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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Appeal from Lancaster County  
Honorable R. Knox McMahon, Circuit Court Judge  
Appellate Case No. 2014-000594

THE STATE,

Respondent,

vs.

DEVATEE TYMAR CLINTON,

Petitioner.

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RETURN TO PETITION FOR WRIT OF CERTIORARI

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## PETITIONER'S STATEMENT OF ISSUES ON APPEAL

- I. Whether the Court of Appeals erred in refusing to consider the proffer of testimony made during a pre-trial motion *in limine* hearing in finding that an argument was not adequately raised to the trial court and therefore unpreserved for appellate review?
- II. Whether the Court of Appeals' incorrect application of issue preservation violates Rule 18 of the South Carolina Rules of Criminal Procedure and imposes an impossible standard on practitioners?
- III. Whether the Court of Appeals erred in failing to adequately consider the directed verdict issue in this case in light of recent opinions of this Court, notwithstanding the fact that the evidence and testimony in this case merely raised a suspicion, but failed to meet the elements of the charged crime?

## COUNTER STATEMENT OF ISSUES ON APPEAL

- I. Whether, assuming that this Court disagrees with the Court of Appeals' reasoning, the Court should still deny certiorari, since Clinton's first argument is not preserved for appellate review because he failed to make an adequate proffer at trial to support introduction of this testimony, after obtaining a favorable *in limine* ruling on its admissibility. Alternatively, should certiorari be denied because the trial judge did not abuse his discretion by sustaining the State's objection, since there was no evidence that the victim's son witnessed his mother's shooting and Clinton did not satisfy the other foundational requirements for introducing the out-of-court declaration under Rule 803(2), SCRE?
- II. Whether the Court of Appeals properly affirmed the trial judge's denial of Clinton's directed verdict motion on the charge of murdering Jenika Jones because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt, either individually or under a theory of accomplice liability?

## STATEMENT OF THE CASE

Petitioner, Devatee Tymar Clinton (Clinton), is currently serving a life sentence for the January 19, 2012, murder of Jenika Jones in her Lancaster County residence. The Lancaster County Grand Jury indicted him in June 2012 for murder (2012-GS-29-616). App. 711-12. His co-defendant, Al Martinez Green, was also indicted for her murder (2012-GS-29-636). William P. Frick, Esquire, represented Clinton in the trial court, while Amy S. Raney, Esquire, represented Green. Clinton and Green received a joint jury trial before the Honorable R. Knox McMahon on March 10-14, 2012. The jury convicted both men of murder. App. 679-82. Judge McMahon sentenced both defendants to life imprisonment. App. 701. Clinton timely served and filed a Notice of Appeal.<sup>1</sup> Following briefing and oral argument, the Court of Appeals affirmed Clinton's conviction on May 11, 2016. *State v. Clinton*, 2016-UP-206 (S.C. Ct.App., May 11, 2016). App. 5-7. The Court denied Clinton's Petition for Rehearing (App. 11-27) on August 22, 2016. App. 8-9. Clinton thereafter petitioned this Court for a writ of certiorari.

## ARGUMENTS

**I. Assuming that this Court disagrees with the Court of Appeals' reasoning, the Court should still deny certiorari, since Clinton's first argument is not preserved for appellate review because he failed to make an adequate proffer at trial to support introduction of this testimony, after obtaining a favorable *in limine* ruling on its admissibility. Alternatively, certiorari should be denied because the trial judge did not abuse his discretion by sustaining the State's objection, since there was no evidence that the victim's son witnessed his mother's shooting and Clinton did not satisfy the other foundational requirements for introducing the out-of-court declaration.**

Clinton first argues that the trial judge erroneously refused to let him elicit an out-of-court declaration by the victim's four year old son that someone other than Clinton or Green shot his mother. The Court of Appeals found that this issue was not preserved for appellate review

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<sup>1</sup> Green likewise appealed. The Court of Appeals affirmed his conviction and sentence on May 11, 2016. *State v. Green*, 2016-UP-205 (S.C. Ct.App., May 11, 2016). It sent the Remittitur to the Lancaster Clerk of Court on May 27, 2016.

because Clinton did not renew his efforts to introduce testimony about this declaration at trial, in response to the trial judge's ruling sustaining the State's objection, despite the trial judge's *in limine* ruling that it was admissible. *Clinton*, p. 2; *App. p. 6*. Clinton attacks the finding that the first issue is procedurally barred, at length, asserting that the cases cited by the Court of Appeals are inapposite because the trial judge had previously ruled that the child's out-of-court declaration was potentially admissible. Even assuming *arguendo* that this Court disagrees with the Court of Appeals' reasoning,<sup>2</sup> certiorari should be denied for two reasons: (1) Clinton's first argument is not preserved for appellate review because he did not make an adequate proffer at trial to support introduction of this testimony, after obtaining a favorable *in limine* ruling on its admissibility; and (2) on the merits, the trial judge did not abuse his discretion by sustaining the State's objection because there was no evidence that the victim's son witnessed his mother's shooting and Clinton did not satisfy the other foundational requirements for introducing this out-of-court declaration under Rule 803(2), SCRE.

**A. Events at trial.**

The State moved pretrial to bar either Clinton or Green from eliciting out-of-court declarations by the victim's four year old son to the first responders after the Sheriff's Department took custody of them, "until other arrangements could be made." *App. 42-43*. Counsel for Clinton stated that after law enforcement arrived and was "still trying to assess what occurred," the victim's four year old son "spontaneously states to I think Investigator Crump first and then to another officer and I think maybe a third officer on the scene that Shi's daddy shot

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<sup>2</sup> Respondent submits that there was no error and that the Court of Appeals correctly relied upon the cases cited by it, such as *State v. Simmons*, 360 S.C. 33, 45-46, 599 S.E.2d 448, 454 (2004) (finding an issue unpreserved where the State objected to a witness's testimony, the objection was sustained, and the defendant failed to raise his argument regarding the trial court's exclusion of the testimony or proffer what that witness's testimony would have been had the witness been allowed to continue testifying), in finding the issue not preserved. Yet, this Court need not grant certiorari for the following reasons.

my momma.” Later, the child said that “Shortycake shot my momma.” *App. 43-44.*

To further clarify the issue, counsel explained that the victim’s son was named Antonio Lamont Truesdale, II, that the son’s nickname is Deuce,” and that his father was Antonio Lamont Truesdale. The nickname in the son’s declaration, “Shortycake,” was not the nickname of either Clinton or Green. Rather, it was the nickname of a Rashad Johnson, who is the father of “Shi.” *App. 44-45.* The State had verified that there was a child whose nickname was Shi, that Rashad Johnson was Shi’s father, and that Rashad Johnson’s nickname is “Shortycake.” The Solicitor also acknowledged that “Deuce” had made a statement to Inv. Crump. *App. 45-46.* When Clinton’s attorney confirmed that his position was the statement was admissible as an excited utterance, under Rule 803(2), SCRE, the trial judge stated, “I realize [under Rule] 803 [the] availability of a witness is immaterial but you have to determine the competency of the individual that made the statement. In this regard I’m dealing with a four-year old.” *App. 46.*

The Solicitor stated that the child’s competency was the basis for his objection, and that Clinton would have to make a showing of the child’s competency as a witness before the statement could be introduced. *App. 46-47.* Counsel for Clinton then argued that the child was four years old at the time of the murder. Almost immediately after the shooting, Deuce

goes to the next door neighbor's house and asks for help. They called 911. The police respond within 15 minutes.” Because it was cold, Deuce and his siblings were “put in an ambulance. [Deuce] makes the comment Shi's daddy hurt my momma. Jamia's (phonetics) daddy hurt my momma. Jamia and Shi are the same person and daddy they are referring to is Rashad Johnson. He makes this statement ... to Investigator Crump. He makes it in the ambulance in front of some of first responders who are on the [S]olicitor's witness list, and Mr. Plyler and Mr. Hope and then he says it spontaneous to Christy Rogers who is a CSI officer that responds there on the scene.

*App. 47-48.*

Counsel presented three cases to the trial judge in support of the position admissibility of

this declaration under Rule 803(2) did not depend upon the competency of the out-of court declarant and he asked the trial judge to consider these cases before ruling. Specifically, counsel relied upon *State v. Ladner*, 373 S.C. 103, 644 S.E.2d 684 (2007), *State v. Sims*, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002), and *In Interest of Smith*, 277 S.C. 187, 284 S.E.2d 586 (1981). *App.* 48. While the trial judge pointed out factual differences between those three cases and this case,<sup>3</sup> he made clear (in response to Green's argument) that his real problem with the proffer was that there must be a "foundation of the personnel knowledge of the hearsay declarant and then meet the three requirements within the rules." *See* Rule 602, SCRE. He also observed that "[p]resence in the home doesn't mean observation of the fatal act. That's all I am saying. ... That goes back to the rule 600 or something." *App.* 48-52.<sup>4</sup>

The trial judge addressed this issue again the following morning. He stated that:

As to the hearsay exception, under that *Ladner* case it appears and my thoughts yesterday was the difference between a victim who makes the statement, a child victim versus a child witness. It is clear in the case that is cited in *Ladner*, *Sims* and I forget the other name -- that those two children that were witnesses were found competent and then would not continue to testify on behalf of the State. They were called by the State. *It is clear* Judge Waters said *there does not have to be a finding of competency of the child necessarily under that hearsay exception. Depending on how it develops, I think is admissible.*

Now, having said that that if it meets the standard of 803.2. As far as the startling event, under the influence of the startling event, no time for reflection, quite frankly I really struggled with no time for reflection having many times in my life been around four years old I don't know what reflection they really do. But at the same time I can't group four year olds and say absolutely they don't reflect. With that being said it does not mean that [Deuce] [cannot] be called as a witness. I'm not saying he should be. I am just saying it does not mean he [cannot] be, if either

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<sup>3</sup> He specifically noted that in two of the three cases relied upon by Clinton, the children were competent to testify, and the child declarant in the third case was the victim. *App.* 48-51.

<sup>4</sup> When Green asked if he was referring to the rule governing competency of a witness, the trial judge emphatically said, "No, ... I am referring to the rule of personnel knowledge and I just don't have the number right now." *App.* 52. He added, "I am not saying it is or isn't admissible. I am saying a foundation has got to be laid for its admissibility and ... you all are welcome to do it in whatever manner you all so choose." *App.* 53.

side chooses to do that and of course the jury could determine their observations of his competency. Of course it has been two years. [Sic)]. It's fuzzy in my memory, but there was a big difference in my children four to six years old. They are now regressing, but back then it was a big difference between four and six years as far as maturity level. As I say they are now regressing.

*App. 62-63.* (Emphasis added). When the Solicitor stated that his understanding of the trial judge's ruling was the declaration could be admitted "if the competency issue is not there and if they can establish the elements of the excited utterance," the trial judge again stated that the defendants did not have to show the declarant's competency "for purposes of asking those questions, but they do have to lay the foundation under the excited utterance." The child's competency or incompetency, however, could be presented to the jury. *App. 63-64.*

On Clinton's cross-examination of Inv. Taylor, he established that Inv. Taylor saw the children at the crime scene on the night of the 19<sup>th</sup>; that all three had blood on their clothing, including the oldest child; and that Inv. Taylor had seized their bloody clothing. *App. 284-86.* Clinton then engaged in the following inquiry, which he mistakenly contends preserves the present issue for appellate review:

Q Did you ever have any conversation with any of these children?

A Yes.

Q Which one?

A Oldest child.

Q Okay. Where did you have this conversation?

A In the EMS truck.

Q Do you recall about when you had this conversation? How long you [had] been on the scene?

A I had probably been there about maybe 20 minutes, 30 minutes. So it was probably shortly before midnight, maybe.

Q Do you recall the demeanor of this child?

A He seemed -- he didn't really seem too upset to a great extent. Kind of being entertained by EMS folks. They were trying to keep him and his sister and I guess the younger brother occupied to keep [their] mind[s] off maybe their thoughts or whatever.

Q Okay. Did you take a statement from any of these children?

A No, I did not take a statement.

Q Was anything told to you?

MR. BARFIELD: Objection.

MR. FRICK: I didn't ask what.

THE COURT: I will sustain the objection. You may ask your next question.

MR. FRICK: Thank you, Your Honor.

*App. 286, line 25 – p. 287, line 25.*

On cross-examination by Green, Inv. Taylor testified that he had been in the ambulance with the children “[p]robably about ten minutes.” *App. 302-03*. Also, based upon the blood of the children’s clothing, it appeared that they would have been physically close to the victim; and the four year old was able to see the blood on his siblings’ clothing while he was in the ambulance. However, he appeared to be “happy-go-lucky” during the time that Inv. Taylor was with him. *App. 303-06*.

**B. Discussion.**

Initially, Respondent submits that the current issue is not preserved for appellate review. As the above discussion reflects, Clinton received a favorable *in limine* ruling and the trial judge *repeatedly* stated that testimony concerning the out-of-court declaration would be admissible if

the defense established an adequate foundation for the introduction of the testimony by offering evidence that (1) the child had witnessed the shooting, see Rule 602, SCRE (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter”), and (2) the declaration met the other requirements for introduction into evidence as an excited utterance under Rule 803(2), SCRE. Because he did not make an adequate proffer in accordance with the favorable *in limine* ruling, there is nothing for this Court to decide on appeal. See *State v. Trotter*, 322 S.C. 537, 543, 473 S.E.2d 452, 455 (1996) (“Inasmuch as petitioner was granted the relief he sought, but failed to take advantage of it, there was actually no issue to be decided on appeal”); *State v. Sinclair*, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (same); *State v. Brown*, 274 S.C. 48, 260 S.E.2d 719 (1979) (same). See also *State v. Simmons*, 360 S.C. 33, 46, 599 S.E.2d 448, 454 (2004) (the failure to make a proffer of excluded evidence will preclude review on appeal); *TNS Mills, Inc. v. S.C. Dep't of Rev.*, 331 S.C. 611, 628, 503 S.E.2d 471, 480 (1998) (same); *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990) (“An alleged erroneous exclusion of evidence is not a basis for establishing prejudice on appeal in absence of an adequate proffer of evidence in the court below”) (citations omitted).

Yet, even if this issue was preserved for appellate review, Clinton is not entitled to relief. “The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion.” *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). “Hearsay is ... ‘a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.’ Rule 801(c), SCRE. Hearsay is inadmissible except as provided by the South Carolina Rules of Evidence, by other court rule, or by statute. Rule 802,

SCRE.” *State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011) “In order for [an appellate court] to reverse a case based on ... exclusion of evidence, error and prejudice must be shown.” *State v. Bell*, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990).

Rather than dispute that the oldest child’s declarations were hearsay, Clinton argues that these declarations were admissible “under the excited utterance exception to the rule against hearsay” (citing Rule 803(2), SCRE). However, the trial judge did not abuse his discretion by sustaining the State’s objection. First, it is axiomatic that in order for the declaration that “Shi’s daddy shot my momma” to have been admissible, the four year old declarant must have, in fact, witnessed the shooting. See Rule 602, SCRE (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony”); *State v. Brockmeyer*, 406 S.C. 324, 339 n. 11, 751 S.E.2d 645, 653 n.11 (2013). Clinton assumes what he was required to prove: that the four year old child saw the shooting of his mother and that this was the basis for his declaration. However, the trial judge correctly recognized that he had not made any such proffer; he had only established that the child was in the house (with his siblings) when the victim was shot: “Presence in the home doesn't mean observation of the fatal act.” *App.* 52.

In the absence of a proffer tending to show that the child witnessed the shooting - as opposed to being awakened by the noise of the gunshot that night - the testimony concerning his declaration was inadmissible. Indeed, even assuming that the child was competent to testify and was called as a witness, he could not have testified that “Shi’s daddy shot my momma,” unless he had witnessed the shooting. *Id.* Based upon the current record, it is not possible to determine

why the child made the statement at issue.<sup>5</sup> Moreover, the failure to affirmatively establish that the declarant witnessed the shooting distinguishes this case from *Ladner*, *Sims*, and *In Interest of Smith*, *supra*. See, e.g., *Sims*, 348 S.C. at 21, 558 S.E.2d at 521 (finding that non-testifying child's statement to officer "relates to the startling event of the son seeing his mother after she was attacked and possibly while she was being attacked"). Nor did the declaration fall within the ambit of Rule 803(2), SCRE. An excited utterance may be admitted whether or not the declarant is available as a witness. See Rule 803, SCRE. Also, when a statement is admissible under a Rule 803 exception, it may be used substantively, *i.e.*, to prove the truth of the matter asserted. See *State v. Dennis*, 337 S.C. 275, 283–84, 523 S.E.2d 173, 177 (1999).

This Court explained in *Ladner* that:

... [T]hree elements ... must be met to find a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. *State v. Sims*, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002). The excited utterance exception is based on the rationale that "the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." *State v. Dennis*, 337 S.C. at 284, 523 S.E.2d at 177. A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception, and that determination is left to the sound discretion of the trial court. *Sims*, *supra*.

*Ladner*, 373 S.C. at 116, 644 S.E.2d at 691. "Other factors useful in determining whether a statement qualifies as an excited utterance include the declarant's demeanor, the declarant's age, and the severity of the startling event." *Sims*, 348 S.C. at 22, 558 S.E.2d at 521. Whether a statement is admissible as an excited utterance depends on the circumstances of each case and the determination is generally left to the sound discretion of the trial court. See *State v. Harrison*,

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<sup>5</sup> Specifically, it cannot be determined whether (1) this was something that he thought that he saw, (2) he disliked Shi's father for some unstated reason, (3) he dreamed this, or (4) the suggestion that Rashad Johnson was responsible for the shooting was suggested to him by an adult whom he encountered when he went to his neighbor's residence to report the shooting.

298 S.C. 333, 380 S.E.2d 818 (1989).

Clinton cannot meet his burden on these criteria. While the child's uncorroborated declarations unquestionably "relate to a startling event or condition," Clinton clearly failed to establish that the child witnessed startling event or condition. More importantly, he did not establish that this declaration was made while the child was under the stress of excitement. Clinton maintains that this requirement was met because the statements were made at the scene and less than two hours after the event. He further asserted below that "too much analysis of the child's demeanor here is fraught with uncertainty." Yet, as the party offering the declaration, it was his burden to establish that it was admissible under Rule 803(2). The only evidence in the record is that, at the time the child made these declarations, "he didn't really seem too upset to a great extent" (*App.* 287) and he was "happy-go-lucky." *App.* 305-06. While the statements in each of those cases appear to have been made while the declarants were under the stress of excitement, and the stress of excitement was caused by the startling event or condition, the same cannot be said here.<sup>6</sup> There was simply no evidence that the four year old declarant was crying, despondent or even upset by the time he made the declarations at issue. Thus, the rationale underpinning the excited utterance exception was absent. *Contra Dennis*, 337 S.C. at 284, 523 S.E.2d at 177.

Clinton did not argue a Rule 403, SCRE, analysis in the trial court. Thus, his argument relating to Rule 403 is not properly before this Court on certiorari. *See State v. Bailey*, 298 S.C.

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<sup>6</sup> In contrast to this case, the victim's five year old son in *Sims* was "found upset and crying outside the apartment of his mother." *Sims*, 348 S.C. at 18, 558 S.E.2d at 520. The three year old victim in *In Interest of Smith*, described the defendant's actions to her mother immediately after the sexual assault, while she was still crying, disheveled and showing signs of pain. *See* 277 S.C. at 188, 284 S.E.2d at 587. In *Ladner*, the hearsay statement "was made by a two-and-a-half year old girl to her caretakers immediately after they discovered blood coming from her vaginal area." *Ladner*, 373 S.C. at 113, 644 S.E.2d at 689.

1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one theory at trial and a different theory on appeal). See *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). Moreover, the proffered testimony does not survive a Rule 403, SCRE analysis, even assuming its admissibility under Rule 803(2).<sup>7</sup> Here, the child's statement had very little probative value. While it was evidence that Rashad Johnson -someone other than Clinton and Green - was responsible for murdering Jenika Jones, it was made by a four year old child who may not have been competent to testify and, more importantly, who may not have even witnessed the shooting.

Also, the proffer was that the child went to his next door neighbor's residence to get help. Because evidence presented at trial was that the victim lived in a mobile home adjacent to the one Clinton shared with his grandmother (*App. 446; 457; 483*), it is possible that the neighbor from whom the child sought assistance or another person whom the child encountered suggested that Rashad Johnson shot the victim. Further, there was absolutely no other evidence presented tying Johnson to the shooting. *Contra Holmes v. South Carolina*, 547 U.S. 319, 330-31 (2006). On the other hand, the prejudicial effect of introducing the statement would have been tremendous. It would have diverted the jury's attention from the issues that were properly before it and caused jurors to speculate about whether the victim's son actually witnessed the shooting when there was no evidence that he had witnessed it.

Likewise, introduction of the uncorroborated declaration would divert jurors to the question of third party guilt. In turn, the State would have been required to present Deuce to testify as to what he actually witnessed and, worse, the State would have had to present evidence negating the question of third party guilt even though the statement by the child was the only

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<sup>7</sup> Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "Unfair prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one." *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct.App. 2003).

evidence connecting Johnson to the murder of Jenika Jones, and the only evidence uncovered by the State's investigation was that the victim was murdered by Clinton, while Green and McDow, his friends and co-defendants acted as accomplices. *Contra Holmes, supra; see also State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941). Nor did Clinton argue in the trial court that the child's declarations were admissible under the present sense impression exception to the hearsay rule. *See* Rule 803(1), SCRE. As a result, his argument based upon that Rule is not properly before this Court. *See Bailey*, 298 S.C. at 5-6, 377 S.E.2d at 584; *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94. *See also State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991) (issues not raised to and ruled on by the trial judge are not preserved for appeal).<sup>8</sup>

**II. The Court of Appeals properly affirmed the trial judge's denial of Clinton's directed verdict motion on the charge of murder because, viewed in the light most favorable to the State, the direct and circumstantial evidence presented at trial reasonably tended to prove his guilt, either individually or under a theory of accomplice liability.**

Notwithstanding Clinton's contrary argument, the Court of Appeals properly affirmed the trial judge's denial of Clinton's directed verdict motion on the charge of murdering Jenika Jones because, viewed in the light most favorable to the State, the direct and circumstantial evidence presented at trial reasonably tended to prove his guilt, either individually or under a theory of accomplice liability.

Clinton moved for a directed verdict at the close of the State's case. He argued that even when the evidence was viewed "in the light most favorable to the State I do not believe there is

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<sup>8</sup> Finally, any error in excluding the proposed line of inquiry was harmless beyond a reasonable doubt. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (citing *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)). "When guilt is conclusively proven by competent evidence such that no other rational conclusion can be reached, [the appellate court] will not set aside a conviction because of insubstantial errors not affecting the result." *State v. Kelley*, 319 S.C. 173, 179, 460 S.E.2d 368, 371 (1995); *State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006). Here, the evidence was harmless and could not have affected the result of the trial because, while the prosecution's case was largely based upon circumstantial evidence, the State presented overwhelming evidence of Clinton's guilt, including his admission to Wayne Blakeney (his co-defendant cousin) that "I shot that bitch." *App.* 455. Because any error was harmless, this issue lacks merit.

enough evidence for the jury to consider it.” He further contended that, although the prosecution had presented “a lot” of evidence, it was a circumstantial evidence case and the State had failed to prove substantial circumstantial evidence. As a result, he was entitled to a directed verdict. **R. p. 503, lines 4-16.** Green likewise moved for a directed verdict. **R. pp. 503-07.** The State responded and opposed both motions, arguing that the evidence was sufficient to go to the jury. **R. pp. 507-09.** The trial judge denied both his and Green’s motions as follows:

Well, as I review the evidence and the standard that I must apply at this stage it appears there have been 22 witnesses presented, or actually 21. One of those [witnesses testified] twice. That being Mr. Thompson.

If you start with the analysis of the testimony of Dominique Davis hearing the conversation on 1-18-12 that Green and Clinton were talking about doing a lick. That Clinton said he still had Taz's gun and was not going to give it back. That was on the a.m. of the 18th. [App. 120-28]. And then on the p.m. of the 18th there's multiple individuals outside of these same apartments; Mr. Twitty [and] Mr. Clinton having a conversation. There [are] others around also -- about Clinton recruiting someone to do a lick. He asked Twitty. He ... responds, yeah whatever, and then when Al Green came up he asked Al Green and Twitty' s indication was he said yeah, whatever. That he was down for it. [App. 133-38; 140-43].

There's ... multiple witnesses that talk about the relationship between Clinton and Green. [App. 110-16; 120-28; App. 394-400; 431-35]. So within 24 hours, 36 hours of the homicide you have two separate and distinct individuals. One hearing a conversation between Green and Clinton about doing the lick. Another having that conversation with Clinton about doing a lick and then hearing Clinton ask Green and Green being down for it in that regard.

Now, you also have then I guess as you progress in time, you have different testimony from ...one of the individuals about the neighborhood of Newtown and that two individuals, black males, go to Newtown and borrow a vehicle from Pomp Blackmon; a white ragtop Caddy that they are going to bring back within an hour and a half, two hours. [App. 170-76; 437-48].

Now, you have witnesses ...circumstantially and by more direct witnesses placing that Cadillac on [the trailer park road]. That would be the testimony of Shakela Montgomery and her cousin Tameca Nelson [who were] coming home from Applebees and saw the vehicle coming out being driven in a fast, reckless manner, a white ragtop caddy. Both of them describe it as a white caddy and then Tameca Nelson further goes to say she saw that same car the next day over at the

Piggly Wiggly. They further state that when they drive in there that night and they see that car coming out that they don't see police. They don't see EMS. They don't see a crowd. They don't see parties in there where something had potentially already occurred. [App. 92-102; 144-50]. When that car is both reported to Lancaster police and then recovered by Mr. Pomp Blackmon he testified he kept his car clean. Its got some red clay mud-type on it, it's kind of messy inside and further it was missing a piece of molding. [App. 176-91]. I think that's by the 23rd when Detective [Thompson] is ... out there at Pomp Blackmon 's house, and on that same day on the 23rd, Detective [Thompson] goes out and locates the what appears to be molding off of the Cadillac on [the trailer park road]. [App. 319-25; 331-32]. So, you got witnesses identifying it out there at particular time saying they saw it the next day -- one of them saying they saw it the next day at Piggly Wiggly. Then you have a piece of a car I would say, or at least just it's jury issue as to whether it is a piece of the car or not found on [the trailer park road].

Going all the way back to Pomp Blackmon too, he did not identify anyone in this case however he does say four black males; one [is] the driver, one passenger and two in the back. [App. 172-76]. That is the same indication that Mr. Blakeney testifies to that he is driving. Mr. Clinton is in the front. He is saying what he [had] done earlier that day. Mr. Green and a person that he does not know at that time who is later identified as being ... Mr. McDow is in the back seat. [App. 437-53; 467-81]. So, they got mode of transportation. They got the planning in mind to do a lick. They got tools in which to do a lick and I submit not only are the tools to do a lick but also the fact that ... at least one of them is wearing a jumpsuit. When the car is recovered by Mr. Blackmon and the police go out there and ... he has already found the jumpsuit and [I] think there is the ID also from Tyson. [App. 181-91; 319-25; 331-32]. Now, when you get to that jumpsuit and you get to the DNA analysis[,] [and] perhaps some of the numbers aren't very great, but there is some corroboration of Mr. Blakeney in the DNA analysis. [App. 376-84; 387; 392]. DNA profile developed from item two is mixture of at least three individuals; Jenika Jones and Delrico McDow [cannot] be excluded as a possible contributor to the mixture. That is swabs from the [underside] of the storm door handle exterior. ... [R]egardless of what the numbers are that corroborates Blakeney. [App. 374-76].

Item three profile -- item three swab from doorknob, DNA profile developed from item three is a mixture of at least two individuals. No conclusive statement can be made regarding the inclusion or exclusion of Jenika Jones and Devatee Clinton as possible contributors. ...Pomp Blackmon, Wayne Blakeney, Delrico McDow and Al Martinez Green can be excluded. [App. 374-76].

Item 6.1 which is a cutting from the jumpsuit excludes all parties. Item 6.2 is an unidentified male individual. Item 6.3 -- and I will note 6.2 is an unidentified individual. I do not see that Reggie the roommate that they got buccal swabs from him, unless I am incorrect in that regard. Item 6.3 Clinton can't be excused as a

contributor. All this is coming from the jump suit. Item 6.4 is mixture of four individuals. Clinton can't be excluded. No statements can be made about inclusion or exclusion of ... Miss Jones, McDow, and Green in that mixture. That is a corroborating testimony as to Mr. Blakeney, where you have this mixture of individuals, again I say regardless of the numbers. Further from the statements given Green, Clinton and Blakeney were at the Hole in the Wall on the 19th. [App. 376-84; 387; 392].

Testimony of Miss Stradford that she was at ... Crenco. And she was approach by Clinton wanting cigarettes and he was wearing that blue jumpsuit. The blue jumpsuit in evidence. Her testimony is he was wearing that blue jumpsuit .... She told him oh, this friend of mine did you hear what happened to Jenika and ... he is not interested. Well, he is not interested in this Court's opinion because he already knows what has [happened] to Jenika or that can be an inference that could be drawn ... from the evidence. [App. 401-10].

Y'eisha Tinsley also [testified] concerning the Hole in the Wall on the 19th. Again Mr. Clinton gives conflicting statements. [App. 394-401]. Mr. Frick wants out on the cross examination of Mr. [Thompson], but it is not usual for someone not to tell the truth, the whole truth and nothing but the truth on [their] first statement to the police. The cross examination of Mr. Blakeney well, why didn't you tell him the truth on the first statement. So you have all this corroborating circumstantial evidence, and I would further add whether there is blood, whether there is fingerprints, whether there is hair, whether there is fiber, whether there is someone's driver's license at the scene, the absence of evidence is not evidence of absence. You have the testimony of Mr. Blakeney that says he was driving. Two individuals that he knew he identified. Three of them got out of the car, went in down there [at the trailer park], came back in a hurry within ten minutes. The one with the gun appeared to be cool, calm and collected. He says chill. The other ones, lets go, lets go, lets go. I think that shows his manner in which he is driving that I don't know if he skimmed something, hit a rut or what, and that molding comes off. But I think there is both direct and substantial circumstantial evidence as to both Mr. Clinton and Mr. Green and I would be remiss if I didn't point out also the direct statement by Mr. Clinton to Mr. Blakeney that I killed that individual. Not by name but by expletive. [App. 445-58; 461-70; 480-81].

**R. p. 509, line 19 – p. 515, line 25.** (Citations to Appendix added).

Both defendants rested without presenting additional evidence. Clinton then renewed his directed verdict motion. Green also renewed his prior motions. The trial judge renewed his ruling on the directed verdict motion. **R. p. 525, lines 9-19.**

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). *See also State v. Blakely*, 402 S.C. 650, 742 S.E.2d 29 (Ct.App. 2013). “Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong.” *State v. Wilds*, 355 S.C. 269, 276-77, 584 S.E.2d 138, 142 (Ct.App. 2003); *Kelsey*, 331 S.C. at 62, 502 S.E.2d at 69 (same). “It is the doing of a wrongful act intentionally and without just cause or excuse.” *Tate v. State*, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002).<sup>9</sup>

“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)). Applying the above principles to the facts of this case, Respondent submits that the trial judge properly denied Clinton’s motion because the direct and circumstantial evidence presented at trial, viewed in the light most favorable to the State, reasonably tended to prove his guilt or

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<sup>9</sup> 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”).

was such that his guilt could be fairly and logically deduced. *Kelsey*, 331 S.C. at 62, 502 S.E.2d at 69.

As Clinton acknowledges, the State proceeded under a theory of accomplice liability.<sup>10</sup> “Under the ‘hand of one is the hand of all’ theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.’ ” *Barber v. State*, 393 S.C. 232, 236-37, 712 S.E.2d 436, 439 (2011). “[However, m]ere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. [Rather,] presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal.” *State v. Thompson*, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct.App.2007) (internal quotations and citations omitted).

“Under an accomplice liability theory, ‘a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.’ ” *See State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct.App.2002) (quoting *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999)). In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties. *Id.* at 193, 562 S.E.2d at 324 (stating that under the hand of one is the hand of all theory, “[a] formally expressed agreement is not necessary to establish the conspiracy” which brings the accomplice to the scene of the crime).

*State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 769-70 (Ct.App. 2010). *See also App. 672-74* (Jury charge).

As the trial judge correctly observed, several witnesses testified that Clinton and Green were friends and associated with one another. Also, Clinton lived with his grandmother in a

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<sup>10</sup> “... [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).

trailer adjacent to the one in which Jenika lived and where the murder occurred; however, when later questioned by the Sheriff's Office after his arrest, he denied knowing that she lived next to him. *App.* 471. On the morning of January 18<sup>th</sup>, Dominique Davis overheard Clinton and Green discuss doing a "lick" or robbing someone. Ms. Davis also heard Clinton say that "he had Taz's gun and he wasn't going to give it back to him." Further, Ms. Davis heard Green ask whether "she" drove "a black car." However, the men never mentioned an intended victim by name or location and Ms. Davis did not know whom the friends planned to rob. *App.* 117-28. On the night of the 18<sup>th</sup>, Jamal Twitty had a conversation with Clinton in the presence of two other men, in which Clinton asked if Twitty wanted "to go on a lick with him." Twitty told Clinton, "yeah, whatever." *App.* 133-41.

Clinton did not give an address of the place he wanted to rob but said that it was "Not far." Twitty changed his mind about participating in the robbery and talked Clinton out of doing it on the 18<sup>th</sup> because Clinton needed a car, Twitty did not have a car and Twitty's girlfriend had told him that her car was parked for the night. *App.* 135-37; 141-42. Green walked up a few minutes later, and Clinton asked Green whether Green "want[ed] to go on a lick." Green replied, "yeah, whatever," indicating that "he was down for it. ...[H]e was like, yeah, he's ready." While Twitty did not see Clinton with a gun that night, he had previously seen Clinton with one. *App.* 135-38; 141-43.

Thus, there was evidence of a conspiracy by Clinton and Green to commit an armed robbery, which supports an inference of malice. This evidence also established an undeniable motive for the subsequent murder. Although "motive is not an element of murder and ... the State need not prove motive, *State v. Smith*, 307 S.C. 376, 385, 415 S.E.2d 409, 414 (Ct.App. 1992), this evidence provides a reason for the subsequent murder of Jenika Jones. *Accord*

*Williams v. State*, 363 S.C. 341, 611 S.E.2d 232 (2005) (circumstantial evidence showed defendant's motives for murdering his wife and child were financial gain and elimination of his domestic problems).<sup>11</sup> More importantly, Wayne Blakeney's testimony, various parts of which were corroborated by testimony from other witness' and DNA, provided further evidence that both defendants were guilty of murdering the victim. Blakeney testified that he is Clinton's cousin and friend, and that they sometimes hung out together. Blakeney also knows Green and McDow. Clinton did not have a driver's license at the time. So, Blakeney occasionally drove him places, if Clinton provided the transportation. *App.* 431-35; 438-40. On the night January 19<sup>th</sup>, Blakeney met up with Clinton, Green and McDow in the Newton area. They later went to a residence in the same part of town, where they borrowed the white Cadillac shown in State's Exhibit 16. Blakeney did not know the name of the man from whom they borrowed the Cadillac, but Pomp Blackmon's testimony confirms that it was his 1991 eggshell white Seville. *App.* 437-38; 440-44. Although Mr. Blackmon did not identify the persons to whom he loaned his vehicle, his testimony was that he did not loan it to the first person who asked to borrow it because that man did not have a license. Rather, Mr. Blackmon only loaned the car after he was certain that the first man's cousin had a license. Additionally, Mr. Blackmon saw the car stop after these two men left his driveway in it and two more men got into it. *App.* 170-81; 187-88; 240. He thus corroborated Blakeney's testimony that there were four people in the Cadillac: Blakeney, Clinton Green and McDow.

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<sup>11</sup> *State v. Rice*, 368 S.C. 610, 615-16, 629 S.E.2d 393, 395-96 (Ct.App. 2006) (trial court did not err by refusing to sever murder and trafficking in cocaine charges where State's theory as to the motive for victim's murder involved the drugs victim stole from Rice when he stole Rice's car, as well as the drug-related argument the two recently had involving the marijuana); *Commonwealth v. Pacell*, 497 A.2d 1375, 1378 (Pa.Super.Ct.1985) (finding evidence that defendant struck common-law wife five days before the murder of wife's paramour was relevant to defendant's motive, and remoteness did not vitiate relevance given incident was part of the sequence of events leading directly to the homicide).

Blakeney also testified that the four men first went to the Hole in the Wall. They all got into the Cadillac and left when Clinton asked Blakeney to take him to get some money. *App.* 437-38; 440-45. Following Clinton's directions, Blakeney drove the Cadillac to the trailer park where the murder occurred and where Clinton lived with his grandmother. Along the way there, Blakeney saw that Clinton was armed with a gun. Once they reached the trailer park, Blakeney parked the Cadillac at a location selected by Clinton. Clinton, Green and McDow then get out of the car. Together, they walked behind a mobile home and disappeared for about ten minutes. When they returned, they were running. Clinton, who was armed, told Blakeney to chill. On the other hand, Green and McDow told Blakeney to "go" and were anxious to leave the scene. Blakeney's testimony that they were running is corroborated by information in the 911 call that three men were seen running from the scene. *App.* 445-53; 467-69; 480-81.

Also and as the trial judge correctly observed, Blakeney's testimony that he quickly drove out of the trailer park is circumstantially corroborated by cousins Shakela Montgomery and Tameca Nelson. When they turned on the road to go into the trailer park, a white car headed in the opposite direction almost ran them off of the road. The car's headlights were not on and it was being driven fast. A clear inference from their testimony is that this occurred shortly after the murder because neither woman saw police or EMS. *App.* 92-102; 144-50.<sup>12</sup> Blakeney's testimony that he quickly drove out of the trailer park is also circumstantially corroborated by testimony that a missing piece of molding that was on the Cadillac when Mr. Blackmon loaned out the car on the 19<sup>th</sup> was found by Inv. Thompson on January 23<sup>rd</sup>, in the area of the road

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<sup>12</sup> Shakela testified that the car was "an Oldsmobile, Buick, [or] Cadillac style." *App.* 97; 100; 102. Tameca described the car as "a white Cadillac with a rag top." Tameca saw the same car the next day over at the Piggly Wiggly with a flat tire. This corroborates Blakeney's testimony of where he left the car and the condition it was in, as well as Blackmon's testimony about the condition of the vehicle when he found it the next day. *App.* 146-47.

leading to the trailer park. Blakeney's testimony is likewise corroborated by evidence that there was red mud on the Cadillac that previously had not been on it. *App.* 176-91; 319-25; 331-32.

Blakeney also testified that he drove back to the Hole in the Wall after leaving the trailer park. Both Green and Clinton admitted that they were at the Hole in the Wall on January 19<sup>th</sup>, and Vivian Stradford saw Clinton there in a blue jumpsuit. *App.* 401-10. Blakeney later dropped off Green, McDow and two strangers in the Newton area before he took Clinton home: *i.e.*, back to the mobile immediately adjacent to the victim's. As they were headed to Clinton's residence, Clinton said, "I shot the bitch." *App.* 455-56; 461. This is express evidence of malice. *E.g.*, *Salazar v. State*, 397 S.W.2d 220 223 (Tex. Cr.App. 1966) ("Statements made by a slayer before, at the time of, and after the homicide are pertinent evidence to show express malice"); *Hinton v. People*, 169 Colo. 545, 551, 458 P.2d 611, 613 (Colo. 1969); *Hopkins v. State*, 190 Ga. 180, 185, 8 S.E.2d 633, 636 (Ga. 1940). Also, Clinton left the murder weapon in the glove compartment of the Cadillac and asked his unsuspecting cousin, Blakeney, to hold it for him.

Additionally, Mr. Blackmon testified that there was a blue jumpsuit in his car when he retrieved it on January 23<sup>rd</sup> that had not been in it when he loaned it out on the 19<sup>th</sup>. So, he turned the jumpsuit over to the Sheriff's Office. Vivian Stradford testified that she was at Crenco after 10:30 p.m. on the 19<sup>th</sup> when Clinton approached her and asked for cigarettes. He was coming from the Hole in the Wall and he was wearing the same blue jumpsuit that Mr. Blackmon later found in the Cadillac. (State's Exhibit 37). Ms. Stradford tried to discuss what she had heard about the victim with Clinton, but he was not interested in discussing the matter. . *App.* 401-10. Once again, the trial judge correctly reasoned that a reasonable inference from her testimony is that the reason he did not want to discuss the victim's death is because he already knew what had occurred: either he, Green or McDow had murdered her.

Furthermore, even though the DNA evidence in this case did not yield the type of statistical analyses that often identify a criminal wrongdoer(s) with virtually unerring precision, it nevertheless corroborated other evidence presented by the State. The DNA profile on a swab of the screen door handle (State's Exhibit 42, SLED item 2) was a mixture of individuals and neither the victim nor co-defendant McDow could be excluded from that mixture. This provides circumstantial evidence of his presence at the crime scene and thereby circumstantially corroborates Blakeney's testimony. Again, Clinton's statement that "I shot that bitch" tends to prove that he was the triggerman and thus establishes his presence when the crime was committed. Further, in light of Blakeney's testimony as to what occurred at the trailer park, a reasonable inference is that both Green and McDow were with him when he shot her. With respect to the touch DNA testing of the blue jumpsuit, the DNA profile developed on SLED item 6.3 was a mixture of at least two individuals and "Clinton could not be excluded as a possible contributor to this mixture. The probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in 580." Also, there was not enough information to either include or the victim from that mixture. *App. 374-80, 387; 392.* The DNA profile developed SLED item 6.4, a swab from the blue jumpsuit, was a "mixture of at least four individuals." Again, Clinton could not be excluded as a possible contributor to the mixture. "The probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in 12." Also, Agent Boehm could not make a conclusive determination as to whether the victim, Green or McDow were contributors to the mixture found. *App. 380-84.*

Additionally, the murder in this case was committed with a deadly weapon and malice may be inferred or implied from the use of that weapon. *See State v. Belcher, 385 S.C. 597, 672,*

685 S.E.2d 802, 810 (2009) (“The permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill)”); *In re Walter M.*, 386 S.C. 387, 391 & n. 2, 688 S.E.2d 133, 135 & n. 2 (Ct.App. 2009). *See also App.* 575 (Solicitor’s closing argument); 671 (jury charge). Finally, Clinton and Green both admitted that they had been at the Hole in the Wall on the night of the 18<sup>th</sup> and Clinton made inconsistent statements to law enforcement. *App.* 498-506; 510-11; 514-15; 528.

Notwithstanding Clinton’s perceived deficiencies in the prosecution’s proof of his guilt, Respondent submits that the trial judge properly refused to grant a directed verdict because there was sufficient direct and substantial circumstantial evidence of Clinton’s guilt submit the murder charge to the jury. *E.g.*, *Kelsey*, 331 S.C. at 62, 502 S.E.2d at 69; *Irvin*, 270 S.C. at 543, 243 S.E.2d at 197; *Martin*, 340 S.C. at 602, 533 S.E.2d at 574.<sup>13</sup> Moreover, none of his arguments demonstrate error by the trial judge in refusing to grant a directed verdict. First, his analysis of perceived shortcomings in the State’s evidence is without merit.<sup>14</sup>

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<sup>13</sup> Many of the arguments presented by Clinton on appeal are not properly before this Court because they were not presented to the trial judge in support of the directed verdict motion made at trial. *See Bailey*, 298 S.C. at 5-6, 377 S.E.2d at 584 (a party cannot argue one theory in support of directed verdict motion at trial and a different theory on appeal). *See also State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) (“To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court”); *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94 (“In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal”). For instance, he did not argue in the trial court the various matters that he felt the State was required to prove but did not, he did not attack Blakeney’s testimony as self-serving and he did not cite any of the cases now referenced in his brief.

<sup>14</sup> For instance, his suggestion that the State did not prove that he was present inside the victim’s home ignores both the reasonable inferences discussed from Blakeney’s testimony and the DNA from the screen door handle discussed above, as well as his admission to his cousin that “I shot that bitch.” Also, the State was not required to produce the murder weapon. However, the State’s evidence explained that the reason it was unable to locate the murder weapon was because Clinton gave the gun to Blakeney when he got out of the Cadillac at his grandmother’s house and asked Blakeney to hold it for him. A reasonable inference from this evidence was that he was attempting to dispose of the weapon or, at the very least, he was attempting to hide it until he was certain that he was not a suspect in the murder. Moreover, when considered with statement that he made to Inv. Thompson on March 9<sup>th</sup>, 2012, a reasonable

Similarly, his complaint about the prosecution's failure to connect the blue jumpsuit to the victim or her home is a red herring. It ignores that Clinton could not be excluded as a possible contributor to the DNA profile developed SLED item 6.4, a swab from the blue jumpsuit. His argument in this regard likewise ignores that the State's evidence was that Ms. Stradford saw him wearing this jumpsuit on the night of the 18<sup>th</sup> and he later left it in the Cadillac, whereas he lied to Inv. Thompson when asked about that jumpsuit. In his interview with Inv. Thompson, he claimed that he wore a camouflage jumpsuit on the 19<sup>th</sup> and that he loaned the blue jumpsuit to others. Also, his DNA would only be on the blue jumpsuit from handling it.<sup>15</sup>

Finally, there is no merit to Clinton's assertion that this Court's reversals of the Court of Appeals in cases where it held a directed verdict should have been granted, *e.g.*, *State v. Bennett*, 415 S.C. 232, 781 S.E.2d 352 (2016); *State v. Phillips*, 416 S.C. 184785 S.E.2d 448 (2016), caused that Court to incorrectly assess whether he was entitled to a directed verdict. Rather, the State's evidence in this case is a far cry from the circumstantial evidence cases where this Court has found that a directed verdict should have been granted. *See, e.g.*, *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011); *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011).<sup>16</sup> Unlike

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inference is that he may have tried to set up his cousin to take the rap for the murder. Specifically, he told Inv. Thompson that he had seen Wayne Blakeney at the Hole in the Wall on January 19<sup>th</sup>, and that Blakeney was in the white Cadillac. *App. 510-11.*

<sup>15</sup> Clinton's attack on Blakeney's credibility only goes to the credibility that he felt the jury should assign to the testimony and has no bearing on whether the trial judge should grant a directed verdict. *E.g.*, *Weston*, 367 S.C. at 292, 625 S.E.2d at 648 ("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"); *McHoney*, 344 S.C. at 97, 544 S.E.2d at 36 (same).

<sup>16</sup> In *Bostick*, the Court found that the prosecution's evidence only established a mere suspicion of Bostick's guilt. It found that the State had only presented the following pieces of circumstantial evidence of his guilt: the victim's car keys, calculator, and other items from her home were found in the Bostick family's burn pile; the fire in the burn pile was accelerated with either kerosene or diesel fuel, and Bostick's mother did not use those accelerants when she burned things in the pile; Bostick had a pattern that matched gasoline on his shoes and gasoline was the accelerant

*Bostick, Odems and State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984), this was not a purely circumstantial evidence case. Rather, there was direct evidence of Clinton's presence at the crime scene. Also unlike *Bostick*, there was express malice and evidence of motive in this case, all of which pointed directly at Clinton, Green and their co-defendants. Based upon this record, Respondent submits that the directed verdict motion was properly denied.

### CONCLUSION

Wherefore, Respondent respectfully submits that this Court should deny certiorari.

Respectfully submitted,

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used for the house fire; and the DNA from the blood found on Bostick's jeans excluded about ninety-nine percent of the population, but the blood could not be matched to the victim's DNA. The Court held that this was insufficient to withstand a directed verdict motion because (1) the State did not present any direct evidence linking Bostick to the crime scene or to the items found in the burn pile; (2) the State failed to establish that he had control over his family's burn pile; (3) the State did not introduce any weapon that it contended had been used to beat the victim in the head; (4) there was no evidence that Bostick knew that the victim may have had money in her briefcase; and (5) there was no evidence any money was in the briefcase on the Sunday of her murder. *Bostick*, 392 S.C. at 141-42, 708 S.E.2d at 778.

In *Odems*, the state presented circumstantial evidence that: (1) police found Odems in the getaway car with the burglars and the stolen goods less than 90 minutes after the burglary; (2) Odems fled from law enforcement when the car was stopped; and (3) Odems asked an individual not involved in the offenses to lie for him. 395 S.C. at 588, 720 S.E.2d at 51. However, other evidence presented did not tend to prove Odems' guilt. For instance, the lone eyewitness saw only two people at the crime scene; a forensic investigator collected twelve sets of fingerprints from the crime scene, but none matched Odems' fingerprints; and a co-defendant testified during the State's case-in-chief that Odems did not participate in the crime but was present in the car after he offered him a ride. *Id.* The Supreme Court reversed, finding that there was not substantial circumstantial evidence on which to base a conviction, and therefore, the trial court erred in refusing to direct a verdict in favor of the petitioner. *Id.* at 592, 720 S.E.2d at 53.

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OCT 21 2016

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Appeal from Lancaster County  
Honorable R. Knox McMahon, Circuit Court Judge  
Appellate Case No. 2014-000594

S.C. SUPREME COURT

THE STATE,

Respondent,

vs.

DEVATEE TYMAR CLINTON,

Petitioner.

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CERTIFICATE OF SERVICE

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I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorneys of record, Chad Johnston, Esq., Willoughby & Hoefler, P.A., 930 Richland Street, P.O. Box 8416, Columbia, South Carolina 29202-8416, and to Robert M. Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady St., Ste. #401, Columbia, SC 29201.

I further certify that all parties required by Rule to be served have been served.

This 21<sup>st</sup> day of October, 2016.



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