STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case No. 2014-002064

THE STATE,

Respondent,

vs.

LESTER DEVARIA MOSLEY, JR.,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

COURT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by instructing the jury on accomplice liability in response to the jury's questions during deliberations?

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether Appellant waived his right to complain of the trial judge's supplemental jury instruction on accomplice liability that was given in response to the jury's questions during deliberations, where Appellant did not object when the trial judge instructed the jury on accomplice liability in his original jury charge, and he did not make the same arguments in support of his objection to the supplemental instruction at trial, as he raises before this Court?

II. Whether the trial judge properly instruct the jury on accomplice liability after the jury had begun deliberating where (1) the trial judge instructed the jury on accomplice liability, without objection, in his original jury charge; (2) there was sufficient evidence of accomplice liability in the record to support the State's request-to-charge on this theory; (3) Appellant had the opportunity to address whether he was culpable as an accomplice, and he asserted alibi and a failure to prove identity; (4) a question from the jury rendered a supplemental instruction on accomplice liability appropriate based upon the evidence presented to it; and (5) Appellant clearly was not prejudiced by the instruction?

STATEMENT OF THE CASE

Appellant, Lester Devaria Mosley, Jr., is currently serving a life sentence for murder and sentences for other offenses that he and three co-defendants committed in Pickens County, South Carolina, on December 8, 2012. The Pickens County Grand Jury indicted him in July 2014 for murder (2014-GS-39-1548); two counts of attempted armed robbery (2014-GS-39-1545 & -1547); burglary in the first degree (2014-GS-39-1597); and possession of a weapon during the commission of a violent crime (2014-GS-39-1546). *R. pp. 404-05; 407-08; 410-11; 413-14; 416-17.* Scott Robinson, Esquire, represented him on these charges. Thirteenth Circuit Solicitor W. Walter Wilkins, II, and Assistant Solicitor William Timmons prosecuted the case.

On September 15, 2014, Appellant received a jury trial before the Honorable Edward W. Miller. Appellant challenged the State's proof of identity and he presented the defenses of alibi and accident. The State requested a charge on accomplice liability at the charge conference. *R. p. 348, lines 18-19.* The trial judge instructed the jury on accomplice liability, without objection, in his original jury charge. *R. p. 383, lines 4-17; p. 392, lines 16-18.* However, Appellant objected to the trial judge providing a supplemental written instruction on accomplice liability, in response to a question from the jury after it had begun deliberating (Court's Exhibit 5). R. p. 393, line 1- p. 394, line 6. *See also Supp. R. pp. 1-2; 8.*

The jury convicted him of each charged offense. Judge Miller imposed concurrent sentences of fifty years for murder, fifty years for burglary in the first degree, twenty years for each of the attempted armed robberies and five years for the weapons charge. *R. pp. 400-01; 403; 406; 409; 412; 415.*

Appellant timely served and filed a notice of appeal. Kathrine H. Hudgins, Assistant Appellate Defender represents Appellant on appeal. On September 10, 2015, counsel filed a brief

pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), and petitioned to be relieved as counsel. Counsel raised the following issue:

> Did the trial judge err in instructing the jury that malice can be inferred if one intentionally kills another during the commission of a felony?

Appellant thereafter filed a *pro se* response addressing the same issue. However, on December 2, 2016, this Court denied the motion to be relieved as counsel and directed the parties to brief the following issue, as well as any other issue of arguable merit:

> Whether the trial court erred by instructing the jury on accomplice liability in response to the jury's questions during deliberations.

Appellant, through counsel, filed a Brief of Appellant on December 19, 2016. This brief follows.

STATEMENT OF FACTS

Viewed in the light most favorable to the State, the direct and circumstantial evidence presented at trial reasonably tended to show that on the evening and night of Saturday, December 8, 2012, six friends - Steven Grich (the murder victim), Robert "Rob" McKinley, Kevin Keck, Daniel Persson, Sam Voison and Jonathan Riordan - were in a Pickens County apartment near Clemson, South Carolina, that was shared by Steven, Rob, Daniel and Dalton Johnson.[1] Around 8:00 p.m., Steven, Daniel, Kevin, Sam and Jonathan were watching TV and drinking downstairs. Rob was upstairs with his friend, Martin, and his girlfriend, Laura Hill. Daniel, Rob and Martin, were smoking marijuana provided by Rob, who had almost two pounds of it.[2] *R. pp. 103-05;*

[1] The apartment complex, known as Chimney Ridge, is "primarily an off-campus housing area for Clemson students." *R. p. 59.*

[2] Two pounds of marijuana costs roughly $5,000.00. Rob sold small quantities of this marijuana to friends six or eight times day. He was only charged with simple possession. *R. pp. 143-44; 149.*

117-19; 126-127; 131-34; 136-39; 153-54.

The surviving friends who testified gave similar testimony about what happened thereafter. As the friends were enjoying themselves, the back door "burst" or "flew open" and "at least three men" entered the apartment. *R. pp. 105; 119; 127; 134; 138.* Kevin Keck testified that these men were wearing ski masks and were armed. Kevin saw the first man who entered strike Jonathan with a gun. He also saw the victim fall to the floor after being struck by the same gun. "After that, everyone got down on the floor," and Kevin did not see much of what happened after that point because he covered his head. *R. pp. 119-21; 124.*

However, he heard one of the men "yelling about money" and demanding drugs. As this was occurring, he heard the victim being pistol-whipped and he heard a gunshot. He did not hear anything after the shot. The victim had been shot victim had been shot and the victim had been shot when Kevin and the others got off of the floor. *R. pp. 120-23.*

The first man who entered was wearing a mask and Kevin had never seen him, but Kevin could see that he was black because Kevin could see the man's skin between the man's glove and sleeve. Also, this man was "probably" Kevin's height, which is 5'7'' tall. This is the person who shot the victim. *R. pp. 120-22.* The State had Appellant's co-defendant, Kadeem Ramsey, brought the courtroom and Kevin indicated that Ramsey was much taller than the first man to enter the apartment on December 8th. Upon viewing Appellant after Appellant stood, Kevin testified that Appellant's height was consistent with that of the first intruder. R. *pp. 122-23.*

Daniel Persson testified that although he may have smoked some marijuana, "it was more of a drinking part kind of thing" (*R. p. 129*) and he was "definitely not drunk or intoxicated. *R. p. 131.* While Daniel was sitting on the right end of a couch in the living room,

> we were just sitting there and people with guns and masks just came in the back

> door. One of them just started yelling, ... ["G]et on the ground[."] .... And ... after ... they came in, [they] started pistol whipping people. I got kicked in the head like once or twice and then pistol whipped when I was laying behind the table right there.

R. p. 127.

Daniel could see that the first assailant was black because he could see "the holes in the mask and stuff." This man was "[d]efinitely shorter" than Daniel. This black assailant made a full circle" as he repeatedly pistol-whipped the victim, Jonathan Riordan, and Daniel. The victim and Jonathan fell off of the couch and onto the floor as a result of this beating. Daniel also "remember[ed] seeing one or two white guys," but he did not remember seeing much else after that point because he had a gun in his face. *R. pp. 127-29; 131.*

The assailants repeatedly ordered everyone to get on the ground and asked where the dope was until they left. *R. p. 128.* After a gunshot was fired, the assailants ran out of the apartment. Daniel immediately checked on the victim but the victim was obviously dead. So, Daniel called 911. *R. pp. 128-30.* When the State had Ramsey brought the courtroom, Daniel testified that Ramsey was much taller than the first man to enter the apartment on December 8th. Upon viewing Appellant after Appellant stood, Daniel could not positively identify Appellant as the first assailant but testified that Appellant's height was "most definitely" consistent with that of the first intruder. *R. pp. 130-32.*

Laura Hill testified that she was living in Clemson and working in Greenville in December 2012. She arrived at the apartment around 8:00 p.m. and went into the bedroom adjacent to the living room. Rob McKinley and Martin were in the room with her. At some point Lara heard the back door open. "... [A]bout 30 seconds later, I heard shouting, profanity, [and] people like scuffling around." At this point, she and Rob "realized that somebody was trying to

rob the house. So we went and jumped out [of] the [bathroom] window and ran a couple of houses down to a neighbor's house." Rob accompanied her to this house. *R. pp. 133-35.*

Once they reached the neighbor's residence, Laura saw "several people dressed in black run in between the houses and get into a black SUV. Laura and Robert talked to their neighbors for roughly ten or fifteen minutes. They then returned to the apartment. She did not recall whether Rob had brought anything with him when he fled his apartment. *R. p. 135.*

Rob McKinley testified that he was in his bedroom, studying for a final exam in chemical engineering and smoking marijuana, around 8:00 p.m. on Saturday, December 8, 2012. Laura Hill and Martin were also in the room. "About 8:20," Rob and Martin heard "a commotion and [people] yelling, Where's the dope, just a bunch of commotion. .... It sounded like a brawl almost inside the den." *R. pp 136-39.*

Rob immediately sent Laura and Martin into the bathroom. As soon as he could load his marijuana into his backpack, he joined them and all three escaped through the bathroom window. Rob told Laura to run to the closest neighbor's residence and call the police. While she and Martin ran for help, Rob hid his backpack "in the woods about five ... [or] six houses up." On his way back to see whether Laura had called 911, he heard "three robbers" running behind him. He immediately began chasing them. *R. pp. 139-40; 142.*

He continued to follow them after they took a right approximately "six ... or eight houses up," and he followed them until he saw the three jump into a Black Dodge Durango and close the doors. A fourth person was already in the driver's seat. He even chased them as the Durango sped away from the apartment complex, and he thought one assailant looked at him. Rob eventually stopped and began yelling, "[H]ey, those are the guys that were at my house robbing me with a gun ...." He stopped yelling when the Durango "peeled out" of the apartment

complex. Rob then returned to his apartment and discovered what had happened. *R. pp. 140-43.*

Rob testified that although the robbers had been wearing masks and gloves, one of the men who jumped into the Durango was African-American. *R. pp. 142; 149.* He later identified the Durango for law enforcement, when shown the apartment complex's surveillance video. Law enforcement later found the drugs and drug paraphernalia that he had hidden. Yet, he was only charged with simple possession of marijuana. *R. pp. 142-43.*[3]

Rob testified that he had sold marijuana in the past to Winton Botchway approximately three to five times in 2012. On one occasion in September, he went to Botchway's apartment and sold marijuana to Botchway. He also smoked a "blunt" with Botchway and another individual on that occasion. He identified Appellant as the other person with whom he had smoked the blunt and to whom Botchway had introduced him. Rob subsequently sold marijuana to Botchway at his own apartment, and he had called Botchway on December 8th and told Botchway that he had "just re-up." He had expected Botchway to come by his apartment and purchase marijuana from him. *R. pp. 145-49.*

Jonathan Riordan testified that he had gone over to his friends' apartment between 5:30 and 6:00 p.m. on December 8th and was hanging out with the other people there. Around 8:00 p.m., Rob was in his bedroom with his girlfriend and Jonathan was sitting on the couch next to the victim. The back door to the apartment was unlocked and some men "barged" into the apartment. *R. pp. 154-55.*

Jonathan gave the following description of the events that happened after the men entered the apartment:

I was … the first person they assaulted when they came in through the door. I was

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[3] Rob testified that police arrived within ten minutes of the 911 call. *R. p. 143.*

> pistol whipped in the head twice. .... I ... only saw the first guy and a couple of guys behind him. After that, I was semi-conscious conscious. I wasn't looking up or anything, I was just on the ground bleeding..... I saw the person who hit me, I saw his eyes..... He was black.

R. p. 155.

After the man had struck him the first time with the butt end of the pistol, Jonathan was "kind of in a daze" and did not know what to do. The second time the man hit him, he understood that the intruder meant business and he fell to the floor. This blow left a gash. Following that blow, Jonathan "just heard ringing in my years and commotion. After some time, there was a shot." *R.pp. 156-58.*

When Ramsey was brought into the courtroom, Jonathan testified that Ramsey was taller than the man who had struck him. However, when he saw Appellant standing, Jonathan indicated that's Appellant's height was consistent with the height of the man who had pistol-whipped him. *R. pp. 158-59.*

Each of Appellant's three co-defendants also testified against him. Jaron Dalton testified that on December 8, 2012, Jaron was at his father's residence cutting wood for a bonfire. He stayed there for most of the day. Eventually, he and his brother, Jordan, went to Clemson in order to pay a bill and to pick up Kadeem Ramsey.[4] They were riding in Jaron's black Dodge Durango. Their original plan was "[t]o hang out and smoke some weed." *R. pp. 182-84.*

The Daltons picked up Ramsey between 7:45 and 7:50 p.m. They spoke to Ramsey. Then, the three men went to Jaron's Clemson, South Carolina, apartment, which he shared with

[4] Ramsey and Jordan were friends from school and Jaron knew Ramsey through his brother. The Daltons frequently spoke to Ramsey. *R. p. 185.*

his roommate, Connor Mann. They stayed there for "a little while." *R. pp.172; 182-84.*[5]

While at this apartment, Ramsey told the Daltons that Appellant had told him about an apartment that they could go to and rob the occupant of marijuana. Ramsey contacted Appellant by cell phone. Jaron testified that Jordan fashioned a mask out of a toboggan (*see* State's Exhibit 46) by cutting holes in it for his eyes, Jaron wore a baseball cap (State's Exhibit 47), sunglasses, and a black hoodie (State's Exhibit 45); and Ramsey wore a hoodie. Once Ramsey contacted Appellant, the men left Jaron's apartment and drove to pick up Appellant on Vista Dr. in Clemson. *R. pp. 186-89; 205-06.*

Appellant met them outside of his residence. So, the Daltons and Ramsey did not get out of the car. Appellant "come up to the window and he was telling us a little bit about where it was and stuff like that. Then he got in the car." Appellant said location was in Chimney Ridge Apartments and that there were between three and four pounds of marijuana at that location. When the men left Vista Dr., they immediately headed for Chimney Ridge Apartments. Jaron was driving, Jordan was in the passenger seat, and Ramsey and Appellant were in the back seat.[6] *R. pp. 189-91.*

The men discussed a plan as they headed to the apartment complex: they would go into the apartment, "get everybody down and just try to find the weed and get out ...." *R. p. 191.* When they reached Chimney Ridge Apartments, Ramsey and Appellant pointed out the apartment they were going to rob, which was the first one on the left after entering the complex. *R. pp. 191-92.*

Jaron drove into the complex, parked about three or four houses away from this

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[5] Connor Mann testified at trial. His testimony is found at *R. pp. 172-77.*

[6] Appellant was seated behind Jaron Dalton.

apartment, and they sat in the SUV until another vehicle pulled out of the complex. Once that car had gone, they got out of the SUV and followed a "back alley" behind the houses to their intended destination. *R. pp. 192-93.*

Initially, Jaron Dalton had a 9 mm (State's Exhibit 42) and Jordan Dalton had a .380 pistol (State's Exhibit 43). However, Jaron gave the 9 mm to Appellant when Appellant pointed out that he was unarmed. Appellant was the first defendant to enter the apartment and Jordan Dalton followed him. They immediately ordered the men in the living room to get on the ground. The men initially hesitated, but quickly complied with this order after Appellant hit one of them with the 9 mm. Jaron and Ramsey then entered the apartment. *R. pp. 194-95; 202; 204-05.*

Jaron stood in front of the coffee table, while Ramsey and Jordan "went upstairs to see if there was anybody upstairs or anything." Jaron watched as Appellant "continued to hit people with the pistol and ... ask[] them where the dope was, and ... [ordered them to] ... stay on the ground, keep your faces down, stuff like that." Jaron also testified that Appellant struck the man he later shot "around eight to 10 times probably or more." Following one of these blows to victim, Appellant "[came] up and the gun went off." By this time, Jordan Dalton and Ramsey had come back downstairs and into the living room. *R. pp. 195-97.*

> ... [W]e all kind of stood there, kind of shocked that the weapon had fired .... Then I think it was my brother said run. That's when we proceeded out of the house out the back door. .... We [ran] up the back alley them back to my car..... We got in [the car] and we left Chimney Ridge went back to my apartment ... At a high rate of speed.

R. p. 197.

According to Jaron, "I think we got like one or two grams of weed ... off the coffee table." They smoke some of the marijuana and Appellant used his cell phone to call someone to pick him up from the apartment. That person arrived within five or ten minutes, and both

Appellant and Ramsey left with that person. *R. pp. 197-98.*

The Dalton brothers thereafter went back to their father's house and stayed there throughout the night. They left the weapons in Jaron's apartment. The next morning, however, Jordan suggested that they needed to get the guns and hide them somewhere in the woods. Jaron called Connor Mann and asked Mann to bring the weapons to him because "[t]hey might try to point the finger at us." At some point, Mann brought both weapons and the clothing that the Daltons had worn on December 8th to Jaron in a Duke Energy backpack (State's Exhibit 48). The Daltons later buried the backpack and its contents in woods, on their father's property. *R. pp. 173-77; 198-200.*

The Daltons stayed at their father's house for most of the remainder of the weekend and Jaron went to work on Monday. However, he "just couldn't take it anymore," and he turned himself in at the Pickens Law Enforcement Center after work on Monday. He gave a statement to members of the Pickens County Sheriff's Office indicating that Appellant had fired the fatal shot, and he led them to where he and his brother had hidden the backpack around 7:30 p.m. that night. Jaron was prosecuted for his role in the crimes, and was convicted of voluntary manslaughter as the result of Steven Gritch's death. *R. pp. 200-03.*

Kadeem Ramsey testified that he lived with his mother in Clemson South Carolina on December 8, 2012. He was at his grandmother's house that afternoon when he received a text message from Jordan Dalton asking him about marijuana. Although he was unable to locate any marijuana from several friends, he told Jordan Dalton that he knew someone who probably would have some, referring to Appellant. Ramsey and Appellant subsequently communicated on the 8th via text messages. *R. pp. 208-10.*

Ramsey corroborated Jaron's testimony that the Daltons picked him up in the black

Durango; that the three friends thereafter picked up Appellant on Vista Dr.; and that the co-defendants then went to Chimney Ridge Apartments, where they planned to rob someone of marijuana. Ramsey "told Jordan Dalton that it was a bad idea, [and] not to go in there. They discussed this briefly before Jordan told Jaron to hand Appellant the 9 mm. With Appellant leading away, the men then went into the apartment.[7] Ramsey testified that he was the last one to enter the apartment and that he went upstairs. The gunshot occurred as he was coming back downstairs. *R. pp. 210-14.*

Ramsey corroborated Jaron's testimony that, after the gunshot, the co-defendants ran out of the apartment and back to Jaron's vehicle. They then got in and went to Jaron's apartment. After ten or fifteen minutes, he and Appellant got a ride from Ericka Gibson, whom he had called for Appellant.[8] *R. pp. 214-17.*

They then went to the residence of Appellant's cousin, Cosha. From there, Ramsey wound up going to his aunt's house. Law enforcement pulled him out of a class the following Monday, and he gave a statement what had occurred on December 8th. He told them that he did not know who shot the victim but that only Jordan Dalton and Appellant had guns. *R. pp. 217-21; 223-24.*

Jordan Dalton corroborated his brother's testimony in virtually every key detail. He testified that he was living at his father's house at the time of the murder. On the night of December 8th, he and Jaron went to see Ramsey in order to get some marijuana. Their initial intent was to purchase it. After they picked up Ramsey, they returned to Jaron's apartment where

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[7] Ramsey testified that neither he nor Appellant covered their faces. However, Jordan was wearing a "ski mask" and Jaron was wearing a Carolina hat. *R. p. 213.*

[8] Mari Greenlee was with them as well. Gibson was driving her silver Honda. *R. pp. 216-17.*

they unsuccessfully attempted to find marijuana. After they were unsuccessful in their efforts, Ramsey told them that Appellant "had a way ... to go get some [marijuana]." Then, they prepared for robbery, as his brother had testified. *R. pp. 225-29.*

Next, they went to Vista Dr. and picked up Appellant. He indicated that he knew where they could rob drugs from someone. Appellant got into the car and they went to Chimney Ridge Apartments. Jordan confirmed that Jaron handed the 9 mm to Appellant before they entered the apartment. Jordan also confirmed his brother's testimony concerning the events surrounding the crimes that night, including his brother's testimony that the 9 mm "went off" when Appellant struck the victim with it, as well as the co-defendants' activities after the crime. *R. pp. 229-35.*

Ericka Gibson testified that she was dating Appellant in December 2012. She was at the residence of his cousin, Cosha Benson, in Ridge Crest, on the night of December 8, 2012. Ericka called Ramsey's cell phone at 8:45 and 8:48 p.m. that night and spoke to Appellant. Appellant wanted a ride and she agreed to go get him. So, she went to an apartment complex in Clemson, where she picked up Appellant and Ramsey, and she drove them back to Benson's house. After their return, Tavis Campbell, Benson, Ericka, Greenlee, Ramsey, she and Appellant were at Benson's residence. The group later went to Crocs, in downtown Clemson. *R. pp. 246-51; 301.*

Nineteen year old Tavis Campbell testified that he and Appellant are friends and that they were friends back in 2012. On Saturday, December 8, 2012, Tavis was staying at his sister's residence in Creekwood Apartments, in Clemson. Appellant came to Creekwood Apartments around noon or 1:00 p.m. on the 8th and was there for two or three hours. Imari Greenlee and Ericka Gibson were with him. With Ericka driving her silver Honda, they eventually gave Tavis a ride to Vista Dr., where Tavis lived with his mother. *R. pp. 256-59.*

They hung out outside of her residence for several hours. "About 6:00, [or] 7:00 [p.m.],"

Tavis saw Appellant get into a black or blue SUV being driven by a "white dude." Ramsey was also in the vehicle. Between forty minutes and an hour later, he saw Ericka's Honda. with both Appellant and Ramsey in it. Tavis asked Appellant what happened that night and Appellant replied, "Something went wrong." However, Appellant did not explain to him what that meant. Ramsey said that a gun went off. *R. pp. 258-64.*

Later that night, Tavis went with the group to Crocs between 8:00 and 9:00 p.m. He rode in Ericka's Honda. He spoke with members of the United States Marshalls Service roughly a week later and claimed that he did not know where Appellant was. This obviously was a lie because he was arrested with Appellant in a Toccoa, Georgia hotel. Tavis was charged with hindering an apprehension and he pleaded guilty to that offense. *R. pp. 264-67.*

In order to better pinpoint the approximate time of the crimes in this case, the prosecution introduced the testimony of Brian Jaynes, the Dispatch Supervisor for the Pickens County Sheriff's Office, that the first 911 call in this case was received at 8:27 p.m. on December 8th. That call, which was introduced as State's Exhibit 2, was published to the jury. *R. pp. 51; 54-55.*

Master Deputy Michael Torres works for the uniform road patrol division of the Pickens County Sheriff's Office. He and a highway patrolman were the first two officers to respond to the crime scene on December 8, 2012, arriving at 8:30 p.m. *R. pp. 56-57.* Upon entering the apartment, Deputy Torres saw the victim lying on the floor and another man was kneeling over him. Deputy Torres sent that person to the porch along with the patrolman, and he cleared the residence so that EMS personnel could attend to the victim. *R. p. 58.* While clearing the residence, he noticed "a heavy order of marijuana coming from the back bedroom area near the back door of the residence." *R. p. 60.*

Deputy Torres testified that there were no barriers that would prevent someone from

walking consecutively behind the apartments on a grassy common area surrounding the perimeter of the property. *R. pp. 62-63.*

On the way to the crime scene, dispatch had issued a BOLO for a "black Nissan SUV-type vehicle," and witnesses at the scene confirmed that a black SUV had left the complex. Later, officers viewed a time-stamped surveillance video taken by the complex's management's cameras. *R. pp. 64-65.* The officers began viewing the video at between thirty and forty-five minutes before Deputy Torres arrived. "The only vehicle that matched close to the description that was given initially was a large black Dodge Durango, which on the video." The Durango "had exited the gate house at such a high rate of speed" that it hit a speed bump hard and "bunny hopped." *R. pp. 64-65.* This occurred at 8:26 p.m. The State introduced still photographs taken from the video as State's Exhibits 11-12. *R. pp. 64-67.*

Inv. Gary Anthony, also with the Pickens County Sheriff's Office, arrived at the scene after Deputy Torres. He also saw the victim lying on the floor and smelled the "strong smell of marijuana coming from the residence." *R. pp. 72-74.* Inv. Anthony's responsibility was to supervise others involved in the investigation. Although nothing supporting a motive was initially recovered from the apartment, Inv. Anthony "felt like there had to be something more to it. So I wound up searching the outside rear of the home." In his search, he found both the drugs and drug paraphernalia that Rob McKinley had hidden earlier that night. Rob was arrested on charges related to the drugs. *R. pp. 74-75.*

Inv. Anthony was told the following Monday that the school resource officer had notified the Sheriff's Office that a girl had provided information about the murder. So, he and other officers spoke to Imari Greenlee around 9:00 a.m. Monday. Afterwards, the officers removed Ramsey from a classroom and interviewed him. Following this interview, they arrested Ramsey

for murder, burglary in the first degree, attempted robbery and a weapons charge. He was then taken to the Sherriff's Office. Ramsey later pleaded guilty to voluntary manslaughter, burglary in the first degree and the weapons charge. *R. pp. 76-80.*

Jaron Dalton came in while the officers were at the Law Enforcement Center on Monday afternoon. He was driving a black Dodge Durango. After giving a videotaped statement of his and his co-defendants' involvement in the murder, Jordan Dalton arrived and was interviewed. Later, Jaron accompanied the officers to his father's house. Jaron's grandmother gave consent for the officers to search the property, and Jaron led them to where he and Jordan had buried the backpack. The officers then seized the backpack (State's Exhibit 48) and its contents, including the toboggan mask (State's Exhibit 18) worn by Jordan, the hat (State's Exhibit 20) and hoodie (State's Exhibit 17) worn by Jaron, the 9 mm used to kill the victim (State's Exhibit 42) and the .380 (State's Exhibit 43). *R. pp. 80-86.*

A crime scene investigator found a spent 9 mm shell casing at the victim's feet (State's Exhibit 56) and a projectile (State's Exhibit 55) that had gone through his body and ended up in his clothing under his left armpit. Unfortunately, officers did not find any useable latent fingerprints. *R. pp. 89-97.* In a subsequent search of Jaron Dalton's Durango, officers found a live 9 mm cartridge. *R. pp. 99-101.* SLED Agent Chad Smith, a forensic firearms examiner, compared both the 9 mm shell casing (State's Exhibit 56) and the projectile (State's Exhibit 55) to projectiles and casings test fired by State's Exhibit 43, the 9 mm used by Appellant. He opined that both the shell casing and the projectile had been fired by that 9 mm. *R. pp. 282-83; 285-88.*

Dr. Michael Ward, a forensic pathologist employed as Greenville County's Chief Medical Examiner, performed an autopsy on the victim. Dr. Ward found a single gunshot wound. *R. pp. 239; 242.* He explained that:

> ... Mr. Grich had a gunshot wound which entered the right lateral chest or the right side of the chest, basically, in the midline of the side. This wound went through the skin and the chest wall at the level of rib number five. It passed through the upper lobe of the right lung, the area we call the pulmonary hilum, which is where the blood vessels coming from the heart pass into the lung. It then went through some fibers of the right atrium of the of the heart, one of the chambers of the heart, then through the left pulmonary hilum. So it got the blood flow out to both lungs. Then [the wound passed] through the tissues of the left upper lobe of lung and it exited the left chest, basically, at the same level of the fifth rib.

R. pp. 242-43.

Dr. Ward opined that the bullet had traveled from the victim's right side to his left side, before ultimately striking a firm object and creating an "abrasion collar." This was consistent with the victim laying on his left side, with the right side of his body up, and the bullet hitting the floor. *R.pp. 243-44.* Also, the trajectory of the bullet could have been consistent with the victim covering his face in a defensive posture. "Toxicology testing of Mr. Grich's femoral blood revealed marijuana as well as amphetamine." The amphetamine was "at a therapeutic level and would be consistent with" his known prescription for Adderall. *R.pp. 244-45.*

The State also introduced evidence that Appellant fled the jurisdiction to avoid prosecution for the murder. Deputy United States Marshal Douglas Leslie testified that the Pickens County Sheriff's Office contacted his Office shortly after the murder and sought assistance in locating and apprehending Appellant. Late in the afternoon of December 19, 2012, Deputy Leslie received a call from Deputy Scott Tickner, another member of his task force. He then went to Falls Landing Apartments, where Deputy Tickner had stopped a silver Honda Civic owned by John Gibson, Ericka Gibson's father. The officers found four men in the car: Devonte Montrel Hodges, MarticusTravon Gibson, Tavis Campbell, and Antonio Scott. *R. pp. 288-91.*

These men were interviewed and asked whether they knew Appellant's whereabouts, as

well as the last time that each man had seen Appellant. Each person signed a statement indicating that he understood he could be prosecuted if they did not answer the questions truthfully. *R. p. 291.*

On December 21st, the Marshal's Office received a tip that Appellant was with Ericka Gibson at the Budget Inn motel, in Toccoa, Georgia. Deputy Leslie and other members of his task force met with officers from the Stephens County, Georgia, Sheriff's Office, and they arrested Appellant at the motel. They also arrested Marticus Travon Gibson and Tavis "Chico" Campbell. They found Appellant hiding in the bathroom. with a hoodie on and the hood "pulled up." When asked his name, Appellant claimed to be "Antonio Scott." *R. pp. 291-94.*

Respondent submits that this evidence of flight to avoid prosecution and giving a false name tended to prove Appellant's consciousness of guilt. *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).[9]

ARGUMENT

I. Appellant has waived his right to complain of the trial judge's supplemental jury instruction on accomplice liability that was given in response to the jury's questions during

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[9] "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). Contrary to the evidence in *State v. Odems,* 395 S.C. 582, 585, 589-90, 720 S.E.2d 48, 49, 52 (2012), where a witness offered a plausible alternative reason for Odems fleeing the scene of his arrest in the State's case-in-chief – *i.e.*, he wished to avoid trouble because the driver told him that the driver did not have a license - there was no such plausible explanation for leaving the state here. Instead, viewing the evidence in the light most favorable to the State, the *only reasonable inference* is that Appellant fled because he knew that he would otherwise be arrested for the crimes he and his co-defendants had committed.

deliberations because he did not object when the trial judge instructed the jury on accomplice liability in the original jury charge, and he did not make the same arguments in support of his objection to the supplemental instruction, at trial, as he raises before this Court. Alternatively, the trial judge did not err in giving the supplemental instruction.

Respondent submits that Appellant has waived his right to complain of the trial judge's supplemental jury instruction on accomplice liability that was given in response to the jury's questions during deliberations because he did not object when the trial judge instructed the jury on accomplice liability in the original jury charge, and he did not make the same arguments in support of his objection to the supplemental instruction at trial, as he raises before this Court.

A. How issue was presented in the trial court.

The State requested a "hand of one, hand of all" jury instruction in the charge conference. The trial judge did not specifically rule on this requested instruction. Rather, he immediately asked the defense for its requests-to-charge. *R. p. 348, lines 15-22.* However, it is apparent that the State's requested instruction was granted because the State argued, without objection, that Appellant could be found guilty under principles of accomplice liability. *R. pp. 364-65.* While Appellant's closing did not specifically address the question of accomplice liability, his closing focused upon the State's failure to even prove his presence at the scene and his alibi defense. *R. pp. 355-61.*

Moreover, the trial judge charged jurors on accomplice liability (*R. p. 383*). Appellant did not object to this charge during the charge, itself, and he did not take *any* exception to the jury instructions after the jury was excused. *R. p. 392, lines 16-18.* After the jury had begun its deliberations, it returned with the following questions:

> What is murder?
> Does the defendant have to pull the trigger to consider it murder?
> Can we have a copy of the law?

Court's Exhibit 5, Supp. R. p. 1. See also R. p. 393.

The State suggested instructions on murder and accomplice liability were appropriate, but Appellant asked the trial judge to only charge the definition of murder. When the trial judge asked whether he objected to "the hand of one is the hand of all" charge being given, Appellant stated "I do, just based on the question, Your Honor." The trial judge overruled his objection. *R. p. 393, lines 6-18.* After a short recess, the trial judge sent the jury printed instructions covering the definition of murder, the permissible "felony murder inference, and accomplice liability. *R. p. 394, lines 1-6; Court's Exhibits 6-8, Supp. R. pp. 2-9.*

B. Discussion.

1. Waiver and procedural bar.

Appellant contends that the trial judge erroneously recharged jurors on accomplice liability because "[r]ather than asking about accomplice liability, the jury was asking if the accidental discharge of the weapon during a robbery met the elements required for murder." BOA, p. 8. Relying upon this Court's Opinion in *Wilds v. State*, 407 S.C. 432, 440, 756 S.E.2d 387, 391 (Ct. App. 2014), *reh'g denied*, (Apr. 24, 2014), *cert. granted* (Nov. 20, 2014), *cert. dismissed as improvidently granted*, 414 S.C. 341, 778 S.E.2d 112 (2015), he also asserts that the accomplice liability instruction was improper because, allegedly, "no evidence indicates that anyone other than Appellant, armed with a 9 mm, was the shooter." BOA, pp. 8-9. However, Appellant's argument is not properly before this Court on appeal for two important reasons.

First, he failed to contemporaneously object to the accomplice liability charge objection at the close of the jury charge. "The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge." *State v. Williams*,

266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976); *see also* Rule 20(b), SCRCrimP ("Failure to object in accordance with this rule shall constitute a waiver of objection"). Also, "the right to have the law declared may be waived by the parties and, ordinarily, silence in the face of an omission from, or error in the charge amounts to waiver." *Williams*, 266 S.C. at 335, 223 S.E.2d at 43. Here Appellant has waived his right to complain.

In *Lundy v. Lititz Mut. Ins. Co., Inc.*, 232 S.C. 1, 10, 100 S.E.2d 544, 548 (1957), the Supreme Court found that an objection to a jury instruction first raised when that instruction was presented to the jury for a second time was insufficient to preserve an issue with the instruction for appellate review. In *Lundy*, the trial judge instructed the jury on the applicable law at the conclusion of trial. *Id.* Once his jury charge was finished, he excused the jury and asked counsel if there were any objections to the charge or if any additional instructions were desired. *Id.* Defense counsel did not object to the charge, as given, but did ask the trial judge to present an additional instruction to the jury. *Id.* In response to that request, the trial judge recalled the jury, instructed them in the manner requested, and then presented further instructions to the jury that were "substantially the same" as instructions he had presented during his initial jury charge. *Id.*

After the jury reached a verdict adverse to the defendants, one of the defendants appealed, arguing the trial judge's further instructions violated the constitutional prohibition against judicial comments on the facts. *Id.* On appeal, the Court indicated it believed the challenged instructions constituted an unconstitutional comment on the facts. *Id.* However, the Court declined to reverse the case because it found that the defendant had waived his constitutional objection to the instructions. *Id.* In reaching that conclusion, this Court concluded that:

> [I]n the main charge . . . , the Court gave substantially the same instructions as those now complained of. If appellant thought these instructions violated Article 5, Section 26 of the Constitution, which we are inclined to think they did, counsel should have made timely objection when the jury was excused at the conclusion of the main charge. They waived the objection by failing to do so. Appellant cannot now complain of the Court's repeating substantially the same instruction to which counsel failed to object when given an opportunity to do so.

Id. (citations omitted).

While the Supreme Court decided *Lundy* sixty years ago, the rule stated therein is still good law, and has been more recently relied upon by the Supreme Court and this Court. *See State v. Hill*, 268 S.C. 390, 395, 234 S.E.2d 219, 221 (1977) ("After the main instructions, to which the Appellant neither objected nor requested additional charges, the jury returned for a clarification. At this point, Appellant for the first time requested additional charges which were rejected. By failing to object or requesting additional instructions to the main charge, Appellant waived any objection to similar subsequent instructions") (citing *Lundy*); *Swicegood v. Lott*, 379 S.C. 346, 356, 665 S.E.2d 211, 216 (Ct. App. 2008); *State v. Armstrong*, 263 S.C. 594, 600, 211 S.E.2d 889, 892 (1975) ("At the conclusion of the charge, an opportunity was afforded to counsel to make any objections thereto. No objection was made that the instructions given were inadequate nor were any additional requests made to the court. The failure to timely request a specific charge or charges constituted a waiver of any right to complain on appeal of asserted errors in the charge"). Thus, Appellant's objection to the supplemental instruction on accomplice liability was too late to preserve a challenge to the instruction on appeal.

A second and equally important reason that his present arguments are procedurally barred is that Appellant did not make the same arguments in support of his objection to the supplemental instruction as he now makes in this Court. As a result, his arguments are not properly preserved for appellate review. *State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000)

(an issue is not preserved if a party argues one ground for objection at trial and a different ground on appeal); *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one ground at trial and then an alternative ground on appeal). Also, he only raised a general objection to the supplemental instruction and this is "insufficient to preserve an issue for appeal." *State v. Varvil*, 338 S.C. 335, 340, 526 S.E.2d 248, 251 (Ct. App. 2000); *State v. Taylor*, 333 S.C. 159, 508 S.E.2d 870 (1998) (appellant's general objection to solicitor's question was insufficient to preserve issue of whether it was an impermissible attack on appellant's character). Rather, an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error. *State v. Byers*, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011); *State v. Prioleau,* 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *State v. Johnson*, 363 S.C. 53, 58–59, 609 S.E.2d 520, 523 (2005).

"Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all *relevant facts, law, and arguments*." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (emphasis added); *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App.2006) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review"). *Cf. Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329-30, 730 S.E.2d 282, 285 (2012) ("this is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants, but rather is an adherence to settled principles that serve an important function. While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation

grounds when it clearly is unpreserved").[10]

2. There was no error in giving supplemental charge.

Yet, even assuming *arguendo* that the Court finds the present argument properly before it, the Court should nevertheless affirm the trial judge's ruling. "The law to be charged must be determined from the evidence presented at trial." *State v. Rivera*, 389 S.C. 399, 404, 699 S .E.2d 157, 159 (2010). The trial judge "has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence." *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct.App.2002); *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). "A jury charge is correct if when read as a whole, the charge adequately covers the law." *State v. Drayton*, 411 S.C. 533, 544, 769 S.E.2d 254, 260 (Ct.App. 2015). "When reviewing a jury charge for error, this Court must consider the charge as a whole." *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 341 (1986).

The Court explained in *State v. Gibson*, 390 S.C. 347, 701 S.E.2d 769-70 (Ct.App. 2010), that:

> Under the "hand of one is the hand of all" theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense. [However, 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

[10] The absence of a contemporaneous, specific objection raising the same arguments now presented explains why appellate counsel did not originally brief the merits of this issue.

> 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).

Gibson, 390 S.C. 347, 354, 701 S.E.2d 766, 769-70.[11]

Contrary to Appellant's contention, it is not readily apparent that the jury's questions in Court's Exhibit 5 were seeking an answer to whether the "accidental discharge" of the 9 mm during a robbery met the elements of murder or whether the jury was asking if he could be convicted of murder even if an accomplice fired the fatal shot. Appellant challenged the State's proof of identity and he presented the defenses of alibi and accident. *See R. pp. 383-84* (jury instructions). To support his challenge on the State's failure to prove identity and his alibi defense, he elicited that Kevin Keck never saw the shooter's face because the shooter wore a mask; when asked the shooter's height, Kevin testified that he did not have a tape measure; the murder occurred roughly two years before trial; and the crime occurred in a matter of seconds. *R. pp. 114-15*. Also, counsel elicited that Sam Voison's vision was impaired after the assailants entered the apartment; he never saw who the shooter was because the shooter wore a mask; he never saw Appellant on the 8th; and he did not see who fired the shot. *R. pp. 124-25*.

On cross-examination of Daniel Persson, counsel established that Daniel did not see was who the shooter was because of the shooter's mask; he was on the ground with a gun in his face

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[11] "[P]roof of mere presence is insufficient, and the State must present evidence the participant knew of the principal's criminal conduct. .... 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.' " *State v. Reid*, 408 S.C. 461, 473, 758 SE.2d 904, 910 (2014).

throughout most of the ordeal; he had been smoking marijuana that night; and he could not positively say that Appellant was the same height as the shooter. *R. pp. 131-32.* Then, counsel's cross-examination of Jonathan Riordan established that Jonathan did not see the shooter's whole face because the shooter wore a mask and that Jonathan had told the Sheriff's Office that the shooter was "approximately 5'9"." *R. pp. 159-61.*

In his closing argument, Appellant did not specifically address the question of accomplice liability. Yet, this is hardly surprising, since his closing focused upon the State's failure to even prove his presence at the scene and his alibi defense. *R. pp. 355-61.* Appellant meshed his cross-examination exposing perceived weaknesses in proof of identity with evidence supporting his claim of alibi. The prosecution's evidence was that two African-American co-defendants and four co-defendants, altogether, were involved in the murder and other offenses.

While the prosecution's theory was that Appellant fired the fatal shot, it is clear that all four co-defendants were acting in concert with one another. Also, none of the victims positively identified him as the shooter; both Ramsey and Appellant are African-American; each of Appellant's co-defendants who testified against him had already pled guilty to manslaughter; the weapons used by Appellant and Jordan Dalton belonged to the Daltons; and the Dalton brothers hid both the weapons used and the clothing they had worn on their family's property.

Accordingly, it is quite plausible that a juror(s) questioned whether Appellant could be convicted of murder if he did not personally inflict the mortal injury, if a juror had a doubt as to whether another co-defendant's gun was fired. Counsel's failure to request a supplemental jury instruction on accident, when that was a defense presented to the jury, is a strong indication that counsel understood Court's Exhibit in the same manner as the trial judge.

Further, Appellant points to this court's decision in *Wilds* as authority that the law

requires the State show a dispute as to the identity of the one who struck the killing blow to support a charge of accomplice liability. His reliance upon this Court's decision in *Wilds* is misplaced. In *Wilds*, this Court relied upon *dicta* from the South Carolina Supreme Court's decision in *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011), which implied that a prosecution of a defendant under principles of accomplice liability was an "alternate theory of liability." *See Wilds*, 407 S.C. at 438-39, 450 SE2d at 390.[12] This Court then found that appellate counsel was ineffective in failing to raise a challenge to the trial judge's accomplice liability instruction on appeal because there was no dispute that the defendant was the trigger man in the murder and armed robbery. *Wilds*, 407 S.C. at 439-40, 450 SE2d at 390-91.

However, the *dicta* in *Barber* relied upon in *Wilds* did not support the conclusion reached in *Wilds*. The doctrine of accomplice liability can be directly traced to the early common law distinction between principles in the first degree and principles in the second degree. A person is a principle in the first degree if they are the actor or absolute perpetrator of the crime while a principle in the second degree are those who are present, aiding and abetting the *actus reus*. 4

[12] The reference in *Barber* implying that a charge on accomplice liability is a different theory of liability was necessarily *dicta*, since the Court held that "the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter. Thus, the charge on accomplice liability was warranted." *Barber*, 393 S.C. at 236, 712 S.E.2d at 439. As further support for the position that this language was *dicta*, Respondent would point out that S.C. Code Ann. § 14-1-50 (2003) provides that the common law of England applies in this state where it is not inconsistent with the laws of this state. Also, "the common law will not be impliedly changed, but only by clear and unambiguous legislative enactment will the settled rules of the common law be changed." *State v. Carson*, 274 S.C. 316, 319, 262 S.E.2d 918, 920 (1980); *accord Page v. Winter*, 240 S.C. 516, 518, 126 S.E.2d 570, 571 (1962) ("It is not for this court to repudiate the common law rule because we may think it illogical or undesirable"). *But see Russo v. Sutton*, 310 S.C. 200, 204, 422 S.E.2d 750, 753 (1992) (the Supreme Court has the authority under extremely rare circumstances and for compelling need to substantially change the common law). Because the *Barber* Opinion did not address the common law rule abolishing the distinction between principles in the first degree and principles in the second degree, discussed, *infra*, the language at issue must be considered *dicta*. *Id.*

William Blackstone, *Commentaries on the Laws of England* 34. The law has held that those persons who are present at a crime aiding and abetting are as equally guilty as principles since at least the time of King Henry IV. *Id.*[13] In 1809, the Court explained that:

> 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 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.*

State v. Fley, 2 Brev. 338, 345, 1809 WL 338, 6 (S.C.Const. App. 1809) (Emphasis added). *See also State v. Anthony*, 12 S.C.L. (1 McCord) 285, 287-88 (S.C.Const. App. 1821); *State v. Jenkins*, 48 S.C.L. (14 Rich.) 215, 226, 1867 WL 2730 (S.C.Const. App. 1867) ("All who are present concurring in a murder are principles therein, and the death, and the act which caused it, is, in the law, the act of each and of all. There is no distinction in the regard of the law, *in the degrees of their guilt*, or the measure of their punishment, *or the nature of their offence, founded upon the nearness or remoteness of their personal agency* respectively") (emphasis added); *State v. Hunter,* 79 S.C. 73, 73, 60 S.E. 240, 240-41 (1908) (where the defense disputed the State's witness who claimed defendant fired the fatal shot, the Supreme Court affirmed the conviction because the identity of the shooter was irrelevant and that the defendant was properly convicted as a principle since he was an aider and abettor). *Accord* 1 Bishop, *Commentaries* 470. More recently, the Court held that "[i]t 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."

[13] King Henry IV of England reigned 1399-1413.

State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000). Because South Carolina law does not recognize any distinction between liability as a principal in the first degree and a principal in the second degree, and because an accused indicted as a principal may be convicted under accomplice principles, *id.*, the submission of a jury charge on accomplice liability necessarily and logically cannot create an alternative theory of liability.

Yet assuming that the language in *Barber* is not *dicta*[14] and further assuming that *Wilds* was correctly decided, Appellant's reliance thereon is still misplaced. Unlike *Wilds* and similar to the conflicting evidence in *Barber*, 393 S.C. at 236-37, 712 S.E.2d at 438-39, the State's proof as to whether Appellant or one of his accomplice's fired the fatal shots was disputed by Appellant, who relied upon an alibi and the prosecution's failure to establish identity. Additionally, here (1) the trial judge had previously instructed the jury on accomplice liability, without objection, in his original jury charge; (2) there was sufficient evidence of accomplice liability in the record to support the State's request-to-charge on this theory; (3) Appellant had the opportunity to address whether he ws culpable as an accomplice, and he asserted alibi and a failure to prove identity; and (4) a question from the jury rendered a supplemental instruction on accomplice liability appropriate based upon the evidence presented to it.[15]

Finally, " '[a] defendant is entitled to a fair trial but not a perfect one.' " *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627 (1968) (quoting *Lutwak v. United States*, 344 U.S. 604, 619, 73 S.Ct. 481, 490 (1953)). *See also State v. Mizell*, 332 S.C. 273, 285, 504 S.E.2d 338,

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[14] Of course, if Respondent is wrong and the language in *Barber* relied upon in *Wilds* was not *dicta*, then, *Barber* also contravenes this well settled South Carolina law.

[15] Likewise, this Court's recent decision in *State v. Johnson*, 418 S.C. 587, 795 S.E.2d 171 (Ct. App. 2016), *reh'g and reh'g en banc denied* (Jan. 20, 2017) is distinguishable because the trial judge in this case charged accomplice liability in his original charge and Appellant was given an opportunity to address his liability as an accomplice in closing argument.

345 (Ct.App.1998). "The dual aim of our criminal justice system is 'that guilt shall not escape or innocence suffer,' *Berger v. United St*ates, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935). The harmless error doctrine recognizes these principles. See *Neder v. United States*, 527 U.S. 1, 18-19, 119 S.Ct. 1827, 1838 (1999); *State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013).

In the present case, Appellant's convictions should be affirmed because he clearly was not prejudiced by the supplemental instruction on accomplice liability, since an accomplice liability instruction was given in the original jury charge and Appellant did not object. Therefore, it must be considered harmless beyond a reasonable doubt, even if the supplemental instruction was not directly responsive to Court's Exhibit 5. *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").

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that his Court should affirm Appellant's convictions and sentence, and the judgment of conviction.

Respectfully submitted,

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