from Ashley with a combination of cash and marijuana. The victim then shut off his phone. (R. pp. 287-316).

A few minutes later, Christina was changing her baby's diaper in the child's room when she heard two (2) vehicles come flying down the street into the culdesac where she and the victim lived, and the vehicles made a loud noise when they struck the speed bump/barrier in the street. She then looked out a front window of her home and saw the two (2) vehicles fly *into their yard* and stop *in the grass*. The vehicles had their headlights on. Three (3) men got out of the vehicles together. Christina testified there were three (3) men who immediately got out of the two (2) vehicles, and one (1) of them, the white male [Byrne] stood on the running board or hub of the vehicle. All three (3) men were yelling loudly across the front yard toward her home. (R.p. 316-324). A neighbor, who was outside her home, testified it was cold that night and the two (2) cars remained running after the three (3) men exited the vehicles. (R. pp. 114-127).

Christina then went to the master bedroom and informed the victim of what she had just seen. As a result of the men pulling up in his yard, the victim got his personal handgun out of his closet, a 9mm semi-automatic, put it in his front waist band, and told Christina he was going outside to see what the men wanted or to try to resolve the situation. (R. pp. 322-323).

Christina then watched out the window of her dining room and saw the three (3) men, Harry, Castro, and Byrne, approach the victim and surround him in a semicircle fashion while the victim was leaning back against his own BMW parked in the victim's driveway. The men began

conversing with the victim. The neighbor who was outside her home, testified the men were talking loud enough where she could hear them, but not what they were saying. (R. pp. 125, 323-328).

At some point, Harry signaled Ashley to get out of the truck. Ashley complied, walked over to the victim, and accused the victim of stealing the T.V. The victim denied he stole the T.V. Harry told Ashley to get back in the truck. (R. pp. 169-170, 328).

The victim told Harry he had given Ashley money and marijuana for the T.V. The victim stated he was not going to give the T.V. to the three (3) men. The men continued to demand the T.V., and the victim stated he was not giving it to them. When the victim finally made it clear the men could not have the T.V., and he was not giving them any money for the T.V., then and only then, did Castro pull out his .357 revolver and shoot the victim three (3) times. The victim was shot in the leg and two (2) times in the torso. (R. pp. 170-171).

Christina did not actually see the murder, having gone to the baby's room to place the child in bed, but on the way back to the dining room she heard the three (3) gunshots. The neighbor who was outside also heard the first gunshot and as the three (3) men were starting to walk away toward their vehicles, she saw one (1) man put his arm out back toward the victim and fire two (2) more shots. Another neighbor, who was awakened [probably by the loud voices], also heard the gunshots and ran out of his home. When Christina ran out of the garage to check on the victim, she saw him on the ground resting on his forearms looking up at the men, and the men were still standing there. She fled back into her home afraid the men would shoot her or come after her. She then came back outside and the three (3) men were already heading back or getting into their

two (2) vehicles, and she heard them say: "Lets go, Lets go." (R. pp. 328-331).⁴

The three (3) men, Harry, Castro, and Byrne, got back into their vehicles and left together in the same two (2) vehicles they had come into the neighborhood together in.⁵ At Harry's direction, Ashley was now driving the red truck, and Harry was in the passenger seat. Castro was again driving his car, and Byrne was in the passenger seat. One (1) neighbor testified the two (2) cars pulled off from the culdesac slowly together, one behind the other. The vehicle containing Harry was the lead vehicle leaving the neighborhood as it had been on the way into the neighborhood. (R. pp. 59-60,119-120, 164-165).

When Christina and a neighbor got to the victim, he had three (3) gunshot wounds, one (1) to the leg, one (1) to the center of his chest, and one (1) to the back.⁶ The victim died at the scene and was formally pronounced dead at the hospital. (R. pp. 202-211, 277-286, 333).⁷

Another neighbor followed on foot the two (2) vehicles Harry, Castro, and Byrne were in as they left the subdivision, got a description of the vehicles, and relayed the same to the police. As the vehicles were leaving the general area of the crime scene, Castro instructed Byrne to throw the murder weapon out of the car, which Byrne did, but not before wiping the gun down to remove any fingerprints. Police almost immediately attempted to stop the two (2) vehicles with blue

⁴ Christina also thought she heard the men say something like "Oh shit." (R.p. 328-331). However, the neighbor who was outside when the shooting occurred exclaimed: "Oh, shit," and ran into her house. (R. p. 119).

⁵ The neighbor who was outside testified that after the first shot, the shooter turned around, extended his arm, and fired two (2) more shots into the victim. After the first shot, the other men with the shooter started moving toward their vehicles, but not fast or in a hurry. (R. pp. 118-119).

⁶ Brian McGarrahan was the neighbor who responded to the victim in his front yard. He was a fireman and a certified E.M.T. He testified the victim was laying on his stomach, and when the victim was turned over a firearm fell *out of his waistband* onto the ground. The victim was unresponsive except for one (1) agonal breath. Then, there was no pulse and no further respiration. McGarrahan informed 911 that the victim was pulseless, apneic, and had injuries incompatible with life. (R. pp. 202-211).

⁷ Christina came forward five and one half (5 ½) months after the incident and admitted to police and testified at trial that a neighbor handed her the gun that fell out of the victim's waist band and money and drugs that were on the victim's person. Christina admitted she put the gun back in the victim's closet, flushed the drugs down a toilet, and put the money in a jewelry box. (R. pp. 333-334).

lights near Hwy 17. Harry ordered Ashley not to stop and to continue driving, which she did for a brief period of time. When she finally decided to stop anyway, Harry fled from the passenger seat of the red truck while it was still moving and escaped on foot. He later claimed he lost his cell phone while fleeing from police.⁸ Ashley was taken into custody at the scene of the car stop. Castro and Byrne were stopped almost immediately and also taken into custody. (R. pp. 18-32, 59-60, 120-121, 174-177).

Harry fled on foot for some distance and eventually made his way back to his residence [the mobile home] on Hwy. 544. Once there, he knocked on the window of a white SUV, registered in the name of the mother of his children, parked in his driveway occupied by McPhail. McPhail testified he had done some repair work on the SUV for Harry in exchange for cocaine and was returning the vehicle when Harry approached the vehicle and knocked on the window. McPhail and Harry then got into a vehicle operated by Harry's brother, Kason. The three (3) men then proceeded back to Byrne's apartment, where Harry and Castro had first conversed. After dropping McPhail off at Byrne's apartment, Harry fled the apartment complex with his brother in his brother's car. (R. pp. 18-32, 60, 215-249, 271-277).

While the above was occurring, Castro, Ashley, and Byrne were being questioned by police at a police substation. During a break in interrogation, Castro escaped from the police substation. Castro fled on foot, went back and recovered the murder weapon and discarded it in a lake, and shaved his head to change his appearance. Castro eventually fled back to the apartment where he had originally met with Harry and obtained the .357. McPhail was there and assisted Castro in fleeing the area. McPhail was arrested shortly thereafter and charged with accessory

⁸ Ashley testified that prior to the shooting, as they two (2) vehicles were proceeding to the victim's residence, Harry was on the phone with the victim.

after the fact of murder. Castro then fled to Florida. He was arrested there by United States Marshalls on a fugitive warrant and returned to South Carolina and charged with Bowen's murder. (R. pp. 18-32, 59-60, 177-179, 407-408). Byrne and Ashley were also charged with murder. Harry was arrested two (2) days later and charged with the victim's murder on March 3, 2011. (R. pp. 47-48, 103-107, 145, 177, 379, 343-350; 409-410, 423).

Later, after Byrne agreed to "cooperate" with police, he took them back to the site where the murder weapon was allegedly thrown out of Castro's vehicle. Police searched the area several times but were never able to locate the murder weapon. (R. pp. 178-179).

All of the defendants testified during the trial. Castro, and of course Harry, both testified for the defense. The other defendants [Ashley, Byrne, and McPhail] testified in the State's case under proffer agreements, in which no promises were made to them regarding the resolution of their charges. At the time of this trial, none of these three (3) testifying co-defendants' had gone to trial or their charges been disposed of. They were still exposed to the maximum sentence for murder [Byrne & Ashley] or accessory after the fact of murder [McPhail]. Like Harry and Castro, they each gave testimony attempting to exonerate themselves of any criminal responsibility for murder; however, their combined testimony was consistent in several important respects: (1) Harry had recently broke up with Ashley and wanted his T.V. back or the money for the T.V.; (2) Harry was operating a vehicle that was not registered to him, McPhail's vehicle, on the night in question; (3) Harry did not go directly to the victim's residence, which was close by, after learning the victim had the T.V. even though he knew where Kings Court subdivision was located and had Ashley in *the truck* with him; (4) Instead, Harry drove to *Castro's apartment*, which was a considerable distance away, and privately enlisted Castro, who was known to carry a weapon, to come with him; (5) Castro immediately went into the kitchen and obtained his loaded .357

revolver; (6) all of the co-defendants, except McPhail, then went together to the victim's residence, in two separate vehicles, with Harry leading the way, where the victim was confronted about the T.V.; (7) when the victim made it clear he was not going to give them the T.V. or money for the T.V., the victim was immediately shot by Castro with the .357 revolver; (8) whereupon all the defendants immediately left the area together with Harry's vehicle leading the way; (9) Castro and Byrne disposed of the murder weapon, and (10) Harry and Castro eventually fled from police; Harry at the car stop, and Castro from the police station. (R. pp. 46-83; 131-193; 215-250; 271-278). Ashley, along with the testimony of the victim's long-time girlfriend Christina, established Harry did not need the assistance of the two (2) other men to load or unload the flat screen T.V. as the victim had loaded and unloaded the T.V. without the assistance of anyone. While the co-defendant's testimony *with charges still pending* was consistent in the above respects, it was inconsistent with each other in several important respects, and inconsistent with the testimony of eyewitnesses to the murder, including the victim's longtime girlfriend Christina Patterson. (R. pp. 46-83; 114-127; 215-250; 271-78; 287-351).

In the defense' case, Castro testified differently from the co-defendants and Harry. Castro testified the shooting was not strictly over the T.V., but the reason the men went to the victim's residence to confront him was because the victim had stolen some *drugs or drug money* from Ashley's apartment the night he stayed over. Castro denied the secret meeting between he and Harry in Byrne's apartment took place. Castro also claimed that at the time of their confronting the victim, the victim pulled his gun and was going to shoot Harry, when Castro shot the victim in defense of Harry.⁹ However, Castro admitted before he shot the victim, Harry gave the victim a

⁹ None of the other co-defendants, including Harry, testified the victim pulled his weapon before Castro shot the victim. (R. pp. 46-83; 215-250, 434-509). Harry basically concedes in his brief that Castro's version of the shooting

“head nod.” (R. pp. 365-402).

Harry testified differently than Castro and the co-defendants. Harry testified he did not go to Castro's apartment to get Castro and enlist his support, but he went there to buy marijuana from Byrne. Harry testified he, Ashley, Castro, and Byrne went by the victim's residence on a side-trip, i.e. on their way to return McPhail's truck to him and for Castro to make a drug sale in the area. Harry claimed that he was planning to go to Ashley's while Castro and Byrne returned McPhail's vehicle, and he and Ashley were going to “chill” at her new apartment and smoke “weed.” Harry testified the exchange with the victim at the victim's home between the men was calm and polite; he, Harry did not really care about the T.V., and Castro shot the victim without any warning and without his foreknowledge.¹⁰ According to Harry, he never saw the victim pull a gun as Castro claimed. Harry claimed he had turned his back to say something to Ashley, when Castro shot the victim. Harry claimed everyone ran back to their vehicles after Castro shot the victim the first time. Harry claimed he did see the victim pointing the gun at him as the victim lay on the ground wounded, and that was why he fled the scene and directed Ashley to drive. Harry also made numerous admissions that only further strengthened the State's case that Harry was guilty of murder.¹¹ (R. pp. 434-509).

was not credible *and* Castro had no justification for shooting the victim. Harry does not even argue Castro acted appropriately. (BOA, p. 10; 11-19)

¹⁰ Harry testified the only person who raised their voice to the victim was Ashley, and she was told to get back in the truck. The victim also remained calm. According to Harry, there was no animosity between the men. (R. pp. 455-56).

¹¹ See discussion of Harry's testimony, *infra*.

ARGUMENT

Judge John did not err in denying the motion for a directed verdict because there was direct and substantial circumstantial evidence of Harry's guilt of murder.

What Occurred Below

At the close of the State's case, Harry moved for a directed verdict. Judge John denied the motion for a directed verdict. (R. pp. 352-362). In ruling on the motion, Judge John stated as follows:

I've looked at, just so that the record reflects, I've also gone through now the case of State v. Curry found at 636 S.E.2d 649. Let me look at State v. Langley here.

All right, based on the Defendant's motion basically for a directed verdict based on insufficient evidence of the crime charged, the murder under the theory of the hand of one is the hand of all basic law regarding directed verdict, of course, is that the Defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged, and again, the trial court's concerned with the existence of evidence, not with the weight of the evidence and if there's any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused the case properly goes to the jury. Obviously their standard is much different. The Court's standard and I think we would all be in agreement this is a substantial or circumstantial evidence case and obviously the Defense disagrees whether it's substantial or not but it's a circumstantial evidence case and the standard then is is there substantial circumstantial evidence reasonably tending to prove the guilt of the accused. The trial court grants a directed verdict motion when a - in the trial of a case when the evidence merely raises a suspicion that the Defendant is guilty of the crime charged and where a jury would only be speculating as to the guilt of the accused or where the evidence is sufficient only to raise a mere suspicion of guilt. Suspicion is defined as implying a belief or opinion as to guilt based on facts or circumstances which do not amount to proof.

In this case, and again in the Court's view, it is a circumstantial evidence case and I'm going to highlight some facts. These are not all the facts the Court has reviewed or using in making its decision, but there are, and some of these are the same that the State brought out in its, in its argument, the - it's clear that the Defendant wanted the TV or the funds, that there's evidence that there was some urgency to his need, that being his probation meeting or hearing the next day, that he knew and was informed where the TV was located he had a direct path to go to the location of the TV, which was in the testimony approximately 2.9 miles. He decided not to do that. He decided to go to a place where an individual by the name of Saire Castro was located, the testimony indicating a person common

knowledge was that he carried a weapon, had him after a conversation with that individual come along and accompany the Defendant to the location and to accomplish this he had to travel distances far out of his way as testified to, many, many miles out of his way to recruit this person, and then to go back to the location. He goes to the location. The testimony indicates that the multiple vehicles arrived at the location and drove into the yard of the location. There's testimony they the did so in a fast manner, that they exited the vehicles in a hurry, they met the person who had the TV and as a result of the discussion the person that Mr. Harry had recruited to come along with him to collect the TV or the money who the testimony indicates was known to carry a weapon, pulled out that weapon and shot and killed the victim in the presence of Mr. Harry. After that Mr. Harry does not stay at the location to answer questions to the police or to explain his position. He flees the scene. When the police attempt to stop him he flees from the police, not once but twice. All this the Court finds is, in addition to all the other testimony and evidence presented in this case, I'm just highlighting those facts, those aren't the only ones in this case, that there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt can be fairly and logically deduced, and therefore, the motion for a directed verdict is denied.

(R. pp. 359-362). At the close of the defense's case, after testifying, and after calling Castro as a witness, Harry renewed his motion for a directed verdict. Judge John again denied the motion for a directed verdict. (R. pp. 514-515). In denying the motion, Judge John stated as follows:

All right, in, in that and, and the Court accepts that your re-argument of the - your directed verdict motion that you made earlier at the end of the State's case with all the arguments you made at that point in time, those being made again now at this stage of the proceedings at the end of the evidence. Again, as I indicated, and I don't see the necessity to go through all the standards again regarding directed verdict standards. I reincorporate those standards as I indicated them previously but the Court finds in this particular matter that it does and I think it's clear that the State is relying here and its basically a circumstantial evidence case, and based upon that and my examination of the facts and the rendition of the facts that we went through and certainly now we've had some additional testimony, but that evidence still exists but now there's additional testimony, that I believe that there has been substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which the guilt of the Defendant could be fairly and logically deduced, and therefore, based upon that the Court respectfully declines to grant your motion for a directed verdict.

(R. pp. 514-515). After the jury convicted Harry of murder, Harry renewed his previous motions

for a directed verdict as a motion for a new trial, which was again denied by Judge John. (R. pp. 519-520). In denying the motion for a new trial Judge John stated as follows:

Regarding this particular matter and the motion of the Defense regarding its previous matters raised to the Court's attention now in their motion for a new trial the evidence in this matter was of a circumstantial nature. As I previously indicated I believe there is more than sufficient evidence to send the matter to a jury for their consideration and I again reaffirm that. I believe there was competent evidence presented in this matter that would and does sustain the verdict of the jury in this matter. It is not my position at this point in time on a motion for a new trial and where we are at this stage of the proceedings to substitute my judgment if there – if I had a difference as to how I would have voted for that of the jury and overturned a verdict on those matters. I have examined the evidence previously regarding the directed verdict motions. I have examined the evidence regarding this motion for a new trial. There is and without question more than sufficient evidence to submit the question of guilt to the jury and more than sufficient evidence to sustain the jury's verdict of guilty of the crime of murder. Therefore, I respectfully decline to grant your motion for a new trial.

(R. pp. 520). Harry now alleges on appeal Judge John erred in denying his motion(s) for a directed verdict because none of the testifying co-defendants, whose charges had not yet been disposed of, or Castro, or appellant Harry, admitted there was an agreement that if the victim did not surrender the T.V. or money he would be assaulted, shot, or murdered. There is no merit to this appellate ground.

The gist of Harry's argument is that the State's case failed because there was no testimonial evidence of an express agreement between Harry and Castro to assault, injure or kill the victim. The effect of this analysis is that unless the State can produce evidence of actual discussions between co-conspirators or co-perpetrators while planning the crime, a defendant's testimony (after the State rests its case-in-chief) that he never conspired with his co-defendant, and never intended to commit any crime, will mandate a directed verdict on any charge requiring an agreement, premeditation, or an intent to commit a crime. The defendants' concerted actions leading up to and during the crime will be irrelevant, while their protestations of innocence and

claim of lack of intent will be paramount. Such a result renders the well-established directed verdict analysis, and the applicable standard of appellate review, completely meaningless. Further, it would be an impossible burden for the State to meet in a case such as this where the two (2) key perpetrators held a private discussion, refused to cooperate or incriminate themselves, and their actions clearly show there was concert of action and both are guilty under the law of parties to a crime.

***General Standard of Review
(Appellate)***

In criminal cases, this Court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Thus on review, the appellate court is limited to determining whether the trial court abused its discretion. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Garrett, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002).

***Standard of Review / Directed Verdict
(Appellate)***

A defendant may only appeal from a trial judge's denial of a motion for a directed verdict of acquittal where there is a total failure of competent evidence tending to establish the charge laid in the indictment, and absent an error of law, the ruling must stand. State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984).¹² In reviewing a denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. State v. Cope, 405 S.C. 317, 748 S.E.2d 194 (2013); State v. Rogers, 405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013). This Court views the evidence *and* all reasonable inferences in the light most favorable to the State. State v. Lemire,

¹² See also State v. Tyner, 273 S.C. 646, 258 S.E. 2d 559 (1979); State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978).

406 S.C. 558, 753 S.E.2d 247 (Ct. App. 2013), *citing State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006).¹³ The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Brown*, 402 S.C. 119, 740 S.E.2d 493, 495 (2013); *State v. Gilliland*, 402 S.C. 389, 741 S.E.2d 521, *3 (Ct. App. 2012). If there is any direct evidence, or if there is substantial circumstantial evidence, that reasonably tends to prove the defendant's guilt, this Court must find the trial court properly submitted the case to the jury. *Brown*, 740 S.E.2d at 495; *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494, 500 (2005); *State v. Rogers* 405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013), *citing State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011); *Gilliland* at *3. This Court considers only the existence or non-existence of evidence, not witness' credibility, in reviewing the denial of a directed verdict. *Rogers supra*, n. 5, 748 S.E.2d 265, n. 5.¹⁴ Our courts have repeatedly held, where the evidence is circumstantial, the evidence will be considered as a whole, not in isolation, in determining whether there was sufficient evidence to submit the case to the jury. *Rogers supra*.¹⁵ If the State has presented any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must affirm the trial court's decision to submit the case to the jury. *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013).¹⁶ "The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling." *State v.*

¹³ See also *State v. Palmer*, 2014 WL 551581 (Ct. App. 2014).

¹⁴ See *State v. Cherry*, 348 S.C. 281, 286, 559 S.E.2d 297, 299 (Ct. App. 2001)(en banc), *aff'd in result*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004); *State v. Scott*, 330 S.C. 125, 131, n. 4, 497 S.E.2d 735, 738, n. 4 (Ct. App. 1998).

¹⁵ See *State v. Frazier*, 386 S.C. 526, 532-33, 689 S.E.2d 610,613-14 (2010)(viewing circumstantial evidence "collectively" and "as a whole" to hold directed verdict properly denied); *Cherry*, 361 S.C. at 595, 606 S.E.2d at 478 (finding circumstantial evidence, when combined, was sufficient to for the fact finder to infer guilt); *State v. Buckmon*, 347 S.C. 316, 323-24, 555 S.E.2d 402, 405-06 (2001).

¹⁶ Furthermore, when the defendant offers proof in his case in chief, the appellate court is to consider all of the evidence in ruling on whether a directed verdict motion at the close of the defendant's case was properly denied. See *Hepburn*, 406 S.C. at 429-42, 753 S.E.2d 402, *adopting State v. Harry*, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996); Cf. *State v. Thompkins*, 220 S.C. 523, 68 S.E.2d 465 (1951)(citation omitted).

Stanley, 365 S.C. 24, 42, 615 S.E.2d 455, 464 (Ct. App. 2005).

(Trial Court's Standard)

A motion for directed verdict is properly denied when there is any evidence, direct or circumstantial, that reasonably tends to prove the defendant's guilt. State v. Brandt, 393 S.C. 526, 542, 713 S.E.2d 591, 599 (2011). When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of evidence, not its weight. Cope, 405 S.C. 317, 748 S.E.2d 194; Cherry, 361 S.C. at 593, 606 S.E.2d at 477-78; State v. Gaines, 380 S.C. 23, 667 S.E.2d 728, 732-33 (2008).¹⁷ A trial court should grant the directed verdict motion when the evidence merely raises a suspicion the accused is guilty, as suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. Cherry, 361 S.C. at 594, 606 S.E.2d at 478. On the other hand, "a trial judge is not required to find that evidence infers guilt to the exclusion of any other reasonable hypothesis." Hepburn, 406 S.C. 416, 753 S.E.2d 402.¹⁸ The trial judge is required to deny the motion for a directed verdict and submit the case to the jury if there is *any* direct evidence or *any* substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. Hepburn, 406 S.C. at 429, 753 S.E.2d 402, *quoting* State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126, 127 (2000).¹⁹

The Lack of Merit of Harry's Argument

The State more than satisfied the standard to overcome the motion(s) for a directed verdict on the charge of murder. Judge John appropriately denied the motion for a directed verdict at the

¹⁷ See also State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002); see Rule 19(a), SCRCrP.

¹⁸ See Cherry, 361 S.C. at 594, 606 S.E.2d at 478 (emphasis removed).

¹⁹ If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the case must be submitted to the jury. State v. Freiburger, 366 S.C. 125, 136, 620 S.E.2d 737, 743 (2005); Weston, 367 S.C. at 292, 625 S.E.2d at 648.

close of the State's case and at the close of Harry's case. There was both direct and substantial circumstantial evidence from which the trial judge and the jury could find Harry guilty of murder pursuant to the law of parties to a criminal offense, i.e. the hand of one is the hand of all and/or as one present aiding and abetting. Considering the evidence, including all inferences, in the light most favorable to the State, Judge John did not err, i.e. abuse his discretion, in denying the motion(s) for a directed verdict.

The Law

Harry argues the State presented insufficient evidence that he is responsible for the victim's murder under an accomplice theory.

Under the "hand of one is the hand of all" theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense. [However, mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. [Rather,] presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal.

State v. Thompson, 374 S.C. 257, 261-62, 647 S.E.2d 702, 704-05 (Ct. App. 2007)(internal quotations and citations omitted).

"Under an accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.'" See State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002)(quoting State v. Langley, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999). In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties. Id. at

193, 562 S.E.2d at 324 (stating that under the hand of one is the hand of all theory, “[a] formally expressed agreement is not necessary to establish the conspiracy” which brings the accomplice to the scene of the crime).

The Evidence

The State's Case

At the close of the State's case, viewing the *evidence* and *all inferences in the light most favorable to the State*, the following was established. Appellant Harry was the only person with a motive to injure, shoot, or kill the victim Kevin Bowens. Harry was angry that his girlfriend, Ashley, had given his T.V. away, and she had given it to *another man*. Harry was angry the victim, Ashley's *new boyfriend*, would not return his T.V. or pay him cash for the same. Harry needed the T.V. or the money for the T.V. because of an impending probation hearing or matter. Saire Castro, the shooter, had no motive to shoot, injure, maim or kill the victim *other than vicariously for Harry*, the person who came and got him before the incident and brought him to the crime scene. (R. pp. 46-83; 131-193).

The State's evidence established that once Harry found out who had the T.V. and where he resided, Harry did not drive to the victim's residence, *in Murrell's Inlet*, which was just 2.9 miles away, with Ashley in his vehicle and attempt to obtain the return of the T.V. peacefully. Instead, he drove completely out of the way and went to another apartment complex, approximately 34 minutes away in Myrtle Beach, where Saire Castro, a man known to carry a .357 magnum pistol, resided. Once there, Harry left Ashley in the vehicle, went directly into the apartment in which Castro resided, and privately and secretly enlisted Castro's cooperation and support. Harry did not ask to speak with anyone else, only Castro, the man known to carry a .357 revolver and who had recently been arrested in possession of two (2) other guns and drugs. There is certainly

evidence Harry enlisted the assistance of Castro because Castro carried a loaded firearm, and he wanted such a person with him when he confronted the victim over the T.V. or the money for the T.V. Harry did not need Castro's assistance to load or transport the T.V. as Harry already had a truck, which he was driving, and the victim had loaded and unloaded the flat screen T.V. by himself on two (2) occasions with no assistance from others. Further, the evidence established Harry knew where Kings Court subdivision was located, and he had Ashley in the truck with him when he was just 2.9 miles from the victim's residence. Further, the record shows that after the private conversation between Harry and Castro, in Byrne's apartment, which lasted five (5) to ten (10) minutes, Castro agreed to assist Harry and immediately walked into the kitchen and retrieved his loaded .357 magnum revolver from above the kitchen cabinet, and secreted it on his person, indicating a nefarious purpose for arming himself. There is certainly an inference from this evidence that Harry instructed Castro to come with him and to bring the loaded .357 magnum pistol with him because they were going to need the gun in the confrontation with the victim, i.e. they were going to force, intimidate, injure, or kill the victim if he did not produce the T.V. or money for the T.V. Castro also enlisted the support of a third (3rd) man, Tommy Byrne. (R. pp. 46-83; 131-193; 194-201).

All three (3) men left Byrne's apartment complex together, in two (2) separate vehicles, with Harry leading the way, with Ashley, the person who had given the T.V. to the victim, in tow. Harry, driving the red truck, led Castro, the man with the loaded gun driving his own vehicle, directly to the victim's residence, in Kings Court subdivision, except for only one (1) stop, at a convenience store, where the three (3) men got out and briefly left Ashley alone in the truck. Harry in the truck then led Castro and Byrne in their vehicle to Kings Court subdivision, which Harry knew the location of. With Ashley providing specific directions as to the location of the

victim's home inside the subdivision, Harry in his vehicle and Castro in his vehicle drove swiftly down the victim's street and hurriedly drove up *into the victim's yard*. This all occurred at approximately 10:00 to 11:00 p.m. on March 1st, while dark. (R. pp. 46-83; 131-193; 194-201; 114-127; 287-352; 35-37; 88-113).

All three (3) men exited the vehicles together and began yelling loudly across the yard. All three (3) men then confronted the victim in the victim's own yard. The three (3) men surrounded the victim in semi-circle fashion and exchanged words with the victim regarding the victim giving up the T.V. or money. Harry then directed Ashley to get out of the truck, and Harry directed her to confirm the victim took the T.V. Ashley accused the victim of stealing the T.V., which the victim denied. Harry told Ashley to get back in the truck. When the victim categorically stated the last time that he was not giving them the T.V. or any money, Castro, the man who Harry brought to the scene, the man Harry brought to the scene with a loaded revolver, immediately pulled his .357 revolver and shot the victim three (3) times. When the victim's girlfriend came out of the victim's home, the victim was on the ground resting on his forearms, and the three (3) men were still standing near him. Another neighbor testified the men then moved back to their vehicles at a regular pace, i.e. they were not running. (R. pp. 287-352; 114-127; 58-59; 205-214; 165-171; 35-37; 88-113; 278-286).

All three (3) men then left the murder scene and the subdivision together in the same two (2) vehicles they came in. Harry directed Ashley to drive the red truck, which she did. Castro was driving his vehicle with Byrne inside. The two (2) vehicles left the subdivision slowly. Harry was again leading the way as the two (2) vehicles left the subdivision. Castro directed Byrne to dispose of the murder weapon, which he did, but not before wiping the gun down to remove any fingerprints. When police tried to stop Harry's vehicle, Harry instructed Ashley to continue

driving and to not obey the police blue light, which she did. When Ashley finally ignored Harry's instructions and began to stop the truck, Harry fled from the passenger side on foot before the vehicle was even stopped. He eventually fled back to his residence on 544, and then Harry and his brother took McPhail to Byrne's apartment, the same apartment where Harry and Castro had the earlier conversation and where Castro retrieved the firearm. Harry then fled that apartment complex with his brother Kason.²⁰ Castro, like Harry, fled from the police station, disposed of the murder weapon, changed his appearance, and fled the area with the assistance of McPhail. (R. pp. 59-60; 119-20; 173-277; 207-08; 237-246).

There was more than sufficient direct and substantial circumstantial evidence Harry was guilty of murder under South Carolina's law of parties to a criminal offense to overcome the motion to for a directed verdict. State v. Gibson, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2012); State v. Ward, 374 S.C. 606, 615, 649 S.E.2d 145, 150 (Ct. App. 2007)(holding in a case with similar facts, that evidence the defendant and his co-defendant together chased after two men in the melee of a parking lot brawl and fired shots, killing a bystander, was sufficient to overcome a directed verdict motion); *see also* State v. Langley, 334 S.C. 643, 649, 515 S.E.2d 98, 101 (1999)(indicating evidence that the defendant and co-defendant were seen together, circumstantial evidence placing defendant at the scene of the crime, and eye-witness testimony, was sufficient to warrant submitting the case to the jury on any theory of liability, including the hand of one is the hand of all theory). The evidence, and all of its inferences viewed in the light most favorable to the State, especially the actions of Harry and Castro, indicates there was an agreement that they

²⁰ Harry not only fled from the scene, but led Castro and Byrne in their flight from the scene and then fled from the vehicle on foot just moments after the murder when police attempted to apprehend Harry. Flight is evidence of guilt when sufficiently connected to the murder, as it was in this case. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); State v. Al Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003) State v. Milan-Hernandez, 287 S.C. 183, 336 S.E.2d 476 (1985).

were going together to the victim's residence at night to force or intimidate the victim into returning the T.V. or money for the T.V., and if the victim refused, the victim would be injured or killed by Castro, Harry's enforcer or "muscle." And, the victim died as a proximate result thereof. Accordingly, Judge John did not abuse his discretion in denying the motion for a directed verdict. Gibson; Ward; Langley.

The Defense Case

The Defense' case only added to the clear evidence of guilt. It further solidified the State's case against Harry. Hepburn, 406 S.C. at 429-42, 753 S.E.2d 402, *adopting State v. Harry*; *Cf. Thompkins, supra*.

Castro testified the motive for confronting the victim was not just over a T.V., but over *drugs* or *drug money* the victim had stolen from Ashley's apartment the night he stayed with Ashley. (R.p. 367-68). All of the co-defendants, except McPhail [who was a drug user], were drug dealers. Castro admitted he had been arrested several days before the incident in possession of drugs and firearms. (R. pp. 390-91). Byrne had already admitted in the State's case that he was a drug dealer. Castro also testified Byrne was a drug dealer. (R. p. 376). Several witnesses testified Harry was a drug dealer. Castro further admitted he had another firearm, a .357 magnum pistol, which had not been confiscated by police, that he took with him the night of the murder. (R.p. 378). In addition to being drug dealers, Castro admitted that he and appellant Harry were also rap musicians, and they had been collaborating on rap music for approximately three (3) years at the time of this murder. (R. p. 384, ln. 13 – p. 385, ln. 1, p. 392). And, they each had several recording studios which they used to collaborate on their rap music. (R. pp. 384-385, 392).

Castro admitted Harry came to Byrne's apartment on the night of March 1, 2011. (R. p. 390). Although he denied the secret meeting with Harry occurred, Castro admitted after Harry

came to Byrne's apartment, he [Castro] left the apartment with Harry and Byrne and carried his loaded .357 revolver with him. He also admitted he was known to carry a weapon. (R. p. 400). Castro admitted it was Harry driving the red truck who led him [Castro] to the victim's residence. (R. p. 392, ll. 21-25). Castro admitted he did not know the victim Kevin Bowens. (R. p. 393, ll. 9-10). Castro also admitted it was not his T.V. at the victim's house. (R. p. 393, ll. 11-12). Further, Castro admitted that Ashley was not his girlfriend. (R. p. 393, ll. 13-14). And finally, he admitted the confrontation with the victim was not his "beef" but Harry's. (R. p. 401).

Neither the trial judge nor the jury was required to believe *Castro's assertions* the meeting Byrne described under oath between Castro and appellant Harry never took place. Byrne testified the clandestine meeting did take place between Harry and Castro, and it lasted for five (5) to ten (10) minutes, whereupon Castro immediately went into the kitchen to retrieve the loaded .357 revolver and asked Byrne to go with them. Nor was the judge or jury required to believe Castro's assertion that the victim pulled his firearm before Castro shot him three (3) times. Byrne also testified the victim did not pull his weapon prior to Castro shooting him, and the E.M.T. at the scene testified when the victim was rolled over after being murdered, the victim's handgun fell out of the victim's waistband.

Castro also admitted he lied to police during questioning about his involvement in the murder, lied about who was driving the red truck, and left the police station during a break in interrogation. He admitted he shaved his head to change his appearance. He admitted he recovered the murder weapon from where Byrne had thrown it, and then disposed of it in a lake. He further admitted McPhail assisted him in escaping from the area. He also admitted he fled to Florida to avoid arrest and was arrested there by United States Marshalls with weapons drawn. He also admitted before he shot the victim, Harry gave the victim a "head nod." (R. pp. 379-380;

393-400, 368).

Appellant Harry's testimony did not help his situation either. Harry admitted he was a drug dealer [specifically in cocaine], and he had no vehicles registered in his name. (R. pp. 470, 439-440, 460-461, 500, 504). He admitted the vehicle he chose to drive to the victim's residence did not belong to him but was registered in another individual's name, McPhail's. (R. pp. 442, 444). He admitted he did give cocaine to McPhail in exchange for McPhail taking his "baby's mother's" vehicle, which allowed Harry to use McPhail's truck on the night in question, a vehicle that could not be traced to Harry except through McPhail. (R. pp. 439-40, 460-61).

Harry also admitted his brother Kason was a drug dealer; Castro was a drug dealer; Byrne was a drug dealer; another associate was a drug dealer, and implied Ashley was also a drug dealer. (R. pp. 436, 441, 445, 462, 475-76, 488, 489, 493, 494, 500, 503). His testimony further established that the individuals surrounding him on the date in question and the days leading up to the murder, which included McPhail, Byrne, Castro, Ashley, and Evelyn were repeatedly taking orders from him or at the least acting at his direction. (R. p. 440, ll. 4-12; p. 448, ll. 2-13; p. 458, ll. 1-10, pp. 498, 502-503, 504).

Appellant Harry contradicted his own witness, Castro, denying the confrontation was over drugs or drug money, but claiming it was over the T.V. or money for the T.V. as the State's witnesses testified.²¹ He also incredibly denied that any strong words were exchanged between the three (3) men and the victim. He admitted in addition to being a drug dealer that he is a rap musician who owned or operated several studios, and collaborated with Castro, another drug dealer, in the recording or record industry. (R. pp. 441-442, 470, 474, 483, 500, 506). He also

²¹ Appellant Harry also conceded several times that the victim did not do anything to justify his murder. (R. p. 464, ll. 14-16; p. 466, ll. 2-25; p. 479, ll. 8-11.

admitted he knew Castro had recently been arrested in possession of two (2) guns. (R. pp. 499-500).

Harry admitted the first time he became aware that Ashley had given the T.V. to another man, and not another woman, was on March 1, 2011, the day of the victim's murder. (R. pp. 443-444). He admitted he had called the victim earlier in the evening and sought to meet him at a neutral location about the T.V. or the money for the T.V., but the victim would not meet him. (R. pp. 447, 483-490). He admitted he left the mobile home on the night of March 1, 2011, in McPhail's red truck, to meet Ashley around 9:00 p.m., while dark (R. pp. 482-488). He admitted he met Ashley at Waccamaw Hospital on the *night* of March 1, 2011; she got in the vehicle with him, and they did not go directly to the victim's residence, which was nearby, but to the apartment where Castro resided. (R. p. 444).

While he denied the secret meeting with Castro as testified to by Byrne, he admitted after going into Castro's apartment, Castro and Byrne followed him to the victim's residence in a separate vehicle. (R. pp. 448-449, 507). He admitted the two (2) vehicles stopped at a convenience store before approaching the victim's residence. (R. p. 449). He admitted when he arrived at the victim's residence he parked in the victim's yard. (R. p. 450). He admitted he parked the truck in the victim's yard with the front of the truck facing the victim's house. (R. p. 480). He also admitted he, Castro, and Byrne approached the victim who was standing next to his car in his driveway. (R. pp. 450-451). He admitted he had met the victim on a previous occasion, and at that time the victim expressed an interest in Ashley. (R. pp. 452-453, 478). He admitted the victim told him he had paid Ashley for the T.V. with cash and marijuana. (R. p. 453). He admitted Ashley then accused the victim of stealing the T.V. (R. p. 454). To which the victim responded that he had given her money and marijuana for the T.V. (R. pp. 455-456). Harry

admitted he told Ashley to get back in the car. (R. p. 456). He admitted Castro had his hand behind his back during the confrontation. (R. pp. 505-506). He admitted Castro, the man he had brought to the scene, then shot the victim three (3) times with his .357 revolver. (R. p. 456).

Harry admitted all three (3) men then got back in their vehicles, and he [Harry] directed Ashley to drive the red truck. (R. pp. 457, 480). He admitted his vehicle led the way out of the subdivision just as it had led the vehicles to the victim's residence. (R. pp. 457-458). He admitted Castro's vehicle followed his vehicle after they got out of the subdivision. (R. p. 458). He admitted he told Ashley to keep driving when the police blue lighted Castro's vehicle. (R. p. 459).

Harry admitted he fled from the red truck before the police were even able to stop it. (R. p. 498). He also admitted his cell-phone, which he had used to text Ashley and contact the victim shortly before the shooting, disappeared during his flight from police. (R. pp. 461-462, 500-501).²² He also admitted he was using marijuana the entire evening and night of the murder. And, he contradicted Castro, regarding the fact that Castro led the way out of the subdivision, testifying there was no question his vehicle, Harry's vehicle, led the way into and out of the victim's subdivision. (R. pp. 457-458, 496).

He further admitted he had previously been convicted of grand larceny, and was on probation at the time of the murder. He corroborated the State's witnesses' testimony that he had an impending probation hearing the morning following the murder. (R. pp. 434-435, 459, ll. 22-23).

He further admitted he owned no vehicles in his own name, but relied on his associates, such as Evelyn, Ashley, or Sage McPhail for transportation. (R. pp. 436-438, 503, 504). He

²² Destruction or attempted destruction of evidence is evidence of guilt. Beckham, 334 S.C. 302, 513 S.E.2d 606; State v. Wells, 162 S.C. 509, 161 S.E. 177 (1931)(similar).

further admitted he had no real job and the majority of his income came from selling drugs. (R. pp. 470, 438). He further admitted he lied to police numerous times when questioned during the investigation. (R. pp. 493, 503).

Importantly, Harry never claimed that he knew the victim carried a firearm or that he knew the victim dealt in drugs, and as a result, he needed protection when he went to the victim's residence. In fact, Harry denied he took Castro with him to the scene for the purpose of helping him retrieve the T.V. or the money for the T.V. (R. pp. 434-509).

In summary, the defense' case allowed the State to present a complete and full picture of how and why the victim was murdered on the night of March 1, 2011. It solidified the State's theory of the case that Harry was guilty of murder under the law of parties to a crime. Harry, a drug dealer and rap musician, initiated and coordinated this entire crime including going and getting a man with a loaded .357 magnum pistol, who was also a drug dealer and fellow rap musician, to confront, intimidate, and coerce the victim into producing the T.V. or money, and if the victim did not comply with Harry's demands for the same, to assault, shoot, or kill the victim. Judge John did not err in denying the motion for a directed verdict at the close of the defense case. Hepburn, 406 S.C. at 429-42; 753 S.E.2d 402, *adopting State v. Harry*, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996); *Cf. State v. Thompkins*, 220 S.C. 523, 68 S.E.2d 465 (1951)(citation omitted).

CONCLUSION

Judge John did not err, i.e. abuse his discretion, in denying the motion(s) for a directed verdict because there was direct and substantial circumstantial evidence of Harry's guilt of murder under accomplice liability. For the foregoing reasons, the judgment, conviction, and sentence of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ANTHONY MABRY
Assistant Attorney General

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit

By: 

Anthony Mabry
ATTORNEYS FOR RESPONDENT
P.O. Box 11549
Columbia, SC 29211

December 4, 2014

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Horry County
Steven H. John, Circuit Court Judge

Appellate Case No. 2013-000336

THE STATE,

Appellant,

v.

KAREEM HARRY,

Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.



ANTHONY MABRY
Assistant Attorney General

December 4, 2014

CERTIFICATE OF SERVICE

I, Anthony Mabry, hereby certify that I have served the *Final Brief of Respondent* in the foregoing action by depositing copies in the United States Mail, postage prepaid, to Meliah Bowers Jefferson, Esquire WYCHE, P.A., 44 East Camperdown Way, Greenville, SC 29601 and by InterAgency Mail to Robert M. Dudek, Chief Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Ste. 401, Columbia, SC 29201 this 4th day of December, 2014.



ANTHONY MABRY
Assistant Attorney General

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge

C.A. No. 2012-GS-26-2938

Appellate Case No.: 2013-000336

The State of South CarolinaRespondent,

v.

Kareem S. HarryAppellant.

**FINAL REPLY BRIEF OF APPELLANT
KAREEM S. HARRY**

Meliah Bowers Jefferson
WYCHE, P.A.
44 East Camperdown Way
Greenville, South Carolina 29601
(864) 242-8200

AND

Robert M. Dudek
South Carolina Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

Attorneys for Appellant Kareem Harry.

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ARGUMENT

The trial court erred in refusing to grant a directed verdict of acquittal in favor of Harry where the State failed to present any substantial evidence that Harry was guilty of murder under the “hand of one is the hand of all” theory of accomplice liability.

This Court should reverse Kareem S. Harry’s conviction because the State could not meet its burden of proving Harry guilty of the crime for which he was charged. The State wholly failed in presenting direct or substantial circumstantial evidence that Harry was guilty of murder under the hand of one hand of all theory of accomplice liability.

While the State would like the Court to believe this appeal can be boiled down to the single issue of whether or not the State must present evidence of an explicit agreement between Harry and Saire Castro regarding the tragic death of Kevin Bowens, Harry has never alleged this to be the legal requirement. Instead, Harry has remained consistent in arguing the well-established law that the presentation of evidence of mere suspicion of guilt is insufficient to submit a case to a jury for determination. Here, the State presented no direct evidence and only presented scant circumstantial evidence amounting to mere suspicion in support of Harry’s guilt of the crime for which he was convicted. It is well-established under South Carolina law, that mere suspicion of guilt is insufficient to send a case to a jury for deliberation. Accordingly, the trial court erred in denying Harry’s motion for directed verdict.

“A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged.” *State v. Lane*, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013) (quoting *State v. Brannon*, 388 S.C. 498, 501, 697 S.E.2d 593, 595 (2010)). “Evidence must constitute positive proof of facts and circumstances which

reasonably tends to prove guilt.” *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011).

Under the ‘hand of one is the hand of all’ theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. Under accomplice liability theory, a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act. In order to be guilty as an aider or abettor, **the participant must be chargeable with knowledge of the principal’s criminal conduct.**

State v. Mattison, 388 S.C. 469, 479-80, 697 S.E.2d 578, 584 (2010) (internal citations and quotation marks omitted) (emphasis added).

In explaining the extent of “knowledge” required to convict a defendant of murder under an accomplice liability theory, the South Carolina Supreme Court has noted that:

For a person who has not actually committed the homicidal act to be regarded as a participant in a homicide, he or she must have aided, abetted, assisted, encouraged, or advised the killing. Also, the courts have required that the **alleged accomplice must have acted with the intention of encouraging and abetting the commission of the homicide**, or, at least that the commission of the murder by the principal must have been a reasonably foreseeable consequence of the defendant’s actions.

State v. Mattison, 388 S.C. 469, 484, 697 S.E.2d 578, 586 (2010) (quoting 40 Am. Jur. 2d Homicide § 26 (2010)) (emphasis in original).

“The lower court should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty.” *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). Instead, “[t]he trial court should grant the directed verdict motion . . . , as suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable

hypothesis.” *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 408–09 (2013) (citations and internal quotation marks omitted).

The State asserts that it presented both direct and substantial circumstantial evidence to support Harry’s conviction. Resp. Br. At p. 19. However, it is all too telling that the State devoted a significant portion of its brief in response to continuing its focus on unsupported, speculative theories of why Kareem Harry could have possibly wanted to commit this murder without ever mentioning any direct or substantial circumstantial evidence of Harry’s intentional participation in or knowledge of the actual crime.

Specifically, while on one hand the State alleges in its brief that Harry was angry that his ex-girlfriend had given his television to another man and was desperate for money to pay his probation fees, the record supports a different set of facts. During trial, Ashley Bledsoe testified that she gave Harry’s television to Kevin Bowens and that Harry had a probation appointment scheduled for the day following Bowens’ death. However, Bledsoe never testified that Harry was angry with Bowens for having the television. Instead, the record reflects that Bledsoe mislead both Harry and Bowens regarding the arrangement for the television and that Harry did not know that Bowens possessed his television until shortly before meeting Bowens about the television. Prior to meeting Bowens, Harry had no heated exchanges with Bowens – only Bledsoe participated in such communications. (R. pp. 53-55.); (R. pp. 66-67.); (R. pp. 72-73.); (R. pp. 75-76.) If Harry was angry with anyone in this situation, it was Bledsoe, not Bowens. Also, the State argues in its brief that Harry was a cocaine-dealing kingpin with a supply of sellable cocaine that he was allegedly giving away. Yet, on the eve of a probation hearing where he was required to pay fees, instead of selling this alleged cocaine supply, the State

argues that he was so concerned with recovering a television or money for a television that he would resort to deadly force to do so. The record does not support an adversarial relationship between Harry and Bowens, but rather the whole case is base on a fabrication invented to suit the narrative of the State's theory of motive.

But, more importantly, although the State implied that Harry should have known Saire Castro carried a handgun at the time of Bowens' homicide, the State has failed to provide any evidence during the trial or provide this Court with any citation in the record to support any claim that Harry actually knew that Castro had a weapon when they went to recover the television from Bowens. During the trial, the State could only present evidence that Castro was a person in the community commonly associated with weapons. Not one witness could testify that Harry had any knowledge that Castro had a weapon on the day of Bowens' killing. A review of the record actually indicates the opposite.

In the State's case, Thomas Byrne testified only that it was common knowledge that Castro was known to carry a gun. (R. p. 143, lines 19-20.) He further testified that, on the day of the shooting, Harry did not see Castro retrieve any weapon. (R. pp. 156-157.) Sage McPhail testified that he knew Castro very well, but that he was not aware of Castro to regularly carry a weapon on his person. (R. p. 244, lines 19-20.) Simply put, the State showed no evidence that Harry had any knowledge that Castro was carrying a weapon the night Bowens was shot. This Court recently reaffirmed the propositions that "suspicion, however strong, does not suffice to sustain a conviction," and that "a defendant is entitled to a judgment of acquittal . . . where the evidence is such as to permit the jury to merely conjecture or to speculate as to the accused's guilt." *See State v.*

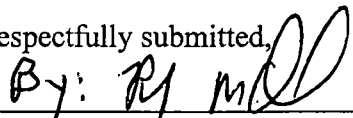
Pearson, Op. No. 5251, (Ct. App. Filed July 30, 2014) (Shearouse Adv. Sh. No. 30 p. 41) (internal citations and quotation marks omitted).

The law is clear that the State carries a burden of establishing more than mere suspicion guilty, but must present evidence of every element of the crime. The State all but concedes its failure to meet this burden in prosecuting Harry for Bowens' murder, and therefore, the trial court should have granted his motion for directed verdict.

CONCLUSION

For the reasons stated above, it is clear that the trial court abused its discretion when it denied Harry's motion for a directed verdict. The State presented no direct or substantial circumstantial evidence of Harry's guilt of the crime for which he was charged; particularly failing to demonstrate the Harry had any knowledge that Castro was armed on the day of the shooting and failing to demonstrate the existence of a plan or scheme to accomplish an illegal purpose involving Harry. Therefore, this Court should reverse Kareem S. Harry's conviction.

Respectfully submitted,

By: 

Meliah Bowers Jefferson (S.C. Bar No. 74064)
WYCHE, P.A.

44 East Camperdown Way

Greenville, SC 29601

Telephone: 864-242-8200

Telecopier: 864-235-8900

E-Mail: mjefferson@wyche.com

and

Robert M. Dudek

South Carolina Commission on Indigent Defense

1330 Lady Street, Suite 401

Columbia, South Carolina 29201

December 8, 2014

Attorneys for Appellant Kareem Harry.

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
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Steven H. John, Circuit Court Judge

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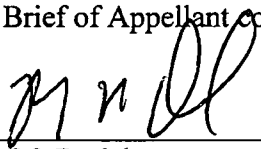
The State of South Carolina.Respondent,

v.

Kareem S. HarryAppellant.

Certificate of Counsel

The undersigned counsel for respondent certifies that the final Brief of Appellant and the final Reply Brief of Appellant complies with Rule 211 (b), SCACR.



Robert M. Dudek
December 8, 2014

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
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Steven H. John, Circuit Court Judge

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Appellate Case No.: 2013-000336

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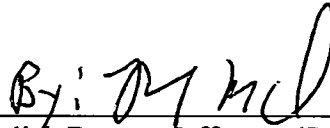
Kareem Harry.....Appellant.

CERTIFICATE OF SERVICE

The undersigned counsel for Appellant certifies that Appellant's Final Reply Brief has been served upon other counsel of record addressed as follows:

J. Anthony Mabry, Esq.
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

Respectfully submitted,

By: 

Meliah Bowers Jefferson (S.C. Bar No. 74064)
WYCHE, P.A.
44 East Camperdown Way
Greenville, SC 29601
Telephone: 864-242-8200
Telecopier: 864-235-8900
E-Mail: mjefferson@wyche.com

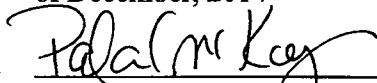
and

Robert M. Dudek
South Carolina Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

December 8, 2014

Attorneys for Appellant Kareem Harry.

SWORN TO BEFORE ME this 8th day
of December, 2014

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

December 8, 2014

J. Anthony Mabry, Esquire
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

Re: The State v. Kareem Harry

Dear Anthony:

Enclosed are two copies of the Final Reply Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/pcm

Enclosure