THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2014-000594

The State, ... Respondent,

v.

Devatee Tymar Clinton, ... Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in excluding the statements given by the four-year-old son of the Victim to multiple law enforcement and EMS professionals, shortly after witnessing Victim's murder, which identified someone other than Clinton as the murderer?

II. Did the trial court err in failing to direct a verdict in favor of Clinton where the evidence and testimony merely raised a suspicion, but failed to meet the elements of the charged crime?

STATEMENT OF THE CASE

This case was commenced against Appellant Devatee Tymar Clinton upon indictment 2012-GS-29-616 for the charge of murder. **(R. pp. 678-681).** Clinton was tried before a jury, along with co-defendant Al Martinez Green, in Lancaster, South Carolina during the week of March 10-14, 2012. **(R. p. 4).** Following deliberations, Clinton was found guilty of murder and thereafter sentenced by the trial court to life in prison, without parole. **(R. pp. 646; 668; 682).** Clinton timely served his notice of appeal on March 18, 2014. **(R. pp. 700-703).**

STATEMENT OF THE FACTS

Late in the evening on January 19, 2012, Jenika Jones (Victim) was killed by a single gunshot wound. **(R. p. 84).** At the time of her death, Victim was in her home, a mobile home in a mobile home community located off of Highway 200 near Great Falls, South Carolina. **(R. p. 245).** Sadly, Victim's three children, all under the age of four years old, were also in the home at the time she was killed. **(R. pp. 37-48).** Her oldest, a four year old boy, went next door to notify neighbors of the incident, who called 9-1-1. **(R. pp. 19; 23).**

Upon arrival, Lancaster County Sherriff's Officers found Victim, already deceased, laying on the couch in the mobile home's main, family room. **(R. p. 43).** The youngest two children, a girl, aged two, and a second boy, aged one, were found in the home; the oldest child remained with neighbors. **(R. pp. 37-48.).** All three children had blood on their clothing, presumably from Victim.[1] **(R. pp. 23-24; 59-60).**

Police arrived on the scene within minutes of the call to 9-1-1. **(R. pp. 19; 39).** Although the mobile homes in this particular community were very near to each other, the State produced no neighbors who heard the gunshot that killed Victim. **(R. pp. 52-55; 578-79).** Nor did the State produce any witness that saw someone entering or leaving Victim's mobile home. **(R. pp. 578-59).** Multiple officers and crime scene investigators, including a resident officer of the South Carolina Law Enforcement Division (SLED) responded to the scene. Evidence was gathered, the scene was dusted for fingerprints, and deoxyribonucleic acid (DNA) samples were collected.

[1] The record does not indicate that a test was ever performed to confirm the source of the blood; however, the children were uninjured. **(R. p. 78).**

Initially, Victim's children were secured by first responders in an ambulance at the scene. **(R. pp. 62-63).** There, the oldest child spontaneously stated (without provocation or questioning) to at least two police officers, as well as other EMS individuals on hand, that "Shi's Daddy shot my Momma."[2] **(R. pp. 14-15).** Shortly thereafter, the oldest child's exclamation changed slightly, becoming "Shortycake shot my Momma."[3] **(R. p. 17).** This statement was repeated several times in the minutes following the first responders' arrival, with all of these statements estimated to have occurred within thirty (30) minutes. **(R. pp. 14-31; 256-59).** Upon the State's motion *in limine*, the trial court initially ruled that the oldest child's hearsay statements were admissible, so long as proper foundation for their admittance was established. **(R. pp. 32-36).** Thereafter, however, the trial court sustained the State's objection to the oldest child's statements and they were never heard by the jury. **(R. pp. 256-59).**

The Lancaster Sherriff's Office developed leads based on the evidence collected at the scene. Ultimately, the investigation centered upon three individuals, Clinton, co-defendant Green, and a third individual, Wayne Blakeney, all three of whom were charged with Victim's murder. **(R. pp. 13; 29).** The linchpin of the State's case was the

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[2] This matter initially comes to light as a result of the pre-trial motion *in limine* of the State seeking to exclude testimony of the oldest child's exclamations from the jury. **(R. pp. 14-36).**

[3] It was later submitted that the oldest child may have also stated that "Jamia's Daddy hurt my Momma." **(R. p. 19).** During the pre-trial motion, it was confirmed by both the Solicitor and Defense Counsel that "Shi" is a nickname for a boy whose first name is "Jamia." **(R. pp. 17-19).** Additionally, it was confirmed that "Shi's Daddy" also goes by the nickname "Shortycake." Id. Moreover, it was determined that Shi's Daddy/Shortycake's actual name is Rashad Johnson. Id. Thus, Shi = Jamia, while Shi's Daddy = Shortycake = Rashad Johnson.

testimony of Blakeney, who provided a statement to police and ultimately testified against Clinton and Green at trial.[4] **(R. pp. 402-455).**

Blakeney testified that on the night of Victim's murder, he, Clinton, Green, and a fourth individual, Delrico McDow borrowed a white Cadillac with a ragtop roof from a person named Pomp Blackmon. **(R. pp. 412-15).** Those four took the Cadillac to the Hole in the Wall Club (Club), a local bar/nightclub. **(R. p. 416).** Blakeney testified that he drove the Cadillac, as he had a driver's license, but Clinton, who knew Blackmon and asked to borrow the Cadillac in the first instance, did not. **(R. p. 409).** While at the Club, according to Blakeney, Clinton said that he needed to leave and get some money. **(R. p. 417).** All four left the Club in the Cadillac, Blakeney again driving, and with Clinton providing directions as to their destination. **(R. pp. 417-19).** On the way, Blakeney testified that he saw Clinton, who was riding in the front passenger's seat, with a gun in or around his lap. **(R. p. 419).** Blakeney further testified that while *en route*, no one discussed a plan or purpose for the trip. **(R. pp. 417; 422).**

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[4] Blakeney was also charged with Victim's murder, initially. **(R. p. 403).** However, the State consented to Blakeney being bonded out of jail and he provided incriminating testimony against Appellant and Green during the trial. **(R. pp. 402-455).** Although Blakeney testified that he had received neither a deal nor promise of one in exchange for his testimony, the Court may take judicial notice of the fact that, following his testimony in this trial, Blakeney's murder charged was reduced to Accessory After the Fact under the Youthful Offender Act. See http://publicindex.sccourts.org/lancaster/publicindex/ (Under search "Blakeney Jr, Wayne Anthony); see also Wise v. Wise, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) ("[A]n appellate court can take judicial notice of something that was not before the trial court if it is indisputable."); Masters v. Rodgers Development Group, 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984); Freeman v. McBee, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984) ("A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records."). Blakeney pled guilty to this reduced charge, and was sentenced to six years, suspended for time served and eighteen (18) months' probation.

Eventually, the group arrived at their destination at the mobile home community located on Roseanna Lane, off of Highway 200.[5] **(R. pp. 418-20).** Blakeney parked the car, but could not remember where. **(R. pp. 418-20; 450-51).** Blakeney testified that he stayed in the car, while Clinton, Green, and McDow exited the car and "disappeared" amongst the mobile homes. **(R. p. 420).** Blakeney said that he did not know, and could not see, where the three went, if anywhere, or whether one or all three went to the same place. **(R. pp. 420-21).** They were gone for approximately ten (10) minutes. **(R. p. 421).** During that time, Blakeney testified he saw no one, including his three passengers, heard nothing, and was unaware of their destination or purpose. **(R. pp. 421; 440-41; 450-53).**

Ten minutes after they exited the vehicle, the three returned. **(R. pp. 421; 452).** The four left the mobile home community and returned to the Club. **(R. p. 422).** Several hours later, the four left the Club, along with several unidentified persons, and Blakeney drove to the Newtown area of town (incidentally, where they borrowed the Cadillac in the first place), where he dropped off Green, McDow, and the unidentified persons; Blakeney and Clinton remained in the car. **(R. pp. 424-25).** Thereafter, Blakeney drove Clinton back to his Grandmother's mobile home on Roseanna Lane. **(R. pp. 425-26).** During this car ride, Blakeney testified that Clinton told him that "I killed that bitch," although he did not elaborate and Blakeney had no idea to whom he was referring. **(R. pp. 426-27).** Blakeney further testified that, although he felt "shocked a little bit," he did not believe Clinton had killed anyone. **(R. pp. 427-28; 444-45).** Once they reached the

[5] It was later revealed that Appellant lived with his Grandmother in this same mobile home community on Roseanna Lane, in the mobile home next door to Victim. **(R. pp. 418; 455; 561).**

mobile home community, Blakeney testified that Clinton left the gun he had previously seen in the glove box of the Cadillac and asked Blakeney "to hold it for him." **(R. p. 428).** Blakeney obliged, for a while, but later sold the gun to a relative (despite originally lying and telling a friend that he had buried the gun). **(R. pp. 429-30; 447; 453-54).** After dropping Clinton off at his Grandmother's home, Blakeney ditched the Cadillac at a nearby Piggly Wiggly. **(R. pp. 429-30; 443-44).**

Even after learning of Victim's murder, and its date and location, Blakeney did not go to the police. **(R. pp. 433-34).** Instead, he later told a friend about his assumed role in Victim's death, and the friend later reported same to the police. Id. Blakeney was arrested and charged with Victim's murder. **(R. p. 430).** He gave multiple inconsistent statements to police, later admitting that he lied, which implicated Clinton, Green, and McDow. **(R. pp. 432-34; 437-39).**

The Lancaster Sherriff's Office, meanwhile, followed up on other leads. Led to the Cadillac after Blackmon reported it missing,[6] **(R. p. 152)**, investigators took swabs and samples from the Cadillac which were submitted to SLED for DNA testing. **(R. pp. 203-204; 233-40).** Test results revealed no link to either Victim or Clinton. **(R. pp. 345-56).** Police also recovered a blue work jumpsuit from the Cadillac, which was also submitted to SLED for DNA testing. **(R. pp. 302-04).** Witnesses claimed to have seen Clinton in a blue jumpsuit on the night of the murder, and Clinton admitted that he owned a similar jumpsuit. **(R. p. 470).** However, nothing linked the recovered jumpsuit to Victim or her mobile home.

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[6] Two other witnesses testified that they saw the Cadillac leaving the mobile home community around the time of the murder, lights off and moving at a high rate of speed, but could not identify any of the occupants of the car. **(R. pp. 65-70; 118-20).**

Investigators recovered little physical evidence at the mobile home of Victim. Swabs were taken of entry door handles, but nothing matched Clinton. **(R. pp. 179; 188-189; 192-94).** Additionally, although the master bedroom of the mobile home appeared to have been ransacked, nothing was ever identified by police as having been stolen, and no fingerprints or "touch" DNA were recovered from the home. **(R. pp. 171-74).** An autopsy of Victim recovered the bullet that caused her death, and a bullet casing was recovered from the mobile home. **(R. pp. 219-21; 391-92).** However, a SLED ballistic expert testing of both the bullet and the casing was inconclusive. Neither item revealed a link to Clinton, and the expert could not even definitively state, with any degree of scientific certainty, that the recovered bullet came out of the recovered casing. **(R. p. 392).** Moreover, despite Blakeney's apparent cooperation, the murder weapon was never recovered. **(R. pp. 455-56).**

Finally, the State relied upon testimony of several individuals who had seen Clinton and Green at the apartment of Green's girlfriend the day before Victim was murdered. According to the testimony of Dominique Davis and Jamal Twitty, Clinton and Green were discussing doing a "lick."[7] However, of the two individuals who testified regarding these conversations, both testified that the conversations were devoid of details, and neither Clinton nor Green discussed when or where the lick was supposed to occur, or who the apparent target might be. The only descriptive fact resulting from this testimony turned out to have no relevance to the facts of this case. Davis testified that she heard Green ask Clinton "[d]oes she drive a black car?" **(R. p. 95).** Davis did not know who the "she" was, or even if "she" was the target of the supposed "lick." **(R.**

[7] According to testimony, a "lick" is a robbery. **(R. p. 93).** See also Urban Dictionary http://www.urbandictionary.com/define.php?term=lick&defid=1795706.

pp. 95-96). Irrespective, no testimony or evidence was introduced that Victim even owned a car, much less a black car.

Jamal Twitty's testimony was similarly vague and non-descriptive. Twitty testified that Clinton asked him if he wanted to "go on a lick." **(R. p. 106).** Twitty was interested, but, according to Twitty, the group stayed put where they were. **(R. p. 107).** Akin to Davis' testimony, no specific details of this "lick" were discussed in Twitty's presence. **(R. pp. 107-110).** Moreover, Twitty's strongest recollection of the conversation was favorable to Clinton, when he testified that he was certain Clinton did not have a gun on him the night of their conversation. **(R. pp. 109-110).** That is all the evidence the State introduced to support the murder charge against Clinton.

In sum, the testimony and evidence put forward by the State was disjointed, amounting to no direct evidence of Clinton's involvement in Victim's murder, but only circumstantial evidence that failed to surpass the level of mere suspicion. Further, the State failed to establish a consistent timeline of the events of the evening of Victim's death or the individuals alleged to have been involved. Finally, Police failed to follow up on the content of the oldest child's statements that incriminated another person, and the State was successful in suppressing the statement before the jury.

SUMMARY OF ARGUMENT

The trial court abused its discretion in excluding the statements of Victim's four-year-old son, who clearly and repeatedly implicated someone other than Clinton as the person that killed his mother. Victim's son had first-hand knowledge of Victim's attacker, as he was present in the home at the time of his mother's death. Further, in describing the perpetrator, the oldest son described the person by name in two separate

ways, demonstrating consistency and understanding of his observations. Because the foundation for these statements was sufficiently laid, they are plainly relevant to Clinton's defense, and they comport with the temporal standard set forth in current case law evaluating the excited utterance exception to the rule against hearsay, the trial court erred as a matter of law in determining that the oldest son's statements were not excited utterances under Rule 803(2), SCRE. In the alternative, and for the same reasons, these statements satisfy the present sense impression exception to the rule against hearsay under Rule 803(1), SCRE.[8] Accordingly, the trial court abused its discretion in excluding the statements of Victim's oldest son, which was prejudicial to Clinton's defense.

Moreover, the State failed to present any direct evidence of Clinton's involvement in the murder of Victim. Additionally, the State failed to present any substantial circumstantial evidence of Clinton's involvement that did more than raise a suspicion of Clinton's guilt. Therefore, trial court's failure to grant Clinton's motion for directed verdict at the close of the State's case-in-chief constitutes reversible error.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Evidentiary rulings are within the sound discretion of the trial court, and such rulings will not be reversed absent an abuse of discretion or the commission of legal error that prejudices the defendant. State v. Garner, 389 S.C. 61, 65, 697 S.E.2d 615, 617 (Ct. App. 2010) (citing State v. Rice, 375

[8] In short, these statements fully qualify under the traditional, common law *res gestae* exception to hearsay. State v. Burroughs, 328 S.C. 489, 498–99, 492 S.E.2d 408, 412–414 (Ct. App. 1997) (explaining that the former *res gestae* exception comprised what the South Carolina Rules of Evidence now recognize as two separate exceptions to the rule against hearsay: present sense impression (Rule 803(1)), and excited utterance (Rule 803(2))).

S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007)). On review, appellate courts are limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998). The trial court abuses its discretion when the ruling is based on an error of law or factual conclusion that is without evidentiary support. Garner, 389 S.C. at 65, 697 S.E.2d at 617 (citing Rice, 375 S.C. at 315, 652 S.E.2d at 415).

In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict. State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 408-09 (2013) (citing State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004)). "During trial, '[w]hen ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight.'" Id. (citation omitted); see also Rule 19(a), SCRCrP. "The trial court should 'grant the directed verdict motion when the evidence merely raises a suspicion that 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.'" Hepburn, 406 S.C. at 429, 753 S.E.2d at 409 (internal quotation omitted). "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.'" Id. (citing Cherry, 361 S.C. at 594, 606 S.E.2d at 478).

On appeal, "[w]hen reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the state." Hepburn, 406 S.C. at 429, 753 S.E.2d at 409 (citing Cherry, supra; State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999); State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000) (finding that when ruling on cases in which the state has relied

exclusively on circumstantial evidence, appellate courts are likewise only concerned with the existence of the evidence and not its weight)). "If the state has presented 'any direct evidence or any 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." Id. (citations omitted).

ARGUMENT

I. The trial court erred in excluding the statements of the Victim's four-year-old son to first responders that implicated someone other than Clinton and his co-defendant in the charged crime.

a. Introduction and background.

The trial court abused its discretion in excluding the oldest son's multiple statements to police and first responders that identified another person (someone not investigated, charged, or tried for Victim's death) as being the person that killed Victim. As this identification meets the requirements of both the excited utterance and/or present sense impression exceptions to the rule against hearsay, the trial court's ruling that the statements could not be introduced through the officers or first responders who witnessed the declarations was an error of law that warrants reversal.[9]

[9] While the majority of the discussion centered on the excited utterance exception to the rule against hearsay, the trial court repeatedly refers in his analysis to the period immediately following Victim's murder and the oldest child's statements as a part of the *res gestae* of the incident. **(R. pp. 24; 652).** Of course, the *res gestae* exception to hearsay, which formerly comprised and required that a statement be substantially contemporaneous with the litigated transaction and was the spontaneous utterance of the mind while under the active, immediate influence of the event, was codified in the South Carolina Rules of Evidence and split into two separate exceptions. See Rule 803(1) and (2); Burroughs, 328 S.C. at 498–99, 492 S.E.2d at 412–414; see also State v. Burdette, 335 S.C. 34, 41, 515 S.E.2d 525, 529 (1999) (citing Burroughs). Because the trial court ruled that the statements did not qualify under *res gestae*, its ruling therefore covers the present sense impression exception to the rule against hearsay under Rule 803(1), SCRE, and that argument is preserved for this Court's review. Compare State v. Garner, 389 S.C. 61, 66, 697 S.E.2d 615, 617 (Ct. App. 2010) (wherein the Court of Appeals declined

This issue was first brought to the trial court's attention by way of the State's motion *in limine*, prior to opening statements, seeking to exclude testimony of the statements from officers and first responders. **(R. pp. 14-36).** As described by Clinton's counsel, police and investigators arrived on the scene of the mobile home community within minutes of the call to 9-1-1 by Victim's neighbors. **(R. pp. 14-31; 256-59).** Neighbors were notified of the situation by Victim's oldest son, who was four-years-old at the time, when he goes next door to ask for help. **(R. pp. 19; 23).** Thereafter, in the presence of officers and first responders, and on multiple occasions, the oldest child spontaneously exclaims: "Shi's Daddy shot my Momma." **(R. pp. 14-15).** Later, also to officers and first responders, the oldest child states: "Shortycake shot my Momma," **(R. p. 17)**, and also "Jamia's Daddy hurt my Momma." **(R. p. 19).**

During this pre-trial discussion it was explained that Shi and Jamia are the same person. **(R. pp. 17-19).** It was also explained that Shi's Daddy/Jamia's Daddy goes by the nickname Shortycake, and Shortycake's actual name is Rashad Johnson.[10] Id. Thus, substituting nicknames, the oldest child told officers and first responders on multiple occasions, within, at most, two hours of having been present inside the mobile home for his mother's killing, that Rashad Johnson shot my Momma; Rashad Johnson hurt my Momma. The State objected to Clinton's counsel eliciting this testimony from officers and first responders on the grounds of hearsay. **(R. pp. 14-15).**

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to address the appellant's argument that the trial court erred in excluding a similar hearsay statement on preservation grounds, where the appellant failed to argue the statement was admissible as non-hearsay or under an exception to the rule against hearsay below).

[10] The solicitor stated that "Your Honor, we did verify there is a child who goes by Shi, the nickname Shi ... And that child's daddy is in fact Rashad Johnson." **(R. pp. 17-18).** The trial court inquired: "Okay. And is Rashad Johnson known as Shortycake?" Id. To which the solicitor responded: "Yes, sir he is." Id.

Initially, the trial court was concerned about the competency of the oldest child, stating that "I think you would have to determine although I realize 803 availability of a witness is immaterial but you have to determine the competency of the individual that made the statement." **(R. pp. 18-20).** The State adopted this argument, arguing that an additional element of competency should be added to the court's review of an exception to hearsay. **(R. pp. 18-19).** Ultimately, the trial court reserved judgment and took the matter under advisement. **(R. pp. 24-25).**

The following morning of trial, the court made its ruling on the State's motion *in limine*. **(R. pp. 32-26).** The trial court indicated that it had read the case law submitted by counsel and no longer believed that there must be a finding of competency of the oldest child prior to the admittance of his statements. **(R. p. 34)**; see also State v. Ladner, 373 S.C. 103, 119, 644 S.E.2d 684, 692 (2007) ("We hold that the incompetency of a declarant at the time of trial does not preclude the admission of that declarant's excited utterance through a different, competent witness.") (citing State v. Bauer, 146 Ariz. 134, 704 P.2d 264, 267 (1985) ("excited utterances of children who are incompetent to testify because of their age are admissible in evidence"); Kilgore v. State, 177 Ga.App. 656, 340 S.E.2d 640, 643 (1986) (rejecting the contention "that because the victim would have been incompetent to testify in court, her out-of-court statements were thus unreliable and incompetent"); People v. Smith, 152 Ill.2d 229, 178 Ill.Dec. 335, 604 N.E.2d 858, 871 (1992) (excited utterances are sufficiently reliable to be admitted even where the declarant is incompetent); Com. v. Pronkoskie, 477 Pa. 132, 383 A.2d 858, 861 n. 5 (1978) ("a finding of incompetency to testify does not necessarily undermine the indicia of reliability attendant upon an excited utterance of the incompetent witness"); State v.

Bouchard, 31 Wash.App. 381, 639 P.2d 761 (1982)). Thus, the court denied the State's motion and correctly ruled that, subject to the parties laying the proper testimonial foundation for the exception to the rule against hearsay, the child's statements were admissible. **(R. pp. 35-36).**

However later, during the cross examination of Officer Ken Taylor, one of the first-responding Crime Scene Investigators for the Lancaster County Sherriff's Office and one of the officers to whom the oldest child made his statements, the trial court inexplicably reversed its ruling and sustained the State's renewed objection to the oldest child's statements coming into evidence. **(R. p. 259).** This ruling was an error. The foundation for the application of the exceptions to the rule against hearsay was set forth in the following manner.

Police officers were dispatched to the scene of Victim's mobile home community at 10:09 pm, and the initial officers arrived only three (3) minutes after 9-1-1 and police dispatch calls, at 10:12 pm. **(R. p. 39).** Officer Taylor later testified that he was called to respond to the scene at 10:30 pm, and arrived a little after 11:00 pm. **(R. p. 212).** One of Officer Taylor's duties at the scene was to collect certain evidence, including the clothes of the Victim's children, which were bloody. **(R. pp. 212-13; 257-59).** He testified that he observed the children for a period of time when they were being tended to by EMS first responders in an EMS vehicle. **(R. pp. 256-57).** He observed "[b]lood on just about all the children's clothing." **(R. p. 257).** The oldest child was present, and was able to tell Officer Taylor his name, as well as the name of his younger sister. Id. The "[o]ldest child, if I recall he had blood on him as well, but I don't think he had nearly as much as the other two [children]." **(R. p. 258).**

The following colloquy between Officer Taylor and Clinton's counsel, William Frick, occurred:

> Q: Did you ever have any conversation with any of these children?
>
> A: Yes.
>
> Q: Which one?
>
> A: Oldest child.
>
> Q: Okay. Where did you have this conversation?
>
> A: In the EMS truck.
>
> Q: Do you recall about when you had this conversation? How long you had been on the scene?
>
> A: I had probably been there about maybe 20 minutes, 30 minutes. So it was probably shortly before midnight, maybe.
>
> Q: Do you recall the demeanor of this child?
>
> A: He seemed – he didn't really seem too upset to a great extent. Kind of being entertained by EMS folks. They were trying to keep him and his sister and I guess the younger brother occupied to keep there [sic] mind off maybe their thoughts or whatever.
>
> Q: Okay. Did you take a statement from any of these children?
>
> A: No, I did not take a statement.
>
> Q: Was anything told to you?
>
> [SOLICITOR]: Objection.
>
> MR. FRICK: I didn't ask what.
>
> THE COURT: I will sustain the objection. You may ask your next question.
>
> MR. FRICK: Thank you, Your Honor.

(R. pp. 258-59).

b. Hearsay standard.

"Hearsay is an out of court statement, offered in court to prove the truth of the matter asserted." State v. Townsend, 321 S.C. 55, 467 S.E.2d 138 (Ct. App. 1996). A

"statement" as defined by Rule 801(a), SCRE, includes "nonverbal conduct of a person, if it is intended by the person as an assertion." See also id., 321 S.C. at 59, 467 S.E.2d at 141 (finding the gesture of pointing to be an assertion). Under Rule 803, SCRE, hearsay statements are not admissible unless otherwise provided by the Rules of Evidence or by other rules prescribed by the Supreme Court or by statute. This "rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001) (citing Jolly v. State, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994)).

The oldest child's statements are hearsay, and Clinton does not challenge that fact. Of course, a determination that a statement is hearsay does not end the inquiry, and exceptions to the rule against hearsay exist and are codified under Rule 803, SCRE. The statements in this case meet the elements of both excited utterances and present sense impressions as a matter of law, and the trial court abused its discretion in excluding them.[11]

[11] Additionally, unlike many cases where the State seeks to introduce hearsay statements against a defendant in a criminal case, in the circumstances under which the oldest child's statements were to be introduced there is no Confrontation Clause issue under the Sixth Amendment, see U.S. Const. amend. VI., because the statement was proffered by the Defendants, and the State is entitled to no such procedural protections. See, e.g., State v. Davis, 364 S.C. 364, 373, 613 S.E.2d 760, 765 (Ct. App. 2005) (containing an extensive discussion on post-Crawford v. Washington, 541 U.S. 36 (2004) Confrontation Clause jurisprudence), rev'd in part, vacated in part, 371 S.C. 170, 638 S.E.2d 57 (2006). Similarly, the child's statements, even though they were to police officers and EMS responders, was clearly non-testimonial in the context that they were given. See Crawford, 541 U.S. at 51-52 (describing testimonial statements as testimony provided at a preliminary hearing, before a grand jury, at a former trial, or formal, recorded statement made to police during an investigation).

c. Oldest child's statements qualified for the excited utterance exception to the rule against hearsay.

i. *Excited utterance standard.*

The oldest child's statements qualify under the excited utterance exception to the rule against hearsay. See Rule 803(2), SCRE (providing that an excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."). "An excited utterance may be admitted whether or not the declarant is available as a witness." State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007) (citing Rule 803, SCRE). "Moreover, when a statement is admissible because it falls within a Rule 803 exception, it may be used substantively, that is, to prove the truth of the matter asserted." Id. (citing State v. Dennis, 337 S.C. 275, 283–84, 523 S.E.2d 173, 177 (1999)).

In order for a statement to qualify as an excited utterance, three elements must be met: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. Ladner, 373 S.C. at 116, 644 S.E.2d at 691 (citing Sims, 348 S.C. at 21, 558 S.E.2d at 521). "The excited utterance exception is based on the rationale that 'the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication.'" Id. (citing Dennis, 337 S.C. at 284, 523 S.E.2d at 177). Whether a statement is admissible under the excited utterance exception to the hearsay rule depends on the circumstances of each case and the determination is generally left to the sound discretion of the trial court. Burdette, 335 S.C. 34, 43-44, 515 S.E.2d 525, 530 (citing Harrison, supra).

ii. *The case of State v. M. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002) is on point and the Supreme Court's analysis is controlling.*

The facts of this case are strikingly similar to those in Sims, wherein the Supreme Court affirmed the admittance of a similar hearsay statement under the excited utterance exception. 348 S.C. 16, 558 S.E.2d 518. In Sims, police were called and dispatched to an apartment where a five-year-old boy was found upset and crying outside of the apartment. Sims, 348 S.C. at 18, 558 S.E.2d at 520. When they arrived, police discovered the mother of the five-year-old on her bed in a pool of her own blood, with a knife protruding from one of her wounds. Id. One of the officers who came to the scene assisted with the five-year-old and began asking him questions. Id. at 19, 558 S.E.2d at 520. At trial, the officer testified that the son answered her questions in a vague and automatic manner, failing to provide any specific details and keeping his head down when answering questions. Id. When the officer asked the five-year-old if there was anyone else in the apartment the night before, the five-year-old responded with a name.[12] Id.

When this testimony was sought to be introduced at trial, defense counsel objected, and the question to the officer was initially withdrawn. Id. Thereafter, the son, six-years-old by the time of the trial, was called to testify. Id. While initially cooperative, the son ceased answering questions on the stand prior to identifying the defendant and was excused as a witness. Id. Subsequently, the State recalled the officer to the stand in order to testify as to the five-year-old's statement at the time, which

[12] In Sims, the manner in which the hearsay statements were introduced is the exact opposite from the case at hand: the five-year-old actually implicated the person (Sims) on trial; thus, this line of questioning was initiated by the solicitor and objected to by defense counsel. Sims at 19, 558 S.E.2d at 520.

identified the defendant. Id. at 20, 558 S.E.2d at 520. Defense counsel renewed their objection on hearsay grounds; however, the trial court overruled the objection and allowed the testimony under the excited utterance exception to the rule against hearsay. Id.

On appeal, the Supreme Court affirmed the trial court's ruling and found, as a matter of law, that the five-year-old's statement to the officer was an excited utterance. With respect to the first element of the requirement for an excited utterance, the Court found it clearly met, "because it relates to the startling event of the son seeing his mother after she was attached and possibly while she was being attacked." Id. at 21, 558 S.E.2d at 521. The Court found the third element similarly easily satisfied, stating that "if the son was under the stress of excitement, then that stress was caused by the startling event of seeing his mother being attacked and not being able to wake her." Id.

The Court spent more time analyzing the second element of the requirements for an excited utterance. With respect to the time that had elapsed, in Sims, it was estimated that the attack had occurred approximately twelve (12) hours before the five-year-old's statements to the officer. Id. Stating that the passage of time "is not the dispositive factor," the Court determined the five-year-old's statements were made during the continuing stress of seeing his mother in such a state. Id. at 21-22, 558 S.E.2d at 521 ("Under these circumstances, we find the stress of excitement from those events lasts a longer period of time than would be likely to occur if the son had been an adult.") (citing State v. Cude, 784 P.2d 1197, 1200 (Utah 1989) (excitement generally lasts longer in children and fabrication is less likely)).

The Court further held that "[o]ther factors useful in determining whether a statement qualifies as an excited utterance include the declarant's demeanor, the declarant's age, and the severity of the startling event. Clearly, the son's age and the severity of the startling event are factors that weigh in favor of finding his statement to be an excited utterance." Id. Therefore, in similar circumstances to those present in this case, the Supreme Court downplayed the relevance of the child's demeanor, in favor of the child's age and the severity of the event. The Court went on to say that "[w]hile the son was not crying or acting 'excited' in the sense of being animated when he made the statement, we believe his demeanor can also be characteristic of someone who is under the 'stress of excitement.'" Id.[13]

Ultimately, the Court employed a "totality of the circumstances" standard to the facts in Sims and found that the five-year-old was under the continuing stress of excitement when he told the officer the identity of the person in the home the night of the

[13] The Court cited additional case law in support of this proposition. See, e.g., Dezarn v. State, 832 P.2d 589, 591 (Alaska Ct. App. 1992) (statement to mother by two-year-old child, who had been unusually quiet, concerning sexual abuse by defendant was excited utterance; extreme emotion can still a person's speech as well as evoke it); State v. Kay, 129 Idaho 507, 927 P.2d 897, 907 (Ct. App. 1996) (four-year-old child, who had dried tear tracks on face and was unusually subdued and quiet, was found to be under stress of abduction and molestation when making statements to mother and officer); People v. Nevitt, 135 Ill.2d 423, 142 Ill.Dec. 854, 553 N.E.2d 368, 376 (1990) (statement to mother by three-year-old child, who was uncharacteristically silent and withdrawn, concerning sexual abuse by defendant was excited utterance); State v. Hobby, 9 Neb.App. 89, 607 N.W.2d 869, 876 (Ct. App. 2000) (victim, who was upset, nervous, withdrawn, and uncomfortable, was speaking under stress of nervous excitement and shock produced by assault perpetrated by defendant); State v. Kaytso, 684 P.2d 63, 64 (Utah 1984) (child who gives statement under stress of nervous excitement need not be hysterical as long as still under emotional influence of the event); Braxton v. Commonwealth, 26 Va.App. 176, 493 S.E.2d 688, 692 (Ct. App. 1997) (statement by three-year-old child approximately one hour after discovered with mother's body was admissible as excited utterance; although record did not establish how much time had passed following mother's death, child remained visibly distressed, *i.e.*, was quiet and dazed, through time of statement).

attack. Id. at 23, 558 S.E.2d at 522. Accordingly, the Supreme Court affirmed the trial court[14] in admitting the five-year-old's statement to police, "because the statement falls under the excited utterance exception to the hearsay rule." Id.

iii. *Under Sims, the oldest child's statements should have been admitted.*

Here, under the express guidance and precedent of Sims, all three elements to the excited utterance exception are met. First, the oldest child's statement clearly related to a startling event or condition; it should go without saying that a child witnessing the brutality of his mother being shot in their home and laying, bleeding, on the family room couch is a startling event or condition. Second, oldest child's statements were made while he was still under the stress of the excitement from the event.[15] The fact that oldest

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[14] The Court also discarded an additional distinguishing feature of Sims from the case at hand based on the fact that the five-year-old's statement was given in response to a question, rather than spontaneously. Id. at 23 n.1, 558 S.E.2d at 522 n.1. If anything, the facts in this case are even stronger because of the fact that the oldest son's statements were made spontaneously and consistently to multiple officers and first responders.

[15] All of the oldest child's statements occurred less than two hours after the child was present in the home for his mother's murder, and some were much closer to the event. However, the trial did not find that the elapsed time between the incident and the statements was a contributing factor to the exclusion of the statements for trial, thus that is not an issue in the trial court's ruling and not a proper subject of this Court's review. Moreover, the State did not argue at trial that this length of time rendered the statements inadmissible; therefore, this argument has been waived and is unpreserved to this Court's review. Cowburn v. Leventis, 366 S.C. 20, 41, 619 S.E.2d 437, 449 (Ct. App. 2005) (holding that an argument must be raised to and ruled upon by the trial judge in order to be preserved for appellate review).

Notwithstanding, longstanding case law confirms that statements made within the time period in which the oldest child made them to police officers and first responders clearly qualifies for both present sense impressions and excited utterances. "While '[t]here are no hard and fast rules as to when the *res gestae* ends,' this Court has generally allowed as excited utterances statements made by the victim to the police immediately following a physical attack." State v. Burdette, 335 S.C. 34, 43, 515 S.E.2d 525, 530 (1999) (quoting State v. Harrison, 298 S.C. 333, 336, 380 S.E.2d 818, 820 (1989)); Sims, 348 S.C. 16, 558 S.E.2d 518 (finding a child's statements to police given twelve hours after witnessing the event qualified as an excited utterance); see also State

son's statements were given within two hours of witnessing this event, fits squarely within the temporal guidelines set forth in relevant case law, particularly in light of the facts and discussion in Sims, where the Court expressly relaxed the temporal restriction on excited utterances with respect to minors. 348 S.C. at 22, 558 S.E.2d at 521 ("Under these circumstances, we find the stress of excitement from those events lasts a longer period of time than would be likely to occur if the son had been an adult.").

At trial, a fair amount of time and testimony was spent on developing the foundation of the oldest child's demeanor at the time the statements were given.[16] When initially ruling in favor of allowing the child's statements, the trial court noted that it struggled with the concept of the state of mind of a four-year-old child and whether a child that young is even capable of the reflection typically evaluated in an excited utterance context. **(R. pp. 34-35).**

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v. M.C. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991) (allowing statements made to police under *res gestae* exception where the officer had proceeded directly to the scene attack upon it being reported); Harrison, supra (allowing as *res gestae* the statements of an alleged rape victim to an officer at the hospital upon first opportunity to tell what had occurred to her); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978) (noting that a time interval of over one hour, and up to eleven hours, did not necessarily eliminate a statement as part of the *res gestae*); State v. Quillien, 263 S.C. 87, 207 S.E.2d 814 (1974) (concluding a rape victim's statements to police when she arrived at the emergency room were admissible under the *res gestae* exception); State v. Dennis, 321 S.C. 413, 468 S.E.2d 674 (Ct.App.1996) (allowing statements made to the police and nurse where the record indicated there was no appreciable time lapse between the attack and the statements).

[16] In fact, after the trial court sustained the State's objection to Officer Taylor's testimony regarding the child's statements, co-defendant's counsel (who cross examined Officer Taylor after Appellant's counsel) attempted to lay further foundation for this element of an excited utterance. **(R. pp. 270-289).** Ms. Raney elicited testimony that there were eight to ten officers at the scene at the time, multiple police cars with blue lights on, and at least one EMS vehicle. **(R. pp. 271-72).** In the ambulance, the children were being entertained by adults they did not know with pairs of gloves ("nitro gloves") packs of crackers and cookies. **(R. pp. 273-76).** Ultimately, Officer Taylor maintained his testimony that the oldest child "didn't seem too upset to a great extent" and that he was "happy-go-lucky" being entertained by the EMS professionals. **(R. pp. 259; 275).**

The above-cited colloquy between Officer Taylor and Clinton's counsel reflects this line of thinking, with questions targeted at the "demeanor" of the oldest child at the time the statements were made. **(R. pp. 258-59).** However, too much analysis of the child's demeanor here is fraught with uncertainty, as pointed out by the Supreme Court in Sims. How should a four-year-old act upon witnessing such an event? Is there any precedent for what is considered "normal," given the age? Additionally given the fact that Officer Taylor testified that police and first responders were making a concerted effort to "entertain" these children and "keep their mind and thoughts off of" what they witnessed, **(R. pp. 259)**, it is little wonder that the oldest child was acting in the manner described. In Sims, the child's age and the severity of the startling event were given more probative value than the child's "demeanor" with first responders. 348 S.C. at 22, 558 S.E.2d at 521. Based on the striking similarity of circumstances, the trial court erred in failing to employ the same approach and adhere to the clear precedent of Sims. In this case, based on the evidence and testimony, the oldest child was still acting under the stress of the excitement of the event when he gave his multiple statements to first responders.

Third and finally, also very similar to the situation in Sims, the oldest child's statements were prompted by the startling event of being present in the home and witnessing his mother's murder along with his siblings. Accordingly, all three elements of the excited utterance exception are present here, and under the holdings and totality of the circumstances approach adopted in Sims on almost identical facts (if not stronger here), the trial court's exclusion of the oldest son's statements to police constitutes an abuse of discretion that warrants reversal.

iv. *Oldest child's statements are relevant and probative to Clinton's defense.*

The oldest child's statements are relevant to Clinton's defense, and the probative value of the statements far outweighs any prejudicial effect in this case.[17] See Rule 403, SCRE. Statements made by a witness who was present during or immediately after the commission of this crime, which identify someone other than the persons charged with the crime, is a significant piece of evidence that goes to reasonable doubt of Clinton's guilt. Under Sims, the jury should have heard these statements, and the trial court's decision to exclude the statements constitutes an abuse of discretion. Additionally, the fact that the oldest son's statements changed as they were repeated, yet they remained consistent in their identification of the persons involved, speaks to the reliability of the statements. In each variation, the oldest son's identification remained the same, changing between real names and nicknames (*i.e.*, "Shi" and "Jamia," and "Shi's Daddy/Jamia's Daddy" and "Shortycake"), but unfailingly identifying the same person each time.

Further, the oldest son's statements become even more probative when put in the context of other testimony elicited at trial. The State called Latoya Green, co-defendant Al Green's sister, at trial. **(R. p. 82).** She testified that she was close friends with Victim,[18] **(R. p. 83)**, and is actually Godmother to Victim's three children. **(R. p. 84).** In fact, Latoya Green testified that she, her co-defendant brother Al Green, Victim, and all three of Victim's children ***lived together in an apartment earlier in 2011***, only months

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[17] Again, because these statements were proffered by the Defendants in this case, as opposed to the vast majority of cases, where the statements are proffered by the State and are prejudicial to the defendant, the circumstances here weigh heavily in favor of a finding that the trial court abused its discretion.

[18] Her testimony also intimated at some familial connection to Victim, stating that Victim's sister and Latoya Green are cousins, although that relationship is never fully developed or explored and remains unclear based on the Record on Appeal. **(R. p. 84).**

before Victim was murdered. **(R. pp. 84-85).** Thus, viewed with this additional fact, the oldest son's identification of Shi's Daddy/Shortcake as the person who killed his mother is even more impactful. If, under the State's theory of the case, Clinton, Green, and McDow entered Victim's residence and murdered her in front of her children, the fact that the oldest son identified someone other than Green as being involved is significant and relevant to their defense.

d. Oldest child's statement also qualified for the present sense impression exception to the rule against hearsay.

Additionally, oldest child's statements qualify under the present sense impression exception, which also requires the demonstration of three elements: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event, or immediately thereafter; and (3) the declarant must have personally perceived the event. State v. Hendricks, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014) (citing Rule 803(1), SCRE; United States v. Mitchell, 145 F.3d 572, 576 (3d Cir. 1998) (listing the "three principal requirements" for a statement to be admissible as a present sense impression). All three elements are met here.

First, oldest child's statements describe and explain the event that occurred in Victim's mobile home. In no uncertain terms, the oldest child exclaims several variations of the theme: someone shot/hurt my momma. **(R. pp. 14-31; 256-59).** Second, the statements were substantially contemporaneous to the event.[19] Finally, the foundation laid by counsel—and even the statements themselves—conclusively demonstrate that the oldest child was present in the mobile home at the time of his mother's murder and perceived the event. As described above, the oldest child is the person who notifies

[19] See discussion, supra.

neighbors of his mother's death. **(R. pp. 19; 23).** He perceives the event, has his mother's blood on his clothing, then goes to the neighbor's house crying in order to get help for his mother. **(R. pp. 19; 23-24; 258).** His actions are what precipitated the police and first responders coming to the mobile home in the first place. **(R. pp. 23-24).** Moreover, the statements made on multiple occasions to police officers and first responders were in the form of a declarative sentence, with no question but that the oldest child perceived the event and is reporting what he saw. **(R. pp. 15-19).** Based on these facts, the elements of the present sense impression were met with respect to the child's statements, and the trial court abused its discretion in reversing its initial ruling and excluding the admission of the statements before the jury.

e. The exclusion of the oldest child's statement was an abuse of discretion.

In sum, the trial court abused its discretion in excluding the statements of Victim's oldest son, who clearly and repeatedly implicated someone other than Clinton as the person that killed his mother. Victim's son had first-hand knowledge of Victim's attacker, as he was present in the home at the time of his mother's death. Further, in describing the perpetrator, the oldest son described the person by name in two separate ways, demonstrating consistency and understanding of his observations. Because the foundation for these statements was sufficiently laid, they are plainly relevant to Clinton's defense, and they comport with the temporal standard set forth in current case law evaluating the exceptions to the rule against hearsay, the trial court erred as a matter of law in determining that the oldest son's statements qualified neither as present sense impressions under Rule 803(1), SCRE, nor excited utterances under Rule 803(2), SCRE.

II. The trial court erred in failing to direct a verdict in favor of Clinton where the evidence and testimony merely raised a suspicion that he was involved in a crime, but failed to meet the elements of the charged crime.

In State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 408-09 (2013), the Supreme Court set forth the current standard under which a trial court should evaluate a defendant's motion for directed verdict under Rule 19, SCRCrP. Under Rule 19, SCRCrP, "[o]n motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment. In ruling on the motion, the trial judge shall consider only the existence or non-existence of the evidence and not its weight." The standard set forth by the Supreme Court dictates that where the State has failed to present any direct evidence or insufficient circumstantial evidence reasonably tending to prove the guilt of the accused, a verdict of not guilty should be directed in favor of the accused. Hepburn, 406 S.C. at 429, 753 S.E.2d at 409 (citing Cherry, 361 S.C. at 593–94, 606 S.E.2d at 478; Mitchell, 341 S.C. at 409, 535 S.E.2d at 127).

Clinton moved for a directed verdict at the close of the State's case-in-chief.[20] **(R. p. 503).** Additionally, Clinton renewed his motion prior to closing statements, **(R. p. 525)**, as well as in a post-trial motion for a new trial. **(R. pp. 651-52).** Because the State did not meet its burden in presenting evidence of Clinton's guilt of the charge of murder, the trial court erred in failing to direct a verdict in his favor.

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[20] The "waiver" rule and its exceptions, discussed in Hepburn, have no applicability to this case, as neither Appellant nor co-defendant Green testified or presented any evidence in their defense. **(R. p. 523).** Consequently, this Court's review is constrained to the same evidence (or lack thereof) presented by the State and considered by the trial court.

Clinton was charged with murder under section 16-3-10 of the South Carolina Code (1976, as amended). This statute defines murder as "the killing of any person with malice aforethought, either express or implied." Id. In a murder prosecution, malice may be implied if the defendant uses a deadly weapon. State v. Kelsey, 331 S.C. 50, 63, 502 S.E.2d 63, 69 (1998). Although devoid of any direct evidence tending to support their arguments, the State presented to the jury a theory that Clinton was the triggerman in Victim's murder, and co-defendant Green was his accomplice, guilty of murder under the "hand of one is the hand of all" doctrine. **(R. pp. 543; 637; 639-41)**; see State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). In denying Clinton's motion for a directed verdict, the trial court found the existence of certain evidence and testimony persuasive. **(R. pp. 509-16).**

However, none of the evidence put forward by the State qualified as direct evidence, and the circumstantial evidence presented fails to rise to the level of substantial circumstantial evidence. When you look under the surface, the evidence submitted by the State establishes nothing but a mere suspicion of Clinton's guilt. See State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001) ("Accordingly, a trial judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty.") (citing State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000)).

In this context, the inadequacy of the State's evidence is best demonstrated by pointing out what the State failed to show:

- The State produced no evidence that Clinton was present inside Victim's mobile home.
    - DNA swabs from the underside of the mobile home's storm door did not contain Clinton's DNA. **(R. pp. 345-48; 685-99).**

- DNA swabs from the main door knob of the mobile home do not indicate the presence of Clinton's DNA. **(R. pp. 345-48; 685-99).**
- Blakeney testified he has no idea where Clinton went upon exiting the vehicle, and did not see Clinton, Green, or McDow enter or even approach Victim's mobile home.
  - By contrast, testimony demonstrated that Clinton lived in that same mobile home community with his Grandmother. **(R. pp. 418; 455; 561).** It is equally as plausible of an explanation that Clinton went to his own mobile home upon exiting Blakeney's presence.

- The bullet casing did not contain the DNA of the Victim, and no one else, including Clinton. **(R. pp. 343; 685-99).**
- No murder weapon was ever retrieved. **(R. pp. 455-56).**
- No samples collected tied the blue jumpsuit to the Victim or the Victim's mobile home. **(R. pp. 334-65; 685-99).**
- None of the DNA samples collected from the Cadillac could be connected to Clinton (or anyone else in this case). **(R. pp. 334-65; 685-99).**
- Blakeney's testimony of Clinton's alleged statement that "I killed that bitch" proves nothing.
  - Blakeney testified that Clinton did not identify Victim when he made his statement and he did not know to whom Clinton was referring. **(R. p. 427).** This makes Clinton's alleged statement, even if believed, merely circumstantial evidence.[21]
- Testimony placed Clinton at the Club on the night of the murder.

None of the "evidence" presented by the State in this case places Clinton in Victim's mobile home with a motive to commit murder. The State's case below was built around the self-serving testimony of Blakeney, who was also charged with

[21] Compare State v. Phillips, Op. No. 5280 (SC. Ct. App. Filed November 12, 2014) (Shearouse Adv. Sh. No. 45 at 82) (wherein the Court found testimony about the appellant's statements to be direct evidence, where the statement identified "the child" in question and thus required no further fact or inference). The court in Phillips found the identification of the child in the statement conclusive, as it could not have referred to anyone else. Appellant's alleged statement, while callous, requires additional information in order to determine the subject, as confirmed by Blakeney. This unquestionably restricts the alleged statement from qualifying as direct evidence and instead renders it merely circumstantial in nature.

Victim's murder and stood to gain (and did subsequently gain) significant favor by providing incriminating testimony about Clinton and Green. However, while Blakeney testified regarding his supposed first-hand, actual knowledge, which would ordinarily qualify as direct evidence, Blakeney's testimony did not establish any precise fact that impacts an element of the murder charge against Clinton. See State v. Rogers, 405 S.C. 554, 563, 748 S.E.2d 265, 270 (Ct. App. 2013) ("Direct evidence is based on personal knowledge or observation and ..., if true, proves a fact ***without inference or presumption***.") (emphasis added). Indeed, Blakeney was witness to no crime. Thus, Blakeney's testimony is merely circumstantial evidence which, if believed, does nothing more than establish secondary facts which do not support a murder charge. See Lollis, 343 S.C. at 584, 541 S.E.2d at 256 ("'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.") (citing (State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963)); see also State v. Littlejohn, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955) ("It is not sufficient that they create a probability, though a strong one....").

Taken as a whole, Blakeney's testimony does not rise to the level of substantial circumstantial evidence required to overcome Clinton's motion for a directed verdict. Coupled with the fact that no physical evidence links Clinton to Victim or her home, the State did not meet its burden in this case. See Hepburn, 406 S.C. at 429, 753 S.E.2d at 409 ("The trial court should 'grant the directed verdict motion when the evidence merely raises a suspicion that 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.'"). Consequently, the trial court erred as a matter of law in failing to direct a verdict in favor of Clinton,

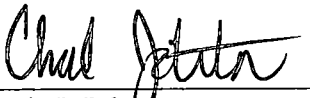
where the State presented no direct evidence, and the circumstantial evidence presented did not rise to the level that could survive a directed verdict motion.

CONCLUSION

For the reasons set forth above, the trial court should be reversed. The trial court erred as a matter of law, under the Sims case, in excluding the statements of Victim's four-year-old son, which qualified as both excited utterances and present sense impressions. Accordingly, the court's exclusion of the statements constituted an abuse of discretion that warrants reversal. Moreover, the State failed to present any direct evidence, and the circumstantial evidence presented was insufficient as a matter of law, as it failed to raise more than a mere suspicion of Clinton's guilt. Consequently, the trial court should be reversed.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



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June 15, 2015

THE STATE OF SOUTH CAROLINA
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R. Knox McMahon, Circuit Court Judge

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The State, ... Respondent,

v.

Devatee Tymar Clinton, ... Appellant.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

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

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

Dear Ms. Kitchings:

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

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

Very truly yours,

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