STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Brooks P. Goldsmith, Circuit Court Judge
Appellate Case No. 2015-002339

THE STATE,

Respondent,

vs.

WALTER TREVOY TUCKER,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ISSAC MCDUFFIE STONE, III.
Solicitor, Fourteenth Judicial Circuit
PO Box 1880
Beaufort, SC 29910
(843) 255-5893

ATTORNEYS FOR RESPONDENT.

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COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the trial judge properly denied Tucker's motion for a new trial based upon alleged juror misconduct because the record supports the trial judge's findings that there was no credible evidence juror Masanto was related by blood or marriage or had a close personal relationship with Ms. Jones, Mr. Brewer or any other potential witness in the case, and that there was no credible evidence that juror Masanto concealed any information from the Court during this trial?

II. Whether the trial judge abused his discretion by allowing the State to introduce Keamber Bigelow's testimony that Tucker told her of a plot to murder Travis Polite, his co-defendant and accomplice, to prevent Polite from testifying against Tucker at trial because this evidence reasonably tended to prove both Tucker's criminal intent (malice) and his consciousness of guilt, and because the probative value of this evidence was not substantially outweighed by its prejudicial effect?

III. Whether the trial judge properly denied Appellant Tucker's motion for a directed verdict on the charges of murder and armed robbery because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt of these offenses, either individually or under a theory of accomplice liability?

STATEMENT OF THE CASE

Walter Trevoy Tucker (Tucker) is currently incarcerated in the South Carolina Department of Corrections, for the September 6, 2012 murder of Quantez Greer and attempted armed robbery of Jessica Power, in Beaufort County. The Beaufort County Grand Jury indicted him on December 13, 2012, for murder (2012-GS-07-2246), kidnapping (2012-GS-07-2248), and armed robbery (2012-GS-07-2247). R. pp. 735-39. Robert E. Ferguson Jr., Esquire, and Derek Wright, Esquire, represented him on these charges, while Deputy Fourteenth Circuit Solicitor Sean P. Thornton and Assistant Solicitor Hunter Swanson prosecuted the case.

Tucker received a jury trial before the Honorable Brooks P. Goldsmith, on March 4-7, 2013. The jury found him guilty of murder and not guilty of kidnapping. Although the jury did not convict him of armed robbery, it found him guilty of the lesser included offense of attempted armed robbery. Tr. pp. 638-39; R. pp. 671-72. Judge Goldsmith imposed concurrent sentences of thirty-nine years imprisonment for murder and twenty years imprisonment for attempted armed robbery. Tr. pp. 654-55; R. pp. 621-22. He denied the defense's post-trial motion for new trial based on the insufficiency of the evidence. Tr. pp. 641-44; R. pp. 608-611.

On October 14, 2015, Tucker filed an Amended Motion for a New Trial Based On Juror Misconduct; Motion For Continuance; Motion For Hearing For Juror Misconduct Inquiry. R. pp. 18-23. In response, the State submitted six juror affidavits, which were subsequently filed as the "State's Affidavits in Opposition to Motion for a New Trial" on November 18, 2015. R. pp. 740-745. Judge Goldsmith denied Tucker's motion in an Order filed on October 14, 2015. R. pp. 4-5.

Tucker timely served and filed a Notice of Appeal. This appeal follows.

ARGUMENTS

I. The trial judge did not abuse his discretion by denying Tucker's motion for a new trial based upon alleged juror misconduct because the record supports the trial judge's findings that there was no credible evidence juror Masanto was related by blood or marriage or had a close personal relationship with Ms. Jones, Mr. Brewer, or any other potential witness in the case, and that there was no credible evidence that juror Masanto concealed any information from the Court during voir dire.

Notwithstanding Tucker's arguments to the contrary, Respondent submits that the trial judge properly denied his motion for a new trial based upon juror misconduct because the record supports the trial judge's findings that there was no credible evidence juror Masanto was related by blood or marriage or had a close personal relationship with Ms. Jones, Mr. Brewer or any other potential witness in the case, and that there was no credible evidence that juror Masanto concealed any information from the Court during voir dire.

A. The voir dire, Tucker's new trial motion and the trial judge's ruling.

One of the names listed as a potential witness by the State during jury qualification was Quornisha Jones. *See* Tr. pp. 34-35; R. pp. 67-68. During the course of the trial judge's qualification of the jury, he asked potential jurors whether "any member of the jury panel ever had a close personal or social relationship with any of the attorneys involved in the case, any of the witnesses that have been identified to you, or the defendant himself." Tr. p. 38; R. p. 71. Juror #210, Jessica Masanto, did not respond to this inquiry. *See* Tr. pp. 38-43; R. pp. 71-76.[1]

On October 14, 2015, Tucker filed an Amended Motion for a New Trial Based On Juror Misconduct; Motion For Continuance; Motion For Hearing For Juror Misconduct Inquiry. R. pp.

[1] The trial judge also asked whether any member of the jury panel had "formed or expressed an opinion about any issue or any matter involved in this case;" whether any potential juror was "aware of any bias or any prejudice that they may have towards either the state or to the defendant in this case;" and whether any member of the jury panel knew of "any reason whatsoever why he or she should not serve as a juror in this case with particular emphasis being placed on your ability to be fair and impartial to both the State into the defendant." Juror Masanto did not respond to any of these inquiries either. *See* Tr. pp. 61-62.

18-23.[2] Tucker alleged that juror Masanto failed to disclose information on voir dire. Specifically, he asserted that:

> 5.
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> One week after the trial, juror Jessica [Masanto] saw witness Quornisha Jones at work. Juror [Masanto] asked Ms. Jones "what trouble did you get yourself into girl?". (See attached affidavit of Quornisha Jones). During this conversation, Juror [Masanto] further disclosed that ... she thought Defendant was responsible for the shooting death of her friend Antonio Brewer. Juror [Masanto] is also friends with the girlfriend of Antonio Brewer that was also shot during the shooting which killed Antonio Brewer. AT NO TIME DURING VIOR DIRE OR DURING THE TRIAL DID JUROR [MASANTO] EVER INFORM THE COURT OR PARTIES THAT SHE KNEW WITNESSES QUORNISHA JONES OR ANTONIO BREWER OR ANTONIO BREWER'S GIRLFRIEND.
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> 6.
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> On or about October 2, 2015, during email exchanges between Sean Thornton, Derek M. Wright, and the Court, counsel for the Defendant disclosed that there was information of juror misconduct. On October 6, 2015, Juror [Masanto] sent witness Quornisha Jones a message to call her and then defriended Ms. Jones [(sic)] on her Facebook account. Additionally, screenshots provide[d] by Ms. Jones show that Ms. Jones [(sic)] and Quornisha Jones were communicating by social media 36 weeks ago, which establish that they were co-workers and friends prior to jury trial.
>
> 7.
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> The Court will recall, that over the Defendant's objection and renewed objection, the State presented evidence of Amber Bigelow who testified that Defendant was trying to arrange for the murder of his codefendant. Accordingly, in addition to Juror [Masanto]'s willful non-disclosure, there was evidence presented which was similar to Juror [Masanto]'s predisposed belief that Defendant has Antonio Brewer killed. This is especially telling as this Court sustained Defendant's objection to the State's request to inform the jury that Antonio Brewer has been killed. As such information was not disclosed to the jury at trial, the fact that Juror [Masanto] knew that Antonio Brewer had been killed also demonstrates that Juror [Masanto] failed to disclose that she knew Antonio Brewer and did not disclose it during voir dire.

Amended Motion, R. p. 19.

[2] Tucker had previously filed an April 24, 2015 motion for new trial, but that motion did not assert juror misconduct as a ground for relief.

Tucker attached an October 11, 2015 affidavit from Quornisha Jones, in which she averred that she had known and worked with juror Masanto "for several years," and described their relationship as "coworker and friends. We speak at work and have communicated on social media." R. p. 24. Jones further averred that Masanto had spoken to her approximately a week after the trial and asked Jones "[W]hat did you get yourself into girl?" Masanto supposedly explained that she had been on "the jury" and that she believed "Oowee" was responsible for Antonio Brewer killing two weeks before trial. Jones also averred that Masanto "was friends with Antonio Brewer and his child's mother who was also shot 2 weeks prior to trial. Jessica and I also discussed Brandon in this conversation also." R. p. 24.

In another paragraph of the affidavit, Jones avers that she had attached screenshots to her affidavit (*see* R. pp. 24- 29) that she had taken from social media pages to support her statement, and she identified the name used by Masanto on Facebook. R. pp. 24-25.[3] Finally, Jones averred that juror Masanto sent her an October 6, 2015 message asking her to call juror Masanto and leaving a telephone number. Jones was able to take a screenshot of Masanto's request to call even though Masanto un-friended her on Facebook. It was Jones's belief that Masanto made this request "in direct response to her finding out that people know about what she said to me." R. p. 25.

At the October 12, 2015 hearing, the State submitted six juror affidavits in opposition to Tucker's motion. R. pp. 740-745.[4] Among the affidavits that it submitted was an October 8, 2015 affidavit from juror Jessica Masanto, who made the following averments:

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[3] Respondent has omitted any reference to this identifying information, in accordance with South Carolina Supreme Court Order 2007-08-13-07, as amended by Order 2014-04-15-02.

[4] These affidavits were subsequently filed as the "State's Affidavits in Opposition to Motion for a New Trial" on November 18, 2015. R. pp. ___-__.

1. My name is Jessica Masanto and I am over the age of 18 years old, suffered from no physical or mental infirmities that would affect my capacity to testify and am otherwise competent to make and give this Affidavit.

2. I was a juror in the State vs. Walter Tucker trial.

3. I am neither friends with Quornisha Jones nor Antonio Brewer.

4. I did not receive any information about this case from Quornisha Jones or Antonio Brewer.

5. I did not have any discussions about this case with Quornisha Jones or Antonio Brewer.

6. I have not had any discussions where I blamed Walter Tucker for the death of Antonio Brewer.

State's Affidavits, Exhibit 1, R. p. 740. The State submitted identical affidavits from jurors Deborah Manyin, Cheryl Lynn Fletcher, Davies Singleton, Belinda J. Bales, and Latosha Carter. State's Affidavits, Exhibits 2-6, R. pp. 740-745.

The trial judge denied Tucker's motion in a two page Order filed on October 14, 2015. R. pp. 4-5. In pertinent part, he found that:

> Defendant's motion for a New Trial is based on an allegation of juror misconduct as to juror Jessica Masanto. Defendant was tried and convicted of Murder and Attempted Armed Robbery in Beaufort County on or about April 16, 2015. The Defendant along with others set up a fake drug deal with the victims in this case to rob the victims. During the robbery [Quantez] Greer was killed. Prior to Defendant Tucker's trial Antonio Brewer, an eyewitness, was killed. During the trial the jury was told that Mr. Brewer was deceased and unavailable to testify.
>
> In support of his motion, Defendant submitted an affidavit from Quornisha Jones as well as two brief social media contacts purported to be between Ms. Jones and Ms. Masanto. In her affidavit, Ms. Jones claims that she and Ms. Masanto are friends and that Ms. Masanto approached her after the Trial and asked "what have you gotten yourself into?" Ms. Jones then claimed that Ms. Masanto was friends with Antonio Brewer and that she blamed Defendant Tucker for Mr. Brewer's death. One of the social media contacts alleged occurred well before the jury trial. The other contact allegedly occurred after Ms. Masanto was contacted by investigators with the Solicitor's office which occurred after Defense counsel disclosed this issue to the Solicitor's office and to the Court on or about October

2, 2015. Ms. Masanto requested that Ms. Jones call her on or about October 6, 2015, which was after the investigator contacted Ms. Masanto, but before Ms. Masanto executed her affidavit. The Defendant argues that Ms. Masanto intentionally concealed information about her knowledge and relationship to Ms. Jones and Mr. Brewer; and that this constituted juror misconduct which would warrant a new trial. Defendant argued that a prima facie issue had been established by the competing affidavits and requested that the Court conduct an evidentiary hearing at which time Ms. Jones, Ms. Masanto, or other evidence could be presented to fully litigate the issue. The Court declined to set the matter down for a hearing over Defendant's objection, and decided to proceed only on affidavits.

The State argues that Ms. Jones was listed as a potential witness in the case. Further, that Ms. Jones did not have any [first-hand] knowledge of Defendant Tucker and was not called as a witness. The State submitted an affidavit from Ms. Masanto which stated that she was not personal friends with either Quornisha Jones or Antonio Brewer. Further that she had not had any discussions about the case with Ms. Jones or Mr. Brewer. Finally, that she had not had any conversations wherein she blamed Defendant Tucker for Antonio Brewer's Death.

While no transcript was available, the Court believes that during the Defendant's trial, the Court inquired of all jurors including Ms. Masanto if they were connected by blood or marriage or had a close personal friendship with any of the potential witnesses in the case.

Based on the affidavits submitted by both the State and the Defendant, as well as the arguments of counsel and the applicable law, this Court finds no credible evidence that Ms. Masanto was related by blood or marriage or had a close personal relationship with Ms. Jones, Mr. Brewer or any other potential witness in the case. The Court further finds no credible evidence that Ms. Masanto concealed any information from the Court during this trial. The Defendant's Motion for a New Trial is therefore respectfully DENIED.

Order Denying Motion for New Trial, pp. 1-2, R. pp. 4-5.

B. Discussion.

The applicable law was set forth in *Smith v. State*, 375 S.C. 507, 518-20, 654 S.E.2d 523, 529-30 (2007):

> "To protect both parties' right to an impartial jury, the trial judge must ask potential jurors whether they are aware of any bias or prejudice against a party." *State v. Woods*, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). "When a juror conceals information inquired into during

> *voir dire*, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." *Id.* "Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn." *Id.* at 586-87, 550 S.E.2d at 284.
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> "Determining whether a juror's failure to respond to a *voir dire* question amounts to intentional concealment is a 'fact intensive determination that must be made on a case-by-case basis.' " *State v. Guillebeaux*, 362 S.C. 270, 274, 607 S.E.2d 99, 101-02 (Ct.App.2004)(quoting *State v. Sparkman*, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004)). "Intentional concealment occurs 'when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable.' " *Id.* "Concealment is considered unintentional where the *voir dire* question posed is ambiguous or incomprehensible to the average juror or where 'the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.' " *Id.*

See also Vestry and Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., Inc., 384 S.C. 441, 447, 682 S.E.2d 489, 493 (2009) ("The trial court is in the best position to determine the credibility of the jurors; therefore, this Court grants broad deference on this issue"). The question of juror misconduct in concealing information on voir dire was also addressed by this Court in *State v. Zeigler*, 364 S.C. 94, 108-09, 610 S.E.2d 859, 866-67 (Ct. App. 2005). As this Court explained in *Zeigler*,

> Initially, the trial judge must make a factual determination as to whether juror misconduct has occurred. *See Smith,* 338 S.C. at 71, 525 S.E.2d at 266; *see also* [*State v. Aldret,* 333 S.C. 307, 315, 509 S.E.2d 811, 815 (1999)] (holding where affidavits supporting juror misconduct are credible, the trial court must conduct an evidentiary hearing to determine if misconduct occurred). "Only if the trial court finds a juror is guilty of misconduct must the judge determine whether the misconduct affected the verdict, warranting a new trial." [*State v. Covington,* 343 S.C. 157, 164, 539 S.E.2d 67, 70 (Ct. App. 2000)].

Zeigler, 364 S.C. at 109, 610 S.E.2d at 867. *See also Woods*, 345 S.C. at 589, 550 S.E.2d at 285 ("Where the juror's failure to disclose information is 'without justification,' i.e., intentional, the juror's bias will be inferred. Conversely, where the failure to disclose is innocent, no inference of bias can be drawn"); *Doyle v. Kennedy Heating & Service, Inc.*, 33 S.W.3d 199, 201 (Mo. Ct.App. 2000) ("If a juror intentionally withholds material information *requested* on voir dire, bias and prejudice are inferred from such concealment.... Only where a juror's intentional nondisclosure does not involve a material issue, or where the nondisclosure is unintentional, should the trial court inquire into prejudice") (Emphasis in original) (cited with approval in *Woods*). Respondent submits that the trial judge did not abuse his discretion.

The trial judge found that there was "no credible evidence that Ms. Masanto was related by blood or marriage or had a close personal relationship with Ms. Jones, Mr. Brewer or any other potential witness in the case[,] ...[and] no credible evidence that Ms. Masanto concealed any information from the Court during this trial." He further found that there was no credible evidence that juror Masanto concealed any information from the Court during voir dire. Order Denying Motion for New Trial, p. 2, R. p. 4. Juror Masanto's affidavit supports his findings because she denied being friends with either Quornisha Jones or Antonio Brewer, receiving any information from either of those individuals or having any discussion about the case with either individual. She likewise denied having any discussion where she blamed Tucker for Antonio Brewer's death. Moreover, neither Antonio Brewer nor his unnamed girlfriend were listed as potential witnesses. Obviously, there could not be any concealment of any possible relationship with these individuals, even assuming that juror Masanto knew who they were.[5]

[5] Tucker relies heavily upon *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998), for the proposition that the trial judge was obligated to hold an evidentiary hearing to resolve the competing affidavits. However, *Kelly* was a capital case where a question arose of whether external prejudicial information had been imparted to the jury, "[a]fter all the

The trial judge's decision to resolve the credibility issue adversely to Tucker is hardly surprising, since the juror (Ms. Masanto) denied being friends with or having a conversation about the case with either Jones or Brewer, and "[t]he Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin*, 471 U.S. 307, 324 n. 9, 105 S.Ct. 1965, 1976 n.9 (1985). *See also United States v. Olano*, 507 U.S. 725, 740, 113 S.Ct. 1770, 1781 (1993); *Old Chief v. United States*, 519 U.S. 172, 196 (1997); *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984) ("a court should presume ... that the judge or jury acted according to law"). "Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed." *Id.*[6]

Additionally, Tucker went to great lengths in order to avoid going to trial in the first place. First, he threatened to kill eyewitness Jessica Power and her family if she cooperated against him, and he told Keamber Bigelow that he did not think Ms. Power would testify against him. Second, he devised the plot to murder his co-defendant, Polite, another potential witness against him. Indeed, with the death of Antonio Brewer only weeks before Tucker's trial, these were the only two witnesses who could have testified against him. *See* **Argument II**, *infra*.

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testimony had been presented, but prior to closing arguments in the penalty phase of the trial." *Id.* at 139-40, 502 S.E.2d at 103. Respondent submits that an evidentiary hearing may be appropriate where there is a question of extraneous prejudicial information reaching the jury. However, Respondent would note that the Supreme Court in *Kelly* never mandated a full evidentiary hearing. Instead, the Court expressly found that "[t]he trial court has broad discretion in assessing allegations of juror misconduct." *Id.* at 141, 502 S.E.2d at 104. No such evidentiary hearing was required in the present case, however, because the trial judge found no credible evidence of misconduct based on his review of the affidavits and recollection of the trial record. *Accord Warger v. Shauers*, 135 S. Ct. 521, 529, 190 L. Ed. 2d 422 (2014) ("Even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered").

[6] This rule "is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 1709 (1987).

Further, the trial judge did not misapprehend the voir dire, as Tucker suggests. Rather, his Order merely omitted that he inquired about close business or social relationships as well. Contrary to Tucker's argument, there was no close social relationship between Ms. Masanto and Jones or the unnamed girlfriend of Brewer. In support of his claim that the trial judge committed an abuse of discretion, Tucker relies principally upon information in Jones' affidavit that she and juror Masanto were "friends" on Facebook and the screenshots attached to her affidavit in support of this claim.

However, "[it] is now common knowledge that merely being friends on Facebook does not, *per se*, establish a close relationship from which bias or partiality on the part of a juror may reasonably be presumed." *McGaha v. Commonwealth*, 414 S.W.3d 1, 6 (Ky. 2013). As the Supreme Court of Kentucky stated in *Sluss v. Commonwealth*, 381 S.W.3d 215, 222–23 (Ky. 2012):

> Websites such as Facebook do require a member to affirmatively approve or deny requests to enter into a 'friendship.' Therefore, in order for the jurors to become 'friends' with April Brewer, either April Brewer would have been required to approve friendship requests from the jurors, or the jurors would have been required to approve requests from April Brewer. In either situation, the 'friendship' that the jurors had with April was not happenstance; there was an affirmative act to connect the parties.
>
> "But 'friendships' on Facebook and other similar social networking websites do not necessarily carry the same weight as true friendships or relationships in the community, which are generally the concern during voir dire. The degree of relationship between Facebook 'friends' varies greatly, from passing acquaintanceships and distant relatives to close friends and family. The mere status of being a 'friend' on Facebook does not reflect this nuance and fails to reveal where in the spectrum of acquaintanceship the relationship actually falls. Facebook allows only one binary choice between two individuals where they either are 'friends' or are not 'friends,' with no status in between.
>
> "Indeed, some people have thousands of Facebook 'friends,' as was the case with April Brewer, which suggests that many of those relationships are at most passing acquaintanceships. This is further complicated by the fact that a person can

> become 'friends' with people to whom the person has no actual connection, such as celebrities and politicians. *See, e.g., Robbie Woliver, Lady Gaga and her 10 million Facebook friends: celebrity worship syndrome*, Psychology Today (July 3, 2010), http://www.psychologytoday.com/blog/alphabet-kids/201007/lady–gaga–and–her–10–million–facebook–friends–celebrity–worship–syndrome (noting that the singer Lady Gaga has '10 million Facebook friends [who] aren't really her friends'). Thus, a Facebook member may be 'friends' with someone in a strictly artificial sense."

(footnotes omitted).[7] *See also W.G.M. v. State*, 140 So.3d 491 (Ala. Ct.App. 2013) (holding that "[b]ecause the status of being a 'friend' on Facebook does not necessarily equate to a close relationship from which a bias could be presumed, W.G.M. has failed to establish that he might have been prejudiced in the failure of the veniremembers to voluntarily disclose a social-media networking relationship with any member of the District Attorney's office"); *Mascarella v. CPlace Univ. SNF, LLC*, 2015 WL 7432370, at *3 (M.D. La. Nov. 23, 2015) (holding that "[b]ecause 'merely being friends on Facebook does not *per se*, establish a close relationship from which bias or partiality on the part of a juror may reasonably be presumed,' there is insufficient evidence from which the Court could conclude a bias on the part of Juror Garon based on, not his, but his wife's Facebook communication with, not Campbell, but Campbell's wife") (footnote omitted); *Slaybaugh v. State*, 44 N.E.3d 111, 118 (Ind. Ct. App. 2015) (juror's failure to disclose during voir dire that the victim's sibling was among her expansive list of Facebook friends did not constitute juror misconduct warranting a new trial), *opinion adopted*, 47 N.E.3d 607 (Ind. 2016). *Cf. State v. Forguson*, 2014 WL 631246, at *13 (Tenn. Crim. App. Feb. 18, 2014) (unpublished) (trial court judge's status as "Facebook friend" with the State's witness "is not sufficient proof that the trial court could not impartially fulfill its duty as thirteenth juror"). *Cf.*

[7] Although the Court in *Sluss* ordered a limited remand to determine whether the voir dire responses of two jurors were false, the degree of "friendship" and whether those jurors should have been struck for cause, *Sluss*, 381 S.W.3d at 229, no limited remand is necessary the present case because juror Masanto has denied having either any friendship with or conversation about the case with Jones or Brewer.

People v. Campbell, No. 4-11-0517, 2013 WL 3147656, at *19-23 (Ill. App. Ct. June 17, 2013).

Thus, any supposed failure of juror Masanto to disclose a Facebook relationship with Jones was innocent, *id.*, and "no inference of bias can be drawn." *See Woods*, 345 S.C. at 589, 550 S.E.2d at 285; *Zeigler*, 364 S.C. at 109, 610 S.E.2d at 867. *See also Smith*, 375 S.C. at 518-19, 654 S.E.2d at 529; *State v. Galbreath*, 359 S.C. 398, 403-04, 597 S.E.2d 845, 847-48 (Ct.App. 2004). Moreover, there is no evidence, credible or otherwise, that juror Masanto had a conversation with Jones about the case prior to her service as a juror at Tucker's trial or during the trial. Indeed, such an allegation is conspicuously absent from Jones' affidavit, as is the name of Brewer's alleged girlfriend. If Jones and Ms. Masanto were truly "friends" - as opposed to casual acquaintances and coworkers - one would reasonably expect an averment that the women would have had a conversation about the case prior to trial.

Thus, the present case is readily distinguishable from *Woods*, 345 S.C. at 587-90, 550 S.E.2d at 284-86, where the Court concluded that Juror B intentionally failed to disclose on voir dire that she had "worked as a volunteer victims' advocate for a period of three years in the solicitor's office which prosecuted the case," where one question "unambiguously sought a response from any juror having a business association with any of the attorneys trying the case" and an honest answer to a second question should have revealed that "Juror B had for three years performed volunteer work for an organization whose primary function was the protection of victims' rights." Also, Juror B. "offered inconsistent explanations for her failure to respond" to the second question;" and "she responded affirmatively to a similar question on voir dire at a later trial during the same term of court." *Id.* Accordingly, Respondent submits that the trial judge did not abuse his discretion by denying Tucker's motion for new trial. *Smith*, 375 S.C. at 518-20, 654 S.E.2d at 529-30. *See also State v. Elmore*, 279 S.C. 417, 420, 308 S.E.2d 781, 784

(1983).

II. The trial judge did not abuse his discretion by allowing the State to introduce Keamber Bigelow's testimony that Tucker told her of a plot to murder Travis Polite, his co-defendant and accomplice, to prevent Polite from testifying against Tucker at trial because this evidence reasonably tended to prove both Tucker's criminal intent (malice) and his consciousness of guilt, and because the probative value of this evidence was not substantially outweighed by its prejudicial effect.

Contrary to Tucker's argument, Respondent submits that the trial judge did not abuse his discretion by allowing the State to introduce Keamber Bigelow's testimony that Tucker told her of a plot to murder Travis Polite, his co-defendant and accomplice, to prevent Polite from testifying against him at trial. This evidence reasonably tended to prove both Tucker's intent (malice) and his consciousness of guilt, and the probative value of this evidence was not substantially outweighed by its prejudicial effect.

A. How issue arose at trial.

Following a *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964), hearing, Tucker's counsel moved *in limine* to prevent the State from introducing testimony by Keamber Bigelow that Tucker told her of a plot to murder Polite, his co-defendant and accomplice, to prevent Polite from testifying against him at trial. He first argued that Tucker was charged with murder, kidnapping and armed robbery, but not with attempting to influence a witness. Counsel suggested "it is speculative whether my client even understood whether they were being charged with something or detained." Also, the evidence did not qualify for admission under Rule 404(b), SCRE. As a result, counsel suggested that the challenged evidence was not probative of any issue before the jury and that whatever slight probative value it had was substantially outweighed its prejudicial effect. Tr. pp. 92-94; R. pp. 125-127.

In response, the State pointed to the South Carolina Supreme Court's opinion in *State v.*

Edwards, 373 S.C. 230, 644 S.E. 2d 66 (2007), and argued that it stood for the proposition that threats by a defendant against a witness are admissible because it shows both consciousness of guilt and intent. The State noted that the decision in *Edwards* followed a long line of cases from the Fourth Circuit Court of Appeals. The State represented that if presented as a witness, Keamber Bigelow, an associate of Tucker's who had already given statements to law enforcement in Savannah and to investigators with the Fourteenth Circuit Solicitor's Office, could testify about admissions made by Tucker. The State explained that Bigelow was one of two women present when Tucker was brought into the Georgia police station and Tucker told the women not his talk to police but to get a lawyer. Bigelow could testify to a number of admissions made by Tucker, including his admissions that the killing was the result of a drug deal gone bad; that he had participated in the robbery; and a statement that he was going to come and kill his co-defendant, "Travy, or Travis Polite." The State further explained that Bigelow and another woman were with Tucker "to help make money for Mr. Tucker ... as part of the plan or plot to go and killed the codefendant." Tr. pp. 94-97; 99; R. pp. 127-130; 132.

The State later revisited the matter when reviewing the admissions that Tucker had made to Bigelow. The State noted that he had admitted that he was present at the time the crimes were committed, that he admitted he participated in the robbery; that "[i]t was a drug deal gone bad;" and that he had been shooting but did not think that he killed anyone because he was shooting as he ran away from the scene. Tr. p. 124; R. pp. 157. Additionally, another set of admissions dealt with threats against a witness, "Travis Polite or Travy." The State noted that, if permitted, Bigelow would testify that:

> [T]hey were down here, he was trying to make money - he being Walter Tucker - in an attempt to kill his codefendant. She didn't know his full name. She knew it as Travy or Travis and that he was a codefendant and that that person was trying

to connect Mr. Tucker to all of the -- all of the wrongdoing in this case, in essence the shooting which Mr. Wright already just pointed out that Travis Polite did say that on his interview. That he was trying -- he being Travis Polite, or the codefendant, was trying to put all of this on Walter Tucker.

She specifically talks about who he brought with him into Savannah to come across to South Carolina to do this, one of those people being a guy named Cedrick and Cedrick's nickname was Savage. And Savage went across into South Carolina in a vehicle, and she described it with a vehicle with a rear-end damage.

And I am getting into this for what I believe, Your Honor, to be information that was corroborated by an officer, by an investigator with our office.

But that there was -- that Cedrick went over into South Carolina. They were supposed to I guess do some reconnaissance work, for lack of a better word.

She described a car, that the car ... had some damage to it and that there was a gun that Mr. Tucker had put inside the car, inside underneath the gear shift of the vehicle.

After getting that information Dylan Hightower with our office along with Roger Heaton of our office went into South Carolina - well, obviously they were already here in South Carolina - but [they] did a run on anybody named Cedrick.

They found a person matching that general description in the Savannah -- in the Hampton County jail. He had Savage tattooed across his chest. They had a car that matched the general description. It was a rental car.

And I forget; Your Honor, I am sorry it escapes me; but it was rented by I want to say one of Mr. Tucker's relatives.

But I can't -- I will verify that shortly for you, Judge. I will have somebody look it up for me. At any rate, the car matched the description. It had damage consistent with the way she described it. There was a guy named Cedrick. He was in the Hampton Detention Center. Had just gotten there. Had just been arrested within a couple of days of that. His nickname was Savage. This guy had Savage tattooed across his chest.

They went to where she indicated that a black gun with a silver slide or silver top on it was located inside that car.

And it wasn't something you could just see. ... [T]hey had to pull the gear shift plate off of it, and that -- and they found a pistol matching that description after they pulled off the gear shift knob and pulled the plate up.

> Dylan Hightower with our office recovered that pistol. The photographs of all of that has been turned over to defense.
>
> So what I would seek to introduce from Ms. Bigelow is two sets of things. One, the admissions made by Mr. Tucker regarding specifically that he participated. All of that.
>
> Two, that ... under Edwards he is making threats against codefendants. He had a plan to come down and [do] what he called which he said was make an adjustment.
>
> And she was asked what do you mean by that. And she did this (motioning), was to kill him. And that -- and that also he was not worried ... about the girl testifying in his case because he had threatened to kill her family.
>
> And the girl of course there was only one girl involved. That is Jessica Powers.
>
> So I think those under Edwards clearly come in. It would be the State's position. And as to the other -- also the ancillary gun that was located I think that further corroborate and I think that's -- because that is a physical manifestation of the threat to kill Travis Polite along with the -- Cedrick, Savage.
>
> I think all of that should come in through Mr. Hightower obviously who is the one who recovered the gun.
>
> So I would seek to introduce both her statements as well as the testimony of Dylan Hightower with our office regarding the recovery of that weapon.
>
> Because again, my argument is that is the physical manifestation of the threat against Mr. Polite. So that would be ... the State's position on those, Judge.

Tr. pp. 125-28; R. pp. 158-161.

In pertinent part, Tucker's counsel then argued that there would be a problem in cross-examining Bigelow to impeach her credibility because any such inquiry necessarily would touch upon the Savannah incident. Tr. pp. 129-30; R.pp. 162-163. Counsel further argued that any alleged plot was not communicated to Polite. "What it amounts to is the State saying well we think that Mr. Tucker was planning to do something to Mr. Polite and because someone told us that had he is associated with a person named Savage and he is associated [with the car] ... and

in that car you might find a gun." Without further proof, counsel suggested that all the State could show was merely that Bigelow had been in the car and that there was a gun in it. Counsel further noted that there was no evidence that Polite was "actually watched, [or] that that was actually a plan in effect," as opposed to merely "bravado." Tr. pp. 130-31; R. pp. 163-164.

Also, counsel argued that the proffered evidence was merely showing propensity and that Tucker was a bad person. Nor had Tucker been charged with any crime in connection with the supposed plot. As a result, counsel argued that the evidence was inadmissible under Rule 404(b). Moreover, there was a danger that a jury may become distracted from consideration of the actual issues before it if this evidence was introduced. Tr. pp. 131-32; R. pp. 164-165.

The State admitted that the proposed line of questioning was prejudicial, however, it noted that a lot of evidence is prejudicial and that the evidence was not inadmissible merely because counsel could not figure out how to effectively cross-examine Bigelow. Again, the State asserted that "the entire tenant of Edwards, which I would ask the court to read, is that this evidence is absolutely admissible. And the test for reliability that they talk about is can you tie it to the defendant." Here, the State could tie it to him by his admissions to Bigelow. Her claim that Tucker said these things was corroborated by what the investigator from the Solicitor's Office found when he investigated the alleged plot. The State contended that counsel's arguments went to the weight of the evidence and not to its admissibility. Tr. pp. 133-35; R. pp. 166-168.

Tucker's counsel contended that there was "a difference between a defendant who directly communicates, whether directly or ... indirectly but gives a communication to a witness to say don't do it or else," and the situation presented here, where "there is no evidence that there has been any contact with Travis Polite or anything really in South Carolina." Tr. pp. 135-36; R. pp. 168-169. When counsel acknowledged that it "would be more problematic" if there was a

witness who testified that Tucker asked the witness to kill Polite, the trial judge indicated that he felt counsel's argument went more to the weight of the evidence than its admissibility. Tr. p. 136; R. p. 169.

Counsel disagreed and pointed out that there was no evidence Tucker "tasked Mr. Savage to do it," and he asserted that there was no agreement between the two men. Counsel maintained that evidence of the supposed plot was inadmissible without Savage's testimony of an agreement and that the prosecution's evidence was merely speculative. Further, in counsel's estimation, the evidence proffered by the State was "hugely prejudicial." Counsel asserted that the State was trying to "essentially back door it in as 404(b) bad acts and get him convicted on this even though ... there is no evidence my client had even been in the car other than she may try to say it. Tr. pp. 137-39; R. pp. 170-172.

The trial judge disagreed with Tucker's position and pointed out that there was circumstantial corroboration of Bigelow's statement concerning Tucker's admission that he plotted to kill Polite. Tr. p. 139; R. p. 172. After listening to further argument by the State, he denied the motion to suppress for the reasons argued by the State. Tr. p. 141; R. p. 174. The following day, the trial judge indicated that he had read *Edwards* and the State indicated that its evidence was being offered to show consciousness of guilt. Tr. pp. 156-58; R. pp. 189-191.

The trial judge entertained further argument from Tucker's attorney on the issue immediately before Bigelow's testimony. Counsel suggested that the State's proffer was inconsistent with the video of law enforcement's interview with Bigelow. Tr. pp. 359-60; R. pp. 392-393.[8] Specifically, counsel argued that:

[8] The trial judge later viewed the video. Tr. pp. 363-64; 369. However, the parties subsequently agreed not to introduce this video because it contained a great deal of inadmissible evidence. Tr. p. 437. As a result, it is not part of the record before this court.

... I believe the State essentially said that this witness will provide testimony that my client wanted to harm, do harm, and arranged for the murder of Travis Polite, that ultimately he had arranged for a gentleman named Savage to do that murder, that there was a gun in the car and had even seen -- and I would just say whatever the record showed, there was information as if that car somehow belonged to Savage that describing the rear-end damage was a way of sort of identifying that car but that the gun in that car was to be used to facilitate this murder. And I was also left with the impression that Savage is arrested sort of almost in route or somewhere during the facilitation of this.

But when we look at the interview, Judge, she never says the name Travis until after one of the investigators tells her the name Travis. So I don't think -- I think it is important for the court to know this isn't that she was saying this person Travis. It was she was saying a person unknown to her, essentially, and labeled that person Travis only after her second interview with Investigator Eaton.

Now she also specifically said in her interview Savage was never going to be the one to do any of this. She had actually talked to Savage and he would never do that; he is not a killer.

So her words in her interview specifically said Savage wasn't going to be the, quote, assassin, for lack of a better word.

She also said that car was a rental car that they had rented from Atlanta that while she was driving it was rear-ended in an accident. So the car is not unique to Savage or unique to any person. It is just a rental car that had rear-end damage.

The gun, yes, is hidden in the gear shift. That ... was accurate. But she also specifically said that gun wasn't the gun that was going to be used for any ... alleged murder.

So I at least wanted to make sure when the court considers whether this is 404(b) -- and I understand the State has relied on Edwards for the idea that consciousness of guilt can come in under 404(b). I concede as an officer of the court that that is a true statement of law. But then the question then arises, what about any of the alleged statements of my client wanting to do violence to a codefendant rise to the level of a statement of intimidation or calculated to intimidate a person. One, that person wasn't a witness.

But when we look at what Keamber is saying, she is basically saying an unknown person with some unknown weapon at some unknown time may at some point do something to this unknown codefendant. Because she at least always did say that; she said codefendant; not witness, but codefendant.

So from a reliability standpoint from whether this is truly consciousness of guilt --

and I think, Judge, I may have also cited, his alleged motive wasn't to intimidate [and] ... it wasn't demonstrative of guilt, but it was demonstrative that he said I didn't do that. And he is saying that I shot and killed Mr. Greer. That was a lie, which we know happens to be true; it was a lie. But at no point was Travis a witness or signed up.

So I at least ... wanted the court to at least get the facts of the interview and then make the analysis under 404(b) and 403 and see if that would change the court's opinion as to whether or not.

Now the last concern I put in there -- and I am not suggesting Investigator Eaton had some willful plan to change this witness's testimony in some form or fashion. But at the end when he starts to explain to her who the codefendants are, what the situation is in this case, he is now giving a witness information she clearly didn't have that this witness may now be adopting and using in her testimony as if she heard it and was aware of it from my client.

*****

... [T]he [officer's] intent doesn't matter, it is the effect that you have now put a name on a person she couldn't name and have you now given her information that flows into her overall testimony that she didn't have before you told her. And that is the further concern we now have with Ms. Bigelow testifying as to this.

Because again, none of it goes to this case in terms of what has to be proved in this case. The whole issue here now is it consciousness of guilt. And I just don't think it is, Judge. But I defer to the court.

Tr. pp. 360-63; R. pp. 393-396.

The trial judge stated that he found several things important on the video of Bigelow's interview. First, Bigelow indicated that Tucker said he had a codefendant in Beaufort and that there was a trial date on October 20th,[9] that this co-defendant was connecting him to the murder, and that he was going to have someone kill the co-defendant, so that there would not be a trial. The trial judge observed that when Bigelow was talking to the detective, she was attempting to remember the co-defendant's name. When she said "T," the detective said "Travis" and she agreed with him. Tr. pp. 363-64; R. pp. 396-397.

[9] Counsel admitted that October 20th was a potential trial date. Tr. p. 364.

Counsel argued that even though Bigelow ultimately did identify Travis, she had indicated on previous occasions that she did not know the person's name. He conceded, however, that she went on to say that "we needed to help him get money to help them hire someone, Savage or somebody, to kill the codefendant." Tr. pp. 364-65; R. pp. 397-398. The trial judge also noted that Bigelow had discussed Tucker's admission to being involved in the robbery but supposedly not the murder because he was shooting behind him as he ran away from the scene. Tr. p. 365; R. p. 398.

The State noted that the investigator who conducted the interview had reviewed the video and had written down everything that was said. The State corrected counsel's argument by noting that Bigelow had said, "maybe his name is -- I have heard him say a name Travis or something like that," before anyone else mentioned the name Travis. Thus, she first mentioned "Travis." Although the State did not believe everything in Polite's statement was true and conceded that he had fired the fatal bullet, Polite was still a potential witness and could testify against Tucker. Again, the State asserted that the proffered evidence was admissible under *Edwards* and that Savage's unwillingness to carry out the murder did not render the evidence inadmissible because Tucker's intent was for Polite to be murdered. The State noted that it intended to present Mr. Hightower to testify about the results of the investigation based upon the information that Bigelow had provided. Tr. pp. 365-68; R. pp. 398-401.

After trial counsel indicated that he stood on his prior argument, the trial judge stated that he had considered the motion and both listened to and viewed the video of the interview. After such review, he was found no reason to change its prior ruling and denied the motion. Tr. p. 369; R. p. 402.

Prior to Bigelow's testimony, the State noted that its examination of Bigelow would be

very narrow and that it was not going to mention Savannah. The parties then reviewed their proposed questioning with the trial judge. Tr. pp. 423-36; R. pp. 456 - 469. Following a recess, the State placed on the record that the parties had agreed not to introduce the video of Bigelow's interview because much of the discussion on it was inadmissible. The State also noted that Bigelow had admitted stealing a necklace belonging to Tucker from his hotel room in Savannah and that this information had been provided to Tucker's attorney. Tr. pp. 437-38; R. pp. 470-71.

Counsel suggested that she may need an attorney because she had admitted to a crime and this information would be used to impeach her credibility. After listening to arguments from both parties, the trial judge appointed a member of the Beaufort County Public Defender's Office to represent Bigelow and she consulted with this attorney before testifying. Counsel also requested a limiting instruction for Bigelow's testimony. However, the State opposed his request because it was unaware of any such limiting instruction for witness intimidation and because the offense for which it would be "limited," if any, was the murder for which Tucker was on trial. Tr. pp. 438-48; R. pp. 471-81.

The trial judge stated that he was reading from *Edwards* and did not find any discussion of a limiting instruction in *Edwards*. As a result, he indicated that he was going to deny counsel's motion, unless counsel could present a South Carolina case requiring such an instruction. Counsel stated that he did not know of any such case. Tr. pp. 448-49; R. pp. 449-50.

B. Bigelow's testimony.

Keamber "Amber" Bigelow testified that she met Tucker, or Oouwee, about a month or so before the crimes in this case. Tr. pp. 450-51; 453; R. pp. 483-84; 486. At some point, she had a conversation with Tucker, in which he had admitted that the murder occurred in a botched drug deal. Also, "[h]e said that he didn't have anything to do with the murder; but the way he

explained it, he wasn't sure. He said he was running and that he was shooting [as he was running away] and his adrenaline was high." Tr. pp. 451-53; R. pp. 484-486. Tucker told Bigelow that Power would not testify because he was threatening her. Tr. pp. 451, 453; R. pp. 484; 486.[10]

However, he detailed a plan to murder his accomplice and co-defendant, Polite. "He said that he had to kill the co-defendant because if he did then there wouldn't be the trial." Tr. 451-52; 458-59; R. pp. 484-485; 491-92. Tucker told Bigelow that he was going to have an acquaintance named "Savage"[11] carry out the hit; that Savage would be driving a black Camry; and that Savage had a black and silver pistol that was hidden in his car's gear shift. Tr. p. 452; R. p. 485.

Bigelow's account of Tucker's plan to have Polite murdered was circumstantially corroborated by Investigator Dillon Hightower, from the Fourteenth Circuit Solicitor's Office. Based upon information Mr. Hightower received from Bigelow, he went to the Hampton County Detention Center to retrieve information concerning a vehicle that was impounded in Beaufort. He identified State's Exhibit 42, a photograph of a black 2014 Toyota Camry rental car with a Florida tag, as the car in question. He discovered that the driver of the vehicle was Cedric Antonio McDuffy, who was incarcerated in the Hampton County Detention Center. When Mr. Hightower searched the car, he found a .22 caliber semi-automatic pistol (*see* State's Exhibits 44-45) matching the description that Bigelow had given, secreted under the gear shift. Again, much like she had described it. Tr. pp. 460-65; R. pp. 493 - 498.

C. Discussion.

Respondent submits that the trial judge properly denied Tucker's motion in light of the

[10] On cross-examination, Bigelow admitted that Tucker was upset that he is being blamed for the murder and that he was worried about being convicted of it because he felt that he had not committed it. Tr. p. 454; R. p. 487. She also admitted that she had previously said that Savage was not going to kill Polite because "he is not that kind of person," Tr. p. 456; R. p. 489, and that "[i]t was discussed that they were going to get another gun." Tr. p. 457; R. p. 490.

[11] "Savage's" real name is Cedric Antonio McDuffy.

Supreme Court's decision in *Edwards* and other authority - both in South Carolina and from other jurisdictions - permitting the introduction of evidence that a criminal defendant has attempted to intimidate a potential witness or have the witness killed, in order to prevent the witness from testifying against him.

In Edwards' trial for three counts of criminal sexual conduct with a minor in the second degree, involving his minor step-daughter, the State was permitted to elicit evidence through the victim's mother (Edwards' wife) that "Edwards told her 'to get in touch with [the victim] and have her not show up because he had a hit out on her, [and] that she wouldn't make it through the courtroom doors.'" When the mother was "asked whether Edwards ever said 'anything about what he would do to [the victim] if he were to go to jail on these charges,' the victim's mother [testified over objection] that '[h]e told me that he would have her killed or he would kill her when he got out.'" 383 S.C. at 68, 678 S.E.2d at 406.

Following his conviction and sentencing on all three counts, Edwards appealed and alleged that the trial judge erred by admitting this witness intimidation evidence. This Court affirmed in a published opinion, *State v. Edwards*, 373 S.C. 230, 644 S.E.2d 66 (Ct.App. 2007), *aff'd as mod.*, 383 S.C. 66, 678 S.E.2d 405 (2009). The Supreme granted certiorari and affirmed this Court's decision, as modified. *See* 383 S.C. at 67-68, 678 S.E.2d at 405-06.

The Supreme Court noted that the question of the admissibility of evidence of witness intimidation was not a novel issue in this state and it discussed several of the earlier cases that had addressed this issue, including *State v. Rogers*, 96 S.C. 350, 351-52, 80 S.E. 620, 621-22 (1914) (although it held the error harmless, the Court found that it was error to admit an unsigned letter delivered to a witness who later testified against the defendant because there was no evidence presented "connecting the defendant in some manner with it"); *State v. Center*, 205 S.C.

42, 47-50, 30 S.E.2d 760, 763-64 (1944) (the admissibility of witness intimidation evidence turns on whether the source of the intimidation may be linked to the defendant); *State v. Goodson*, 225 S.C. 418, 429, 82 S.E.2d 804, 809 (1954) (Eatmon, AAJ, concurring) (recognizing that "[e]vidence that a person charged with [a] crime procured or attempted to procure [the] absence of a witness or to bribe or suppress testimony against him tends to show unrighteousness of defendant's cause and a consciousness of guilt"); and *Mincey v. State*, 314 S.C. 355, 444 S.E.2d 510 (1994). *See Edwards*, 383 S.C. at 69-72, 678 S.E.2d at 406-08.

The Court then held that:

> Today we follow *Rogers*, *Center*, the concurring opinion in *Goodson*, and *Mincey* and hold that witness intimidation evidence, if linked to the defendant, may be admitted to show a consciousness of guilt. Establishing the defendant as the source of the intimidation provides the necessary reliability for admissibility. Here, the mother of the victim identified Edwards as the author of the intimidation. Because the State presented evidence linking Edwards as the source of the witness intimidation, we find no abuse of discretion in the admission of the evidence.FN3
>
> > FN3. The admission of evidence, of course, remains in the sound discretion of the trial court. Relevant evidence may be excluded for a host of reasons, including a finding under Rule 403, SCRE, that the probative value of the evidence is substantially outweighed by its prejudicial effect.

Id. at 72 & n. 3, 678 S.E.2d at 408 & n. 3. *See also United States v. Hayden*, 85 F.3d 153, 158-59 (4th Cir.1996) ("[e]vidence of witness intimidation is admissible to prove consciousness of guilt and criminal intent under Rule 404(b), if the evidence (1) is related to the offense charged and (2) is reliable." Hayden challenged the trial court's admission of "evidence that he had written a threatening letter to a witness" and that he "telephoned [a witness] to threaten [the witness] and his family if [the witness] testified") (cited with approval in *Edwards*, 383 S.C. at 72-73, 678 S.E.2d at 408).

Obviously, the evidence in the present case sufficiently tied the plot to eliminate the potential witness to Tucker, since Bigelow testified to admissions by him under Rule 801(d)(2)(A), SCRE ("A statement is not hearsay if ... [t]he statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity...."). Contrary to Tucker's contention, raised for the first time to this Court,[12] the State presented clear and convincing evidence of the plot. In particular, the State was able to circumstantially corroborate many of the details in the admissions that Bigelow said Tucker had made through the testimony of Mr. Hightower.

Additionally, it is clear that this evidence was part of the *res gestae* of the murder and armed robbery, since this "evidence ... is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context." *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 370–71 (1996) (alterations in original) (internal quotation marks omitted), *overruled on other grd.s*, *State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014). *See also State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) ("The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred"). As a result, it was unnecessary for the trial judge to give a limiting instruction, such as that requested by Tucker. *See State v. Johnson*, 306 S.C. 119, 126-27, 410 S.E.2d 547, 552 (1991) (concluding that the failure to give a limiting instruction did not constitute reversible error because the other crime was part of the *res gestae* and directly related to the murder for which the defendant was on

[12] His argument is not properly before this Court. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. .... A party may not argue one ground at trial and an alternate ground on appeal") (citation omitted),

trial); *State v. Nix*, 288 S.C. 492, 497-98, 343 S.E.2d 627, 630 (Ct.App.1986) (holding a limiting instruction was unnecessary when evidence of the other crime is admissible on the main issue or the evidence is admitted to show motive or intent and the prior bad acts may have been committed in furtherance of such motive or intent).

There is also no merit to the contention that this evidence was inadmissible because Bigelow testified that Savage would not have killed Polite. This contention "misses the forest for the trees." The State did not present this evidence to prove that Tucker and Savage had entered into a conspiracy to murder Polite. Rather, the evidence was offered to show Tucker's consciousness of guilt and his criminal intent. Tucker's argument in this regard ignores that *he had the specific intent for Polite to be murdered*, in order to prevent Polite from testifying against Tucker at trial. His intent for the crime to occur was not lessened, in any way, by either Savage's unwillingness or failure to carry out the plot to murder.

There is also no merit to his claim that evidence of the plot to kill was inadmissible because there is no evidence that his intended target, Travis Polite, "was ever told, heard, or knew of any plan to murder or influence him." FBOA, p. 22. This assertion misunderstands *Edwards* and the rationale for permitting such evidence to be introduced. There is no indication in either the Supreme Court's or Court of Appeal's decisions in *Edwards* that the threat made had been communicated to its intended recipient, the step-daughter, by the person actually having knowledge of the threat: her mother. *See State v. Edwards*, 383 S.C. 66, 678 S.E.2d 406 (2009); *State v. Edwards*, 373 S.C. 230, 644 S.E.2d 66 (Ct. App. 2007). Also, many other jurisdictions have allowed such testimony, even where there is no indication that a threat was communicated directly to its intended target or that the intended target somehow became aware of such a threat. *See State v. Belkner*, 117 N.H. 462, 469, 374 A.2d 938, 942 (1977) (defendant

overheard discussing with another inmate retribution for informing); *State v. Russell*, 159 N.H. 475, 488-89, 986 A.2d 515, 526 (2009) (defendant recorded on jail phone discussing with his mother how he would attempt to intimidate witness); *People v. McCullough*, 2015 IL App (2d) 121364, ¶95, 38 N.E.3d 1, 24, 395 Ill. Dec. 124, 147 (2015) (defendant asked fellow inmates if they could "do anything" to witnesses who were going to testify against him); *State v. Dukes*, 290 Ga. 486, 487-88, 722 S.E.2d 701, 703-04 (2012) (defendant asked cellmate to threaten witness for him).

Even less persuasive is his contention that assuming he made the statement to Bigelow, he was not being truthful with her when he made it because he was actually innocent. His position should not hold because the witness to whom the statement was made, Bigelow, was in the best positon to determine whether or not such a statement was a real threat. *See Jordan v. State*, 2014-KA-00615-COA ¶35, 2015 WL 8142708, at *7 (Miss. Ct. App. 2015). Bigelow clearly testified that Tucker wished to have his accomplice killed. *E.*g., Tr. p. 451. She was in the best position to judge the credibility of his resolve. The question then becomes her credibility, and "[t]he assessment of a witnesses' credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012), which counsel tested through cross-examination.

Nor did trial judge err by finding that this evidence withstands a Rule 403, SCRE, analysis. The Supreme Court stated in *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 27-28 (2014), that "'[w]hen [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case.'" (Quoting *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct.App.2008)), *reh'g denied* (Sept. 24, 2014). Considering the record in this case, it is clear that the probative value of this

evidence was not substantially outweighed by its prejudicial effect. *See also* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ....").

First, this evidence was extraordinarily probative of both Tucker's consciousness of guilt and his state of mind (i.e., malice) because it showed that he wanted to have someone kill the only person whom he thought would be willing to testify against him, since he felt that he had adequately scared Power by threatening to kill her and her family. *See* **Argument III**, *infra*. Undoubtedly, the challenged evidence was prejudicial to him, as much evidence introduced by the prosecution in a murder case rightfully is. "Unfair prejudice, however, does not include damage that occurs to a defendant's case because of the 'legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.'" *United States v. Guerrero-Cortez*, 110 F.3d 647, 652 (8th Cir. 1997).

Whatever prejudicial effect this evidence may have had was dramatically outweighed by its probative value, since it indicated Tucker's willingness to stop it nothing to ensure that he would not be convicted of robbing and murdering Quantez Greer. Also, Tucker's statement to Bigelow was admissible as an admission of a party-opponent under Rule 801(d)(2)(A), SCRE; *State v. Beck*, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000) ("'As a general rule, statements or declarations made by one accused of a crime are admissible against him'") (quoting *State v. Plyler*, 275 S.C. 291, 295, 270 S.E.2d 126, 128 (1980)). It was likewise corroborated by Mr. Hightower's investigation of the information provided.[13] Moreover, Tucker was able to fully

[13] Contrary to the victim's oral statement in *State v. Blackburn*, 271 S.C. 324, 247 S.E.2d 334 (1978), the prosecution's evidence in this case was that Bigelow relayed statements made by Tucker, which were corroborated by Mr. Hightower, as opposed to Bigelow's opinion of his intention to kill Polite. *Contra Id.* at 329, 247 S.E.2d at 337 (although victim's statement implicating appellant in plot to kill her was improperly admitted as a part of the *res gestae*, where it merely reflected her opinion, the error was harmless because the statement was cumulative to

cross-examine Bigelow and impeach her credibility. Tr. pp. 453-59; R. pp. 486-92.

His impeachment of her included evidence that she had stolen the necklace from Tucker and counsel attempted to have her admit that this necklace was worth $15,000.00. Tr. pp. 455-56; R. pp. 488-89. He also impeached her credibility with her admission that Savage was not the type of person who could murder someone, and that the plot included obtaining another gun in addition to the gun found in the car Savage was driving. Tr. pp. 456-57; R. pp. 489-490. Further, counsel was able to cross-examine Mr. Hightower in an effort to impeach his credibility, as well. Tr. pp. 464-66; R. pp. 497-499.

Under these circumstances, the trial judge properly denied his motion. In addition to *Edwards*, *Hayden*, and the other cases already discussed, Respondent would cite the following cases in support of the admissibility of this evidence: *see*, *e.g.*, *State v. Marlowe*, 156 S.C. 363 ___, 153 S.E. 340, 341 (1930) (defendant, convicted of possessing and storing liquor, complained on appeal about the introduction of evidence showing that after the date alleged in the indictment he furnished whisky to state's witnesses for the purpose of keeping them from testifying against him. The Court disagreed and held that "If a defendant seeks to bribe witnesses not to testify against him, evidence to that effect is always competent"); *United States v. Van Metre*, 150F.3d 339, 352 (4th Cir. 1998); *Guerrero-Cortez*, 110 F.3d at 652 (acknowledging that "[a]n effort to intimidate a witness tends to show consciousness of guilt"); *United States v. Gatto*, 995 F.2d 449, 454-55 (3rd Cir. 1 993) (evidence defendant and courtroom spectator allegedly threatened prosecution witness with looks was admissible to impeach and to show consciousness of guilt, and prosecutor's closing argument properly commented on the alleged threats); *United States v. Maddox*, 944 F.2d 1223, 1230 (6th Cir. 1991) ("[S]poliation evidence, including

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evidence by six other State's witnesses that appellant "plotted [victim's] murder because she planned to testify against him").

evidence that the defendant threatened a witness, is generally admissible because it is probative of consciousness of guilt"); *United States v. Mickens*, 926F.2d 1323, 1329 (2nd Cir. 1991) (an effort to intimidate a witness is relevant to the issue of the defendant's state of mind and admissible under Rule 404(b)); *United States v. Pina*, 844 F.2d 1, 9 (1st Cir. 1988) (defendant's threats against adverse witness is probative because it shows "that the defendant is willing to go to extreme measures to exclude relevant evidence from trial"); *United States v. Young*, 248 F.3d 260, 272 (4th Cir. 2001) ("Threats or intimidations against an actual witness are admissible because they establish a defendant's 'consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit'"). *Cf. State v. Preslar*, 364 S.C. 466, 613 S.E.2d 381 (Ct. App. 2005) (defendant charged with intimidating a witness objected to evidence of underlying charge of CSC - where defendant's intimidating letters were written to the victim of the CSC; *res gestae* theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred; trial judge should determine whether the res gestae evidence has "probative value [that] clearly outweighs any unfair prejudice. Rule 403, SCRE." [sic]); *State v. Coffey*, 480 S.E.2d 664 (N.C. 1997) (defendant's prior threatening of witness about an unrelated matter was admissible to explain her state of mind at time of investigation into case at trial and to corroborate witness' testimony).

Finally, even if this evidence was improperly introduced, Tucker cannot show any prejudice from it in light of the overwhelming evidence of guilt, including other evidence showing his consciousness of guilt. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected

the result of the trial"). First, there was overwhelming evidence of guilt, which is discussed in **Argument III**, *infra*. Ms. Power's eyewitness testimony was corroborated by his admissions to being present during the armed robbery and shooting as he ran away from the scene, as well as DNA, and cell phone records, and historical cell site location information.

Additionally, the challenged evidence was cumulative to other evidence showing consciousness of guilt that was presented to the jury and which is not being challenged on appeal. *See State v. Haselden*, 353 S.C. 190, 577 S.E.2d 445 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993) (finding any error in admission of evidence cumulative to other unobjected-to evidence is harmless). Specifically, the challenged evidence is cumulative to both his threat to kill Ms. Power and her family if she testified, as well as his efforts to avoid prosecution by fleeing the jurisdiction, traveling several hundred miles and hiding underneath the kitchen sink. *See* **Argument III**, *infra*. Accordingly, the trial judge's ruling must be affirmed because he did not abuse his discretion by denying Tucker's motion for a new trial.

III. The trial judge properly denied Appellant Tucker's motion for a directed verdict on the charges of murder and armed robbery because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt of these offenses, either individually or under a theory of accomplice liability.

Notwithstanding Tucker's arguments to the contrary, Respondent submits that the trial judge properly denied his motion for a directed verdict on the charges of murder and armed robbery because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt of these offenses, either individually or under a theory of accomplice liability. *See* Tr. pp. 615-17; R. pp. 648 - 650 (trial judge's instructions on

accomplice liability).

A. The prosecution's evidence.

The direct and circumstantial evidence presented at trial, viewed in the light most favorable to the State, reasonably tended to show that the charges in this case arise from an armed robbery that was set up as an attempted drug deal in northern Beaufort County. Tr. p. 371; R. p. 404.

The prosecution's evidence was that the murder victim, Quantez Greer, (Quantez) was murdered after attempting to purchase marijuana from the Appellant, Walker Tucker, a/k/a "Oouwee "(Tucker), and Travis Polite (Polite). On September 6th, 2012, Quantez contacted Jessica Power, a woman who both sold and bought marijuana and who was the victim of the attempted armed robbery. Quantez informed her that he no longer had any marijuana and that he wanted to buy some. Tr. pp. 247-50; R. pp. 280-83.

Power arranged for Quantez to purchase marijuana from Tucker. Tr. pp. 250-51; R. pp. 283-84. Quantez and Power eventually drove to Taylor's Mobile Home Park, in Beaufort County, where they met Tucker. Tr. pp. 251-52; R. p. 284-85.[14] After Quantez parked in front of the trailer, Tucker came up to the car. Quantez tried to negotiate with Tucker on the price of the marijuana, but Tucker would not negotiate. Tr. p. 253; R. p. 286.

So, Quantez agreed to pay Tucker $2,500.00 for a half-pound. Tr. p. 253; R. p. 286. He re-entered his vehicle and got his money from the glove box. He told Power that he did not have enough room in his pants to fit all of the bills and asked her to place it in her purse. Tr. p. 254; R. p. 287. He handed the money to Power and she put it in her purse. Tr. p. 254; R. p. 287. Power then got out of the car and walked to the front door of the trailer where Tucker was standing,

[14] The original plan was for them to meet Tucker at a boutique and purchase the drugs there. However, Tucker telephoned her and told her to meet him at the mobile home park because it was "safer." Tr. p. 252.

holding the door open. Quantez followed close behind her. Tr. p. 254; R. p. 287.

After Power entered the trailer, Tucker immediately slammed the door shut behind her and locked it, leaving Quantez outside the trailer. Power noticed another man in the trailer, Polite, who was sitting on a couch with a white T-shirt on his head. Tucker immediately brandished a handgun, pointed it at Power, and said, "[G]ive me the money you stupid white bitch." Tr. pp. 254-57; R. pp. 287-290. Initially, Power said no, but one of the men grabbed her and forced her to the floor and Tucker grabbed her purse. When Tucker was unable to find the money in her purse, he threw it back at her and ordered her to give him the money that she had in her purse. Tr. p. 255; 277; R. p. 288; 310.

Power immediately pulled the money out of a pocket in her purse and handed it to him. As Power lay face down on the floor, Tucker handed his accomplice, Polite, the handgun that he had been holding and Polite ran out of the front door. Tucker then armed himself with another gun that had been in his pocket. Power heard a gunshot and Tucker ran out of the trailer. At that point, Power heard "multiple gunshots." She later estimated that she had heard six shots. Tr. pp. 255-58; 294-96; R. pp. 288-291; 327-329.

At first, Ms. Power ran to a "little girl's" bedroom. She looked out of the window, but it was too high for her to jump out of it. She soon saw a man whom she did not know run out of another room and out of the trailer's back door. She quickly ran out that same door and to the trailer of her ex-boyfriend, Eugene "Chip" Jabar, and hid behind it. While she was running, she saw the brake lights of a black car that was parked on the left. Within minutes of the shooting, Tucker contacted Power and told her that "if I said anything that he would hurt my family and then kill me." Power unsuccessfully attempted to contact Quantez. Tr. pp. 258-62; 285-86; 299; R. pp. 291-295; 318-319; 332.

Power deleted her cell phone log after the car had left because she was scared. She later spoke to Detective Gobel, from the Beaufort County Sheriff's Department, and told him what she had occurred. She also eventually told him that she deleted the cell phone log. She denied any involvement in or knowledge of the murder and robbery. Tr. pp. 262-64; 372-74; 388-89; R. pp. 295-97; 405-07; 421-22.

She did not know the Quantez been shot and killed until four hours after the crimes. Tr. p. 275; R. p. 308. Kalin Higgs testified that he was visiting his sister and brother-in-law in Taylor's Trailer Park on September 6, 2012 when he heard "about three" gunshots. Tr. pp. 188-89; R. pp. 221-22. Turning around and looking out of the window, Mr. Higgs saw someone running into the woods with a gun in his hand, and another person lying on the ground. As that man was running, he took something off his head and threw it to the ground. Mr. Higgs immediately called 911 while his brother-in-law tried to assist the man lying on the ground. Tr. pp. 189-92; R. pp. 189-192.[15] It was undisputed that Polite fired the fatal shot that killed Quantez. Tr. pp. 120-21; 538; 584; R. pp.153-54; 538; 617.

David Roche was employed at an antique shop near the trailer park on September 6, 2012. He heard a gunshot that afternoon and, following a brief pause, heard "two other shots in rapid succession." The shots appeared have been fired at the trailer park. Shortly thereafter, he observed a similar midsized black sedan, with heavily tinted windows, fleeing the trailer park. Tr. pp. 184-86; R. pp. 217-219.

Cpl. Brandon Disbrow processed the crime scene outside of the trailer at Lot number 60 on September 6th. He found a 9 mm Ruger pistol at the tongue of the trailer on Lot number 59.

[15] Mr. Higgs saw a gun lying on the ground some distance away from that man. Tr. p. 191; R. p. 224. Also, the first 911 call was placed at 2:13 p.m. Tr. p. 176; R. p. 209. By time EMS personnel were permitted on the scene, Quantez Greer did not have any poles or respirations. Although EMS was able to obtain electrical activity of Quantez's heart, his heart did not beat. Tr. pp. 178-80; R. pp. 211-213.

Tr. pp. 198-201; R. pp. 231-234. It was subsequently determined that this weapon belonged to the murder victim, Quantez Greer. Tr. pp. 374-75; 378; R. pp. 407-408; 411. Cpl. Disbrow also found a $50.00 bill, at the base of a tree between Quantez's car and the trailer at Lot 60. He found two other $50.00 bills nearby. Tr. pp. 201-05; R. pp. 234-238.

The car doors were still open and the motor was running. Cpl. Disbrow located additional money on the floorboard of the car. He also saw a bullet hole that had gone through the driver's side window and struck the mirror. This shot came from behind the car. Additionally, there was a bullet hole to the trailer on Lot 59 that appeared to come from the direction of Lot 60. Tr. pp. 205-14; 219-21; 223; R. pp. 238-47; 252-54; 256.

Sgt. Christine Wilson is a criminal investigator for the Beaufort County Sheriff's Department. She processed the trailer on Lot 60 pursuant to a search warrant. Among the items that she seized was a Lipton white tea bottle (state's Exhibit 27) that was on the kitchen table. Although the bottle did not have any latent prints on at, it was submitted to DNA for testing. Tr. pp. 228-29; 232-33; R. pp. 261-62; 265-66.

The State also introduced testimony placing Tucker's black sedan in Beaufort. Cpl. Rebecca Whitney, with the Beaufort Police Department, testified that she had stopped Tucker on September 4, 2012. He was driving a black Chevy Impala. In her conversation with him, he identified himself as Oouwee and said that he was from Atlanta, Georgia. Tr. pp. 335-37; R. pp. 368-370.

Tucker subsequently fled the State of South Carolina and was finally apprehended in Buncombe County, North Carolina. Deputy Darrell Maxwell, of the Buncombe County Sheriff's Department, went to the Buncombe County apartment where Tucker's brother lived, based upon a South Carolina arrest warrant for Tucker and information provided to him. The occupants of

the apartment claimed that Tucker was not there. However, officers searched the apartment and found him hiding underneath the kitchen sink, with "a bunch of like grocery bags" covering him. He was immediately taken into custody. Tr. pp. 419-22; R. pp. 452-55.

Furthermore, DNA testing and cell phone records both placed Tucker in the vicinity of the crime on the day in question. In particular, Tucker's DNA could not be excluded as a contributor to DNA found on a swab of a Lipton tea bottle seized from the trailer where the robbery occurred. "The combined probability of inclusion or the expected frequency of individuals who could contribute to this mixture is approximately one in 1.6 million." Jessica Power and the victim were excluded from this mixture, as were co-defendants Antonio Brewer (who owned the trailer) and Travis Polite. Tr. pp. 348-54; R. pp. 381-87.

The Verizon historical cell cite location records for Tucker's cell phone reflected that from shortly before 2:00 p.m. on September 6th until after 2:00 p.m. that day, Tucker's phone was pinging off of Tower 213, which is .23 miles from Taylor's Trailer Park. Tr. pp. 412-13; 416; State's Exhibits 40-41; R. pp. 445-446; 449; His cell phone records also showed twenty calls between his phone and one owned by Power, but only two calls were between 1:57 p.m. and 2:40 p.m. Tr. pp. 413-15; R. pp. 446-448.

Keamber "Amber" Bigelow testified that she met Tucker, or Oouwee, about a month or so before the crimes in this case. Tr. pp. 450-51; 453; R. pp. 483-484; 486. At some point, she had a conversation with Tucker, in which he had admitted that the murder occurred in a botched drug deal. Also, "[h]e said that he didn't have anything to do with the murder; but the way he explained it, he wasn't sure. He said he was running and that he was shooting [as he was running away] and his adrenaline was high." Tr. pp. 451-53; R. pp. 484-486. Tucker told Bigelow that Power would not testify because he was threatening her. Tr. pp. 451, 453 R. p. 484; 485.

However, he detailed a plan to murder his accomplice and co-defendant, Polite. "He said that he had to kill the co-defendant because if he did then there wouldn't be the trial." Tr. 451-52; 458-59; R. pp. 484-485; 491-492. Tucker told Bigelow that he was going to have an acquaintance named "Savage"[16] carry out the hit; that Savage would be driving a black Camry; and that Savage had a black and silver pistol that was hidden in his car's gear shift. Tr. p. 452; R. p. 485.

Bigelow's account of Tucker's plan to have Polite murdered was circumstantially corroborated by Investigator Dillon Hightower, from the Fourteenth Circuit Solicitor's Office. Based upon information Mr. Hightower received from Bigelow, he went to the Hampton County Detention Center to retrieve information concerning a vehicle that was impounded in Beaufort. He identified State's Exhibit 42, a photograph of a black 2014 Toyota Camry rental car with a Florida tag, as the car in question. He discovered that the driver of the vehicle was Cedric Antonio McDuffy, who was incarcerated in the Hampton County Detention Center. When Mr. Hightower searched the car, he found a .22 caliber semi-automatic pistol (*see* State's Exhibits 44-45) matching the description that Bigelow had given, secreted under the gear shift. Again, much like she had described it. Tr. pp. 460-65; R. pp. 493-498.

The cause of death was a single gunshot wound to the "posterial lateral chest, meaning that it was "kind of towards the back." This wound fractured the victim's fifth rib and it pierced the victim's left lung and heart. The bullet did not exit the body and was retrieved at autopsy. Tr. pp. 469-74; R. pp. 502-507. Other testimony established that the bullet that killed the victim, and which was retrieved at autopsy, had been fired by either a .40 Smith &Weston or 10 mm semi-automatic pistol. Thus, the bullet was too large to have been fired by the victim's Ruger 9 mm.

[16] Again, his real name is Cedric Antonio McDuffy.

that was found at the scene. Tr. pp. 329-30; R. pp. 362-363.[17]

B. Tucker's motion and the trial judge's ruling.

After the close of the State's case Tucker moved for directed verdict on all three charges. In pertinent part, counsel argued that Tucker was entitled to a directed verdict on the armed robbery charge because the only property that was taken was the money belonging to the murder victim, Greer, which was taken from Power. Counsel further argued that the money at issue was later involved in a drug transaction and that it was unclear as to whether Tucker or Polite had taken it. Although he understood that credibility was a matter for the jury to determine, he also contended that there was "a bona fide issue of whether any of this is true." Tr. pp. 476-77; R. pp. 509-510.

Counsel then argued, "As to the murder, Judge, it is undisputed and the State has already said Travis Polite shot and killed Mr. Greer. That is undisputed." Counsel suggested there was not a sufficient nexus between Tucker and Polite, such that Polite's actions can be attributed to Tucker. Counsel argued there was no evidence of a planned armed robbery and he focused upon the absence of any mention that Tucker had handed Polite a gun, in Power's two original statements. Counsel suggested that this "in itself should establish that he didn't give a gun to a person who then used it to [shoot] and kill Mr. Greer." Tr. pp. 477-78; R. pp. 510-11.

Counsel further argued that Power never mentioned the second gun belonging to Tucker, and counsel argued that Tucker can only be convicted if he was linked to Polite and he argue

[17] Also, the victim's 9 mm had a fully loaded clip, meaning that it had not been fired. Tr. pp. 374-76; 378; R. pp. 407-409; 411. A lead core fragment "was not suitable for identification with a specific firearm." Tr. p. 329; R. p. 362. Additionally, gunshot residue testing was performed on Quantez Greer, Antonio Brewer, and Power. Tr. pp. 240-42; 306-07; R. pp. 273-275; 339-340. All three proved negative. Tr. pp. 311-14; R. pp. 344-347. Brewer was an eyewitness, but, he died three weeks before Tucker's murder trial. Tr. p. 78, R. p. 111. The jury only heard that Brewer owned the residence where the robbery was attempted and that he had died after the before the trial. Tr. pp. 208-09; 372; R. pp. 241-242; 405.

there was no evidence that Tucker actually shot Mr. Greer. Counsel argued that this point was undisputed. Tr. pp. 478-79, R. pp. 511-12.

In response, the State argued that Power's testimony was consistent with her prior statements: "Walter Tucker put a gun in her face and he along with Travis Polite took the money." She had also testified that when Tucker could not find the money, Power helped him find it and he took it. This was sufficient evidence of an armed robbery. Tr. pp. 480-81; R. pp. 513-14. The State likewise argued that the motion should be denied on the charge of murder:

> And as to the murder I want to make sure that all of this is straight for the record. I think based on all the evidence that we have available - and when I say the evidence we have available I mean this trial and the other trial, Judge, that the jury doesn't have ... [is] that it is most likely that Travis Polite fire[d] the bullet that killed Quantez Greer.
>
> He went out first. He was armed. You hear the gunshot. Based on the fact that it is a perpendicular wound to the left side. And I am going to tell the jury that, and I have a told council this, that they should assume that Travis Polite fired the fatal bullet. But under the hand of one is the hand of all, Judge. That is not relevant.
>
> Clearly they are working in concert. They are in the trailer together. Both of them according to Jessica Power[] are participating in forcing her to the ground, taking the money. And even if you don't believe what she testified to - and again this is any evidence – she testified Walter Tucker hands him a gun. That in and of itself make them acting in concert, even if Travis Polite is the one - and I believe he probably is ... who actually fired the fatal bullet.

Tr. pp. 481-82; R. pp. 514-515. Contrary to Tucker's argument, the State pointed out that Tucker had admitted to Bigelow that he was outside and shooting during these crimes. Tr. pp. 482; R. p. 515.

Although the trial judge commended defense counsel for the argument made on Tucker's behalf, he denied the directed verdict motion for the reasons argued by the State. Tr. p. 482; R. p. 515.

The defense only called one witness. Afterwards, the case was submitted to the jury

which returned a verdict finding Tucker guilty of murder, not guilty of armed robbery but of the lesser included offense of attempted armed robbery, and not guilty of kidnapping. Tr. pp. 638-39; R. pp. 671-672 The Court denied the defense's post-trial motion for new trial based on the insufficiency of the evidence. Tr. p. 641-44; R. pp. 674-677.

C. Discussion.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. A defendant is entitled to a directed verdict [only] when the state fails to produce evidence of the offense charged." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). "In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." *State v. Irvin*, 270 S.C. 539, 543, 243 S.E.2d 195, 197 (1978) (citing *State v. Massey*, 267 S.C. 432, 229 S.E.2d 332 (1976)).[18]

[18] The South Carolina Supreme Court has held that the state standard is consistent with *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). *See State v. Stokes*, 299 S.C. 483, 484, 386 S.E.2d 241, 241 (1989). Also, and contrary to Tucker's argument, the Supreme Court has recently made clear that both direct and circumstantial evidence are to be viewed equally by the trial judge in determining whether or not to grant a directed verdict. *E.g.*, *State v. Phillips*, No. 2015-000351, 2016 WL 1584046, at *4 (S.C. S.Ct., Apr. 20, 2016) ("As we recently stated in *State v. Bennett*, 'the lens through which a court considers circumstantial evidence when ruling on a directed verdict motion is distinct from the analysis performed by the jury.'") (citing *State v. Bennett*, 415 S.C. 232, 236, 781 S.E.2d 352, 354 (2016)); *State v. Pearson*, 415 S.C. 463, 471, 783 S.E.2d 802, 806 (2016) ("Recently, this Court has been presented with a series of criminal cases where the Court of Appeals has reversed the trial judge's denial of a defendant's motion for a directed verdict on the ground the circumstantial evidence was insufficient to submit the case to the jury); *State v. Lane*, 410 S.C. 505, 765 S.E.2d 557 (2014); *State v. Larmand*, 415 S.C. 23, 31, 780 S.E.2d 892, 896 (2015) ("While the court of appeals should have considered the evidence in the light most favorable to the State, it instead primarily cited to

Applying the above principles to the facts of this case, Respondent submits that Tucker's directed verdict motion on the charges of murder and armed robbery was properly denied. South Carolina defines "murder" as the "killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). "Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." *Kelsey*, 331 S.C. at 62, 502 S.E.2d at 69. It is the doing of a wrongful act intentionally and without just cause or excuse. *Tate v. State*, 351 S.C. 418, 570 S.E.2d 522 (2002).[19] *See also* Tr. pp. 615-17; R. pp. 648-650. (trial judge's instructions on accomplice liability).

"Strong armed robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear. *State v. Gourdine,* 322 S.C. 396, 472 S.E.2d 241 (1996)." *State v. Rosemond*, 356 S.C. 426, 430, 589 S.E.2d 757, 758 (2003). *See also* S.C. Code Ann. § 16-11-325 (2003) ("the common-law offense of robbery is a felony. Upon conviction, a person must be imprisoned not more than fifteen years"). "Armed robbery includes all the elements of strong arm robbery. *State v. Keith,* 283 S.C. 597, 325 S.E.2d 325 (1985) (armed robbery is commission of common law robbery while armed with a deadly weapon)." *State v. Muldrow*, 348 S.C. 264, 269, 559 S.E.2d 847, 850 (2002). "Under [S.C. Code Ann. § 16–11–330(A) (2003), the State

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Respondent's and Lemire's testimony, including their explanations for their actions. .... In doing so, the court of appeals incorrectly minimized the circumstantial evidence the State presented regarding premeditation and an agreement between Respondent and Lemire") (citation omitted), *reh'g granted* (Dec. 23, 2015), reh'g denied (Feb. 11, 2016)

[19] Alternatively, malice has been defined as "something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief." *Arnold v. State*, 309 S.C. 157, 163, 420 S.E.2d 834, 837 (1992). *See also State v. Fennell*, 340 S.C. 266, 275 n. 2, 531 S.E.2d 512, 517 n. 2 (2000) ("[m]alice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it").

may prove armed robbery by establishing the commission of a robbery and either one of two additional elements: (1) that the robber was armed with a deadly weapon or (2) that the robber alleged he was armed with a deadly weapon, either by action or words, while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon." *Muldrow*, 348 S.C. at 267-68, 559 S.E.2d at 850.

S.C. Code Ann. § 16–11–330(B) (2003) provides that "[a] person who commits attempted armed robbery while armed with a pistol ... or other deadly weapon, ... is guilty of a felony...." Attempted armed robbery is defined as acts taken towards the commission of a robbery with the intent to commit the robbery, but the act falls short of actual completion. *State v. Hiott*, 276 S.C. 72, 80, 276 S.E.2d 163, 167 (1981) (holding attempted armed robbery is lesser-included offense of armed robbery). The "act" towards the commission of the robbery is to be liberally construed, and it is sufficient if the act goes "far enough toward accomplishment of the crime to amount to the commencement of its consummation." *State v. Quick*, 199 S.C. 256, 259, 19 S.E.2d 101, 102 (1942).

This Court has given the following explanation of attempt crimes in *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001):

> Attempt crimes are generally ones of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime. *State v. Sutton,* 340 S.C. 393, 532 S.E.2d 283 (2000). "In the context of an 'attempt' crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant's purpose." *Id.* at 397, 532 S.E.2d at 285 (citing *United States v. Calloway,* 116 F.3d 1129 (6th Cir.1997)). Additionally, the State must prove that the defendant's specific intent was accompanied by some overt act, beyond mere preparation, in furtherance of the intent, and there must be an actual or present ability to complete the crime. *State v. Evans,* 216 S.C. 328, 57 S.E.2d 756 (1950); *State v. Quick,* 199 S.C. 256, 19 S.E.2d 101 (1942). "The

> preparation consists in devising or arranging the means or measures necessary for the commission of the crime; the attempt or overt act is the direct movement toward the commission, after the preparations are made." *Quick,* 199 S.C. at 260, 19 S.E.2d at 103.
>
> Further, the State proceeded on a theory of accomplice liability.
>
> The doctrine of accomplice liability arises from the theory that "the hand of one is the hand of all." 23 S.C. Jur. *Homicide* § 22.1 (2014). Under this 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. *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). 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 to be guilty under a theory of accomplice liability. *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999). Accordingly, proof of mere presence is insufficient, and the State must present evidence the participant knew of the principal's criminal conduct. *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987). If "a person was 'present abetting while any act necessary to constitute the offense [was] being performed through another,' he could be charged as a principal—even 'though [that act was] not the whole thing necessary.' " *Rosemond v. United States*, —— U.S. ——, 134 S.Ct. 1240, 1246, 188 L.Ed.2d 248 (2014) (alteration in original) (quoting 1 J. Bishop, Commentaries on the Criminal Law § 649, p. 392 (7th ed. 1882)).

State v. Reid, 408 S.C. 461, 472-73, 758 S.E.2d 904, 910 (2014). *See also State v. Hill*, 268 S.C. 390, 395–96, 234 S.E.2d 219, 221 (1977) ("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"). "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." *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct.App. 2010).[20]

[20] "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." *State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000). *See also State v. Fley*, 2 Brev. 338, 345, 1809 WL 338, 6 (S.C.Const. App. 1809) ("It is very clear that *a person aiding and assisting another in committing a murder, is to be regarded as a principal*, and that he may be indicted and punished, although the principal who really gave the mortal blow, or was otherwise the immediate instrument by

The State's evidence reasonably tended to prove that Tucker called Ms. Power and let her know that he wanted to sell the drugs at the trailer, instead of the boutique as they had agreed, claiming this location would be "safer." Also, he, personally, slammed and locked the trailer door after Ms. Power was in but Quantez Greer was outside. He then put a gun in Ms. Power's face and ordered her to give him the money.[21] Ms. Power complied and gave him her purse with $2,500.00 in it.

When Tucker could not find the money, he threw it back at her and ordered her to give him the money that was in her purse. She gave it to him at gunpoint. However, it is not clear that either he or Polite took the money when they ran out of the trailer. This was sufficient evidence of an attempted armed robbery to go to the jury. *See* § 16–11–330(B); *Nesbitt*, 346 S.C. at 231-35, 550 S.E.2d at 866-69. *See also Hiott*, 276 S.C. at 80, 276 S.E.2d at 167.

Further, Tucker was not entitled to a directed verdict on the charge of murder, despite the State's concession that Polite fire the fatal shot because it is clear that Tucker and Polite were acting in concert during the murder of Quantez Greer. *See Reid*, 408 S.C. at 472-73, 758 S.E.2d at 910; *Gibson*, 390 S.C. at 354, 701 S.E.2d at 770 In fact, the State's evidence proved that as soon as Ms. Power handed the money over, Tucker gave Polite the weapon that was apparently used to murder Quantez. Without Tucker's assistance, it does not appear that Polite had a weapon with which to shoot Quantez. Also, Tucker ran out of the trailer, armed with a gun that he pulled out of his pocket, after he and Power heard the first gunshot outside. Additionally, he

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which the murder was effected, had not been taken. The immediate injury, from which death ensues, is considered as proceeding from all who are present and abetting the injury done, and the actual perpetrator is considered as the agent of his associates. His act is their act, as well as his own; and all are equally criminal. Fost. 351. *The distinction between principals in the first and second degree* has been exploded. It *is now a distinction without a difference*") (emphasis added).

[21] It is unclear if he or his co-defendant, Polite, forced Ms. Power to the floor, but she testified that one of them did so.

admitted to Bigelow that he had fired a number of shots as he ran away from the scene, but denied that he had killed Quantez.

Likewise and as to both offenses, there is the obvious evidence of Tucker's flight from the scene (and ultimately hiding under a kitchen sink with grocery bags over him) in a jurisdiction hundreds of miles from where the offenses occurred, in a failed effort to elude capture. *See State v. Pagan*, 357 S.C. 132, 591 S.E.2d 646 (2003) (evidence of flight constitutes evidence of defendant's guilty knowledge and intent); *State v. Grant*, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980) ("[A]ttempts to run away have always been regarded as some evidence of guilty knowledge and intent") (citation omitted); *State v. Crawford*, 362 S.C. 627, 634-36, 608 S.E.2d 886, 890-91 (Ct. App. 2005).[22]

Finally, the prosecution presented evidence of Tucker's plot to have Polite murdered, so that Polite cannot testify against him. See Edwards,

Further, her testimony was circumstantially corroborated by investigator Hightower, who testified that he found the car described by her, the individual named "savage" who was supposed to effectuate the murder of Polite, and the gun secreted precisely the location described by Bigelow. *See Edwards*, 383 S.C. 66, 72, 678 S.E.2d 405, 408 ("witness intimidation evidence, if linked to the defendant, may be admitted to show a consciousness of guilt. Establishing the defendant as the source of the intimidation provides the necessary reliability for admissibility").

Therefore, the trial judge did not err by denying Tucker's motion for a directed verdict on either charge.

CONCLUSION

[22] "This common law rule is based on ordinary human experience that echoes its often-quoted Biblical antecedent: 'The wicked flee where no man pursueth; but the righteous are bold as a lion.' Proverbs 28:1.' " *Ordway v. Com.*, 391 S.W.3d 762, 790 (Ky. 2013). *See also* 2 Wigmore, *Evidence* § 276 (Supp. 2007).

For the above-stated reasons, Respondent respectfully submits that the judgment of convictions must be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305/esaltter@scag.gov

ISSAC MCDUFFIE STONE, III.
Solicitor, Fourteenth Judicial Circuit
PO Box 1880
Beaufort, SC 29910
(843) 255-5893

August 10, 2016.

By: _____
WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Brooks P. Goldsmith, Circuit Court Judge
Appellate Case No. 2015-002339

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SC Court of Appeals

THE STATE,

Respondent,

vs.

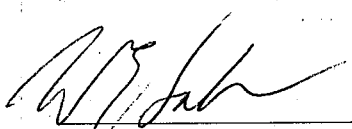
WALTER TREVOY TUCKER,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 10th day of August, 2016.



WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT