THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF GENERAL SESSIONS

The Honorable Brooks P. Goldsmith, Circuit Court Judge

Case No.(s)2012-GS-07-2246 & 2012-GS-07-2247

State of South Carolina

Respondent,

v.

Walter Tucker,

Appellant.

FINAL BRIEF OF APPELLANT

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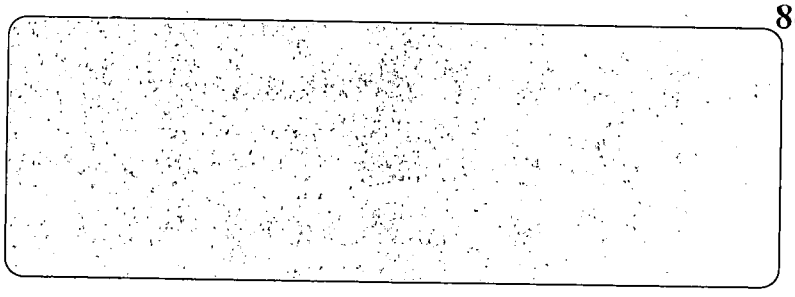

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STATEMENT OF ISSUES ON APPEAL

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A. THE TRIAL COURT ERRED BY FAILING TO CONDUCT AN EVIDENTIARY HEARING.

B. THE TRIAL COURT FAILED TO ACCURATELY RECALL THE INQUIRY MADE TO THE JURORS.

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IV. THE TRIAL COURT ERRED BY FAILING TO GRANT APPELLANT A DIRECTED VERDICT ON ARMED ROBBERY AS THERE WAS INSUFFICENT EVIDENCE PRESENTED BY THE STATE.

STATEMENT OF THE CASE

1.

On or about April 13-16, 2015, Appellant proceeded with jury trial on indictments 2012-GS-07-2246 Murder, 2012GS0702247 Robbery/Armed Robbery, and 2012GS0702248 Kidnapping. On or about April 16, 2015, the jury returned a verdict of guilty on Murder, guilty on attempted armed robbery, and not guilty of kidnapping. Appellant was sentenced to serve 39 years in prison.

2.

On or about April 24, 2015, a timely Motion for New Trial was filed. On or October 2, 2015, by email the Court set the hearing for the Motion for New Trial on October 12, 2015. Appellant disclosed to the Court and opposing counsel that an issue of juror misconduct had arisen and would need to be heard by the Court. On October 12, 2015, the written Amended Motion for New Trial Based on Juror Misconduct, Motion for Continuance, and Motion for Hearing on Juror Misconduct Inquiry was filed raising the ground of jury misconduct previously disclosed on October 2, 2015. On October 12, 2015, the Trial Court conducted a hearing as to Motion for Continuance. Specifically, Appellant requested that a continuance be granted and that an evidentiary hearing be held at which time juror could be produced and the witness for the Appellant. The Court denied the Motion for Continuance and denied the Motion for Hearing for Juror Misconduct and proceeded with a hearing on the Motion for New Trial. The State presented affidavits of approximately 6 female jurors and the Appellant presented the affidavit of one witness. The Court based its ruling strictly upon the tendered affidavits and issued an order denying the Motion for New Trial and Amended Motion for New Trial on or about October 28,

2015.

3.

On or about November 2, 2015, Appellant received notice of the entry of the order denying Defendant's Motion for New Trial. A timely Notice of Appeal was filed November 10, 2015. Appellant ordered the transcript and received a copy of the trial transcript on or about January 4, 2016. The deadline for the filing of the Initial Brief of Appellant is February 3, 2016.

ARGUMENT & CITATION

I. APPELLANT WAS DENIED DUE PROCESS WHERE THE TRIAL COURT FAILED TO CONDUCT AN EVIDENTIARY HEARING ON APPELLANT'S AMENDED MOTION FOR NEW TRIAL ALLEGING JURY MISCONDUCT

The applicable law relating to juror misconduct for willful nondisclosure is set forth in the recent decision of State v. Coaxum, 410 S.C. 320 (S.C. 2014). In Coaxum the Court stated:

> "All criminal defendants have the right to a trial by an impartial jury." State v. Woods, 345 S.C. 583, 597, 550 S.E.2d 282, 284 (2001) (citing U.S. Const. amends. VI and XIV).To that end, the jury must render its verdict free from outside influences of all kinds. Kelly, 331, S.C. at 141,502 S.E.2d at 105 (quoting State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d10, 12 (Ct. App. 1993)). To protect both parties' right to an impartial jury, the trial court must conduct voir dire of the prospective jurors to determine whether the jurors are aware of any bias or prejudice against a party, as well as to "elicit such facts as will enable [the parties] intelligently to exercise their right of preemptory challenge." Woods, 345 S.C. at 587, 550 S.E.2d at 284.
>
> ***"[T]rial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information.*** Kelly, 331 S.C. at 145, 502 S.E.2d at 106. ***Should jurors give false or misleading answers during voir dire, the parties may mistakenly seat a juror who could have been excused by the court, challenged for cause by counsel, or stricken through the exercise of a peremptory challenge."*** State v. Gulledge, 277 S.C. 368, 371, 287 S.E.2d 488, 490 (1982).
>
> ***In the event of such juror misconduct, the trial court must inquire into whether the withheld information affects the jury's impartiality.*** Kelly, 331 S.C. at 141, 502 S.E.2d at 104. However, the court should not grant a mistrial based on a juror's concealment of information "unless absolutely necessary." Id. At 142, 502 S.E.2d at 104. Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. Id. (citing State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989)); see also State v. Williams, 321 S.C. 455, 459-60, 469 S.E.2d 49, 52 (1996)(affirming the trial court's decision to seat an alternate juror midtrial after another juror's impartiality came into question); State v. McDaniel, 275 S.C. 222,224, 268 S.E.2d 585, 586 (1980)(same).
>
> We have previously held that a new trial is required "*only* when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor

in the use of the party's peremptory challenges. Woods, 345 S.C. at 587, 550, S.E.2d at 284 (emphasis added). ***In the face of a juror's intentional nondisclosure during voir dire, "it may be inferred, nothing to the contrary appearing, that the juror is not impartial." Id. At 587-88, 550 S.E.2d at 284. Thus, should the trial court fail to replace such a juror or grant a mistrial, the party need only demonstrate the error of the trial court's decision by providing the concealment was, in fact, intentional; however, the party need not show prejudice, as the bias against the moving party is inferred, and prejudice from the moving party's inability to strike the juror is apparent.*** Id. At 589, 550 S.E.2d 285.

We have said that a "juror's answer to questions touching his state of mind is primary evidence of his competency", and in case of doubt, justice demands that the challenge for cause be allowed. United States v. Chapman, 10 Cir., 158 F.2d 417, 421. In Consolidated Gas Equipment Company of America v. Carver, 10 Cir., 257 F.2d 111, 23 recognized the burden on the complaining litigant in a post-verdict hearing to show that failure of a juror to fully and truthfully answer questions propounded to the panel concerning his experience in similar litigation resulted in prejudice to his cause. We embraced the settled rule which moved the court to act only upon a showing of probable bias of the juror with consequent prejudice to the unsuccessful litigant.

In State v. Alvis Guillebeaux, 362 S.C. 270 (2004), the Court held that "The denial of a motion for a new trial will be disturbed on appeal only upon a showing of an abuse of discretion. State *v.* Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 69 (Ct.App.2000). "Where a new trial motion is based upon allegations that a juror gave misleading and incomplete answers on voir dire, the trial court's denial of that motion will be affirmed absent a prejudicial abuse of discretion." *Id.* at 163, 539 S.E.2d at 69-70; State v. Kelly, 331 S.C. 132, 145, 502 S.E.2d 99, 106 (1998).

A. THE TRIAL COURT ERRED BY FAILING TO CONDUCT AN EVIDENTIARY HEARING.

When allegations arise concerning a juror's failure to reveal information in response to

voir dire questions, courts look to whether the concealment was intentional and consider the nature of the information concealed. State v. Woods, 345 S.C. 583, 587-88, 550 S.E.2d 282, 284 (2001). A new trial is warranted if the court finds: (1) the juror intentionally concealed the information; and (2) "the concealed information would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." Id. However, a determination that a juror did not intentionally conceal the information ends the court's inquiry. State v. Sparkman, 358 S.C. 491, 497, 596 S.E.2d 375, 377-78 (2004).

Determining whether a juror's failure to respond to a voir dire question amounts to intentional concealment is a "fact intensive determination that must be made on a case-by-case basis." Sparkman, 358 S.C. at 496, 596 S.E.2d at 377. [362 S.C. 275]. ***Intentional concealment occurs "when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable."*** *Id.* Concealment is considered unintentional where the voir dire question posed is ambiguous or incomprehensible to the average juror or where "the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." *Id.* Although it may be inferred that a juror is not impartial if she fails to disclose a relationship without justification, such an inference may not be drawn where there is information to the contrary or the failure to disclose is innocent. State v. Stone, 350 S.C. 442, 448, 567 S.E.2d 244, 247 (2002). See also Lynch v. Carolina Self Storage, Inc., 409 S.C. 146 (S.C. App. 2014).

Accordingly, in a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences. Kelly, 331 S.C. at 141, 502 S.E.2d at 104; *see also* State v.

Salters, 273 S.C. 501, 257 S.E.2d 502 (1979) (finding a defendant in a criminal prosecution is constitutionally guaranteed a fair trial by an impartial jury and, in order to fully safeguard this basic protection, it is required that the jury render its verdict free from outside influences). Initially, the trial judge must make a factual determination as to whether juror misconduct has occurred. See Smith, 338 S.C. at 71, 525 S.E.2d at 266; see also Aldret, 333 S.C. at 315, 509 S.E.2d at 815 (holding where affidavits supporting juror misconduct are credible, the trial court must conduct an evidentiary hearing to determine if misconduct occurred). "Only if the trial court finds a juror is guilty of misconduct must the judge determine whether the misconduct affected the verdict, warranting a new trial." *Covington,* 343 S.C. at 164, 539 S.E.2d at 70.

In the instant case, the trial Court refused to conduct a full evidentiary hearing. The body of law clearly establishes that an inquiry must be made and that such inquiry is necessarily "fact intensive". The trial Court abused its discretion by failing to schedule and conduct an evidentiary hearing.

B. THE TRIAL COURT FAILED TO ACCURATELY RECALL THE INQUIRY MADE TO THE JURORS.

This Court has addressed the failure of a juror to reveal a relationship with a witness in State v. Galbreath, 359 S.C. 398, 597 S.E.2d 845 (Ct.App.2004). In Galbreath, potential jurors were asked during voir dire if they were close personal friends or business associates with any of the witnesses. A seated juror did not respond to this question, despite information that the juror knew the victim's mother and that the juror's brother-in-law rented land from someone in the victim's extended family. This court found no intentional concealment where the juror accurately answered the specific question posed and the alleged relationships did not amount to close

personal friends or business associates. Galbreath, 359 S.C. at 403-04, 597 S.E.2d at 847-48; *see Sparkman,* 358 S.C. at 498-97, 596 S.E.2d at 376-77 (finding no intentional concealment where the judge asked on voir dire whether anyone had been the victim of a "serious crime" and seated juror did not immediately recall that he had been a crime victim forty years earlier and was not sure if the crime amounted to a "serious" one). Therefore, the question is what is the "specific question" asked by the Court.

In the instant case, the Court's specific question (Trial Transcript at pg 38, ln 1-7) was as follows:

> **"Has any member of the jury panel ever had a close personal relationship or social relationship with any of the attorneys involved in this case, any of the witnesses that have been identified to you, or the defendant himself, if you have ever had a close personal or social relationship with any of those individuals would you please stand."**

Accordingly, the plain language of the inquiry of the Court's request is for each prospective juror to disclose any "close personal relationship" or any "social relationship". In Lynch v. Carolina Self Storage, Inc., 409 S.C. 146 (S.C. App 2014), the Court held that a relationship has been defined as:

> The definition of "relationship" denotes a "connection" between people. *See Webster's New World College Dictionary* 1209 (4th ed.2008) (defining "relationship" as "the quality or state of being related; connection" and "a continuing attachment or association between persons, firms, etc."); *The American College Dictionary* 1022 (1969) (defining "relationship" as "connection; a particular connection").

To that end, juror #70 responded that she knew a witness from Church. (Trial Transcript pg 39, ln 3-7). Juror #85 disclosed that a witness's son dated his daughter. (Trial Transcript pg 39, ln 23-25; pg 40, ln 1-9). Juror #33 disclosed that his kid plays with the kid of a witness, that they see each other every so often while dropping off kids. (Trial Transcript, pg 40, ln 13-25; pg 41, ln

1-13). Juror #171 disclosed that he went to paramedic school with one of the witnesses and that they correspond occasionally over email over the past several years, but not common to see each other. (Trial Transcript pg 41, ln 22-25; pg 42, ln 1-25). It is clear that jurors understood that the inquiry was not limited to close personal relationships, but also requested information regarding social relationships. Yet, there was no response from juror #210 Jessica Monsanto.

A review of the trial court's order reveals that the trial court, without the benefit of the transcript, incorrectly believed that ***"the Court inquired of all jurors, including Ms. Mansanto, if they were connected by blood or marriage or had a close personal friendship with any of the potential witnesses in the case."*** (See Order Denying Motion for New Trial, pg 2, ln 6-10). The trial court was mistaken. The trial court did not simply ask for close personal relationships, but in fact inquired as to "social relationships". (Trial Transcript at pg 38, ln 1-7). As such, a review of the trial court's order demonstrates that the Court's own order acknowledged that there was evidence of social media contacts between juror #210 Monsanto and the witness Quornisha Jones, that they worked together, and that they had each other's phone number. (See affidavit and attachments to affidavit of Quornisha Jones which were exhibits to the Amended Motion for New Trial). As such, even on affidavits, a prima facia case was made in support of Appellant's claim of juror misconduct. At a minimum, an evidentiary hearing should have been granted and the Court conduct an inquiry. The failure to set down an evidentiary hearing and have a full inquiry denied Appellant due process and was an abuse of discretion.

C. JUROR MONSANTO'S FAILURE TO DISCLOSE THAT SHE HAD A SOCIAL RELATIONSHIP WITH 2 OF THE STATES WITNESSES, ONE OF WHICH WAS MURDERED 2 WEEKS PRIOR TO TRIAL AND FOR WHOSE MURDER SHE BLAMED THE APPELLANT, WAS INTENTIONAL AND CALCULATED TO HARM APPELLANT.

It has long been the law in the State of South Carolina that a juror is expected to give a truthful answer in voir dire. In State v. Gulledge, 277 S.C. 368 (S.C. 1982), the Court held:

> "Where the trial judge grants counsel's request that the judge ask a particular question on voir dire, counsel is entitled to a truthful answer to the question. [277 S.C. 371] In the case of Photostat Corporation v. Ball, 338 F.2d 783 (CA 10 1964) it was held reversible error to fail to grant a new trial where jurors did not respond to voir dire questions: 'Necessarily, it is expected and required that jurors in their answers shall be completely truthful and that they shall disclose, upon general question, any matters which might tend to disqualify them from sitting on the case for any reason. ***It therefore becomes imperative that the answers be truthful and complete***. False or misleading answers may result in the seating of a juror who might have been discharged by the Court, challenged for cause by counsel or stricken through the exercise of peremptory challenge. Ball, supra, at 786."

Further, looking at the Ball decisions, the Tenth Circuit stated:

> "The Constitution does not provide any formula or procedures for the ascertainment of a mental attitude or state of mind from which requisite impartiality is to be determined. *See* United States v. Wood, 299 U.S. 123, 57 S.Ct. 177,81 L.Ed. 78; Frazier v. United States, 335 U.S. 497, 69 S.Ct. 201, 93 L.Ed. 187; Dennis v. United States, 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734. The common law and the statutes have, however, laid down definite safeguards for the effectuation of the constitutional guaranty. The common law cautiously excludes from the jury box for implied prejudice persons occupying a certain status or relationship to a litigant. *See* Cooley's Blackstone, Vol. 2, p. 223. In those enumerated categories the law conclusively presumes bias or partiality. *See* United States v. Burr, 25 Fed. Cas. Pp. 49, 50, No. 14,692. *See also* Mr. Justice Frankfurter dissenting in Dennis v. United States, supra 339 U.S. p. 181, 70 S.Ct. p.525.
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> Statutory law has relaxed the rigidity of the common law, and with enumerated exceptions has committed to the trial judge the power to excuse or exclude for good cause any person called as juror. 28 U.S.C. § 1863. And, all challenges for cause or favor are determined by the court. 28 U.S.C. § 1870. 'While impaneling a jury the trial court has a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges therefor. Dennis v. United States, supra, p. 168, 70 S.Ct. p. 521.
>
> Then, as if out of an abundance of precaution, the statute preserves the common-law right to peremptorily challenge a prospective juror for suspicion of bias or

partiality. The right is a traditional, arbitrary and capricious one and 'it must be exercised with full freedom, or it fails of tis full purpose.' Lewis v. United States, 146 U.S. 370, 378, 13 S.Ct. 136, 139, 36 L.Ed. 1011. Thus, under statutory law, the court is the judge of actual bias, but counsel is the sole and exclusive judge of whom he shall challenge for suspected bias or prejudice against his client's cause. ***No one will gainsay that the denial or substantial impairment of the statutory right of peremptory challenges is prejudicial to the constitutional right to a fair and impartial jury.***

> ***The very purpose of voir dire examination is to develop the whole truth concerning the prospective juror's state of mind, not only to enable the trial judge to determine actual bias, but to enable counsel to exercise his intuitive judgment concerning the prospective jurors' suspected bias or prejudice. 'The right of challenge includes the incidental right that the information elicited on the voir dire examination shall be true."*** Drury v. Franke, 247 Ky. 758, 57 S.W.2d 969, 985, 88 A.L.R. 917, 941. AS so well stated by Judge Vogel, while a trial judge, "The answers the questions put by the Court necessarily form the basis for the Court's excusing a juror on its own motion or challenges foe cause and the exercise of peremptory challenges by each side. Necessarily, it is expected and required that jurors in their answers shall be completely truthful and that they shall disclose, upon a general question, any matters which might tend to disqualify them from sitting on the case for any reason. ***It therefore becomes imperative that the answers be truthful and complete. False or misleading answers may result in the seating of a juror who might have been discharged by the Court, challenged for cause by counsel or stricken through the exercise of peremptory challenge. The seating of such a juror could and probably will result in a miscarriage of justice and therefore courts and attorneys, who are officials of the court, are ever mindful of the importance of jurors' answers to questions regarding their qualifications.*** United States v. Freedland, D.C., 111 F.Supp.852, 853.

Having established that the inquiry to the jury panel by the trial court certainly was clear and unambiguous and that Juror #210 Monsanto failed to disclose her relationship to Quornisha Jones and Antonio Brewer, the first prong of the analysis has been satisfied. Juror #210 Monsanto intentionally failed to answer the inquiry. When a court finds the juror's concealment was intentional, it must then determine whether the concealed information "would have been a material factor in the use of the party's peremptory challenges." State v. *Woods*, 345 S.C. at 587, 550 S.E.2d at 284 (2001). "[I]ntentional concealment occurs when the question presented to the

jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." 345 S.C. at 588, 550 S.E.2d at 284. It is undisputed that both Quornisha Jones and Antonio Brewer were disclosed as State witnesses. (Trial Transcript, pg 34, ln 8; pg 34, ln 23). In fact, another juror realized she knew Quornisha Jones from work at the same hospital which juror #210 Monsanto is employed, that juror contacted the Court at the end of the first day of trial (Trial Transcript, pg 147, ln 10-12), and was ultimately excused from service. (Trial Transcript, pg 153, ln 8-14). ***It is important to note, that the Court specifically asked for further inquiry before excusing the juror.*** (Trial Transcript, pg 150, 16-19). The juror stated that she had worked with the witness for about 3 years but on different floors (Trial Transcript, pg 151, ln 7-8), that she spoke with the witness who stated she rented a car for a person involved in the case (Trial Transcript, pg 151, ln 16-17), and that she was scared to testify. (Trial Transcript, pg 151, ln 22). Further, consider the Court's statements upon excusing the juror which were as follows:

> ***"Yeah, I just—if she had told me that in voir dire I think we would have probably removed her form the group. I feel I would guess also—one—one side or the other would have used a strike if the Court had not disqualified her. So I am going to – now..."***

So, certainly the trial Court knew to inquire further if there appears to be impropriety with a juror. Yet, the trial court abused its discretion in failing to inquire of juror #210 Monsanto upon the request of an evidentiary hearing by Appellant. Further, compare the excused juror #143 with juror #210 Monsanto. Both worked with witness Jones and both were on a talking basis with witness Jones. However, Monsanto's relationship also included social media connections and

telephone calls. Accordingly, there was more red flags and reasons to be concerned about Monsanto than juror #143 who was excused for cause. Notwithstanding the connection between juror #210 Monsanto and witness Quornisha Jones, the affidavit of Quornisha Jones also established that juror #210 Monsanto knew witness Antonio Brewer and blamed Appellant for having Antonio Brewer killed two weeks prior to trial. It is undisputed that Antonio Brewer was murdered two weeks prior to trial. (Trial Transcript, pg 76, ln 8-19)(Affidavit of Quornisha Jones, paragraph 3). Certainly, this information demonstrates a bias and inability to be impartial. Certainly, this information demonstrates that the failure to disclose the relationships to Jones and Brewer was intentional and indicative of not being impartial. Lastly, this information certainly would have resulted in juror #210 Monsanto being excused for cause or by peremptory strike.

II. APPELLANT WAS DENIED A FAIR TRIAL WHERE THE TRIAL COURT ALLOWED 404(B) TESTIMONY INTO EVIDENCE THAT ALLEGED THAT APPELLANT CONSPIRED TO MURDER A CODEFENDANT.

"South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). See also State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); Rule 404(b), SCRE. To be admitted, evidence of other crimes must be logically relevant to the crime charged. State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998). Further, where the other crimes are not the subject of conviction, they must be proven by clear and convincing evidence. Id. In cases where the evidence is offered as proof of a common scheme or plan, a close degree of similarity or connection between the prior bad act and

the crime is necessary. *Id.* A general similarity to the charged offense is insufficient. *Id.* The common scheme or plan and identity exceptions are interrelated, as evidence of a common scheme or plan essentially goes to prove the identity of the perpetrator. State v. Jenkins, 322 S.C. 414, 416 n. 2, 472 S.E.2d 251, 252 n. 2 (1996). Where the close similarity between the charged offense and the previous bad act enhances the evidence's probative value so as to outweigh its prejudicial effect, the evidence is admissible. State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993). See State v. Kennedy, 528 S.E. 2d 700, 339 S.C. 243 (S.C. App 2000); State v. Beck, 536 S.E. 2d, 342 S.C. 129 (S.C. 2000).

Appellant, from the beginning of trial and through the trial, objected to the admission of evidence that Appellant allegedly conspired to murder his codefendant. (Trial Transcript, pg 95, ln 21-23). The Court first denied Appellant's motion in limine in regards to this evidence prior to trial. (Trial Transcript, pg 141, ln 5-7). Further, the Court later denied Appellant's motion for reconsideration in which a detailed breakdown of the evidence was given to the Court and the Court listened to the interview of Keamber Bigelow. (Trial Transcript, pg 369, ln 1-4).

A. THE TRIAL COURT ERRED BY ADMITTING 404(B) EVIDENCE UNDER A THEORY THAT IT SHOWED "CONSCIOUSNESS OF GUILT".

At trial, the State argued and the Court relied upon the authority presented in State v. Edwards, 644 S.E. 2d 66 (2007) which held that threats to a witness designed to intimidate that witness may be admitted under 404(b). Edwards, supra, at 70. The Court of Appeals of South Carolina decision in Edwards was the first case in South Carolina to clearly establish this "consciousness of guilt" exception for a 404(b) analysis. However, Edwards did not eliminate

the need for such evidence to be proved by clear and convincing evidence. Two years later, the Supreme Court of South Carolina passed upon the issue in State v. Edwards, 678 S.E.2d 405, 383 S.C. 66 (2009). The Supreme Court affirmed the decision but clarified the requirements for admission of "witness intimidation" evidence by giving examples of prior case rulings. Specifically, the Supreme Court cited the decision of State v. Center, 205 S.C. 42 (1944) where the Court reversed holding that "there is no testimony whatever that the defendant had any knowledge of such transaction, therefore they are the acts of a third party and such testimony is prejudicial where it is not shown the accused was privy thereto". Accordingly, the Supreme Court of South Carolina reasoned that the admissibility of such evidence turns on whether the "source of the intimidation may be linked to the Defendant". The analysis then went on to cite Mincey v. State, 314 S.C. 355 (1994), where the conviction was reversed because "we noted the absence of 'evidence that Mincey intimidated any of the witnesses'". And so the standard set forth in Edwards has 3 prongs: 1) must be related to the offense charged; 2) reliable; and 3) satisfies SCRE 403. In the instant case, only prongs 2 and 3 are at issue.

B. THERE IS NO RELIABLE EVIDENCE UPON WHICH TO MEET THE CLEAR AND CONVINCING EVIDENCE REQUIREMENT FOR ADMISSION OF WITNESS INTIMIDATION EVIDENCE.

First, the only evidence presented that Appellant conspired to murder a codefendant was by and through the testimony of Keamber Bigelow. (Trial Transcript, pg 450-459). At trial, Bigelow testified that Appellant said he was going to kill the codefendant (Trial Transcript 451, ln 23-24) and that he had gotten Savage to do it (Trial Transcript, pg 452, ln 8-10) and that he threatened the white girl from testifying (Trial Transcript, pg 453, ln 5-7). Yet on cross

examination Bigelow admitted that Appellant was upset because he was being blamed for a murder he didn't do. (Trial Transcript, pg 454, 5-14). Bigelow also admitted that she stole Appellant's jewelry at the time she was making these statements. (Trial Transcript, pg 455, ln 16-25). Most importantly, Bigelow admitted repeatedly that Savage was never going to kill the codefendant because he is not that kind of person. (Trial Transcript, pg 456, ln 5-8; pg 458, ln 13-14)). Bigelow also admitted that the gun found in the vehicle Savage was driving was not the gun allegedly to be used in the murder of the codefendant. (Trial Transcript, pg 457, ln 8-10).

First, there was no evidence that the codefendant, Travis Polite, was ever told, heard, or knew of any plan to murder or influence him. Similarly, there was no evidence that Appellant ever threatened the white girl, Jessica Power. As such, this evidence was not evidence of witness intimidation. This makes the instant case factual dissimilar to Edwards or any other case cited by the State in which actual witness intimidation was the subject matter of the evidence.

Second, Bigelow clearly testified that Appellant was upset that he was being blamed for a murder he did not do. This is absolutely opposite of any contention that he is expressing a "consciousness of guilt". The State wanted to bootstrap the alleged statement of Appellant as a manifestation of consciousness of guilt. Yet, Bigelow's testimony clearly indicated that Appellant, assuming the statement was made, was simply upset he was being blamed for a murder he did not commit.

Third, there is no evidence to corroborate the State's theory of a murder plot. Bigelow said Savage wasn't going to kill anyone nor was the gun in Savage's vehicle going to be used for any murder. As such, the gun was not relevant, the car was not relevant, Savage is not relevant, and the testimony of Bigelow does nothing to establish "consciousness of guilt". Further, there is

clearly a reliability issue when Bigelow admits to stealing Appellant's jewelry at the time she is making these alleged statements about a murder plot. This evidence did nothing except attack the character of Appellant and is not based on any reliable evidence. Certainly, it was not clear and convincing upon which to allow for its admission. It is likewise telling that the case in Savannah, Georgia in which Bigelow was the primary witness alleging she was kidnapped by Appellant was ultimately dismissed. The dismissal came after Appellant was extradited to Georgia and shortly before the case was scheduled to proceed with jury trial. (See State of Georgia v. Walter Tucker, Superior Court of Chatham County, Case #CR142786).

C. ANY PROBATIVE VALUE OF THE 404(B) EVIDENCE WAS FAR OUTWEIGHED BY THE PREJUDICIAL ATTACK ON APPELLANT'S CHARACTER.

Appellant incorporates by reference the citations to the record and arguments of the preceding section. As such, as the evidence did not establish "consciousness of guilt", it only served to accuse Appellant of a plot to murder someone. Further, it served as the basis to allege that a gun found in the vehicle was connected to Appellant. There is nothing more prejudicial, especially in conjunction with juror #210 Monsanto who believed Appellant murdered her friend Antonio Brewer two weeks before. The jurors could well have believed that Appellant was responsible for Antonio Brewer's death after hearing the testimony of Bigelow. The jurors could have believed that Appellant was really capable of murdering the codefendant and rendered a verdict to prevent Appellant from being released. In sum, the character of Appellant was absolutely destroyed by admission of this evidence, but this evidence did nothing to prove to the case for which he was on trial. Without evidence of "consciousness of guilt", this evidence is

pure character evidence that is highly prejudicial without any probative value.

III. THE TRIAL COURT ERRED BY FAILING TO GRANT APPELLANT A DIRECTED VERDICT ON MURDER AS THERE WAS INSUFFICENT EVIDENCE PRESENTED BY THE STATE.

This Court has held that where two persons combine to commit an unlawful act and, in execution of the criminal act, a homicide is committed by one of the actors as a probable or natural consequence of those acts, all present participating in the unlawful act are as guilty as the one who committed the fatal act. State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972), cert. denied, 409 U.S. 1077, 93 S.Ct. 691, 34 L.Ed.2d 666. ***Mere presence at the scene of a crime is insufficient to convict one as a principal on the theory of aiding and abetting***. State v. Green, 261 S.C. 366, 200 S.E.2d 74 (1973).

Murder is the unlawful killing of another with malice aforethought, express or implied. S.C.Code Ann. § 16-3-10 (1985). Malice has been defined as the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. State v. Fuller, 229 S.C. 439, 93 S.E.2d 463 (1956); State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1952). Where there is no evidence in the record the appellant actually caused the death of the victim, a directed verdict should have been granted. See State v. Johnson, 291 S.C. 127 (1985).

In the instant case, it is undisputed by the State that Travis Polite is the shooter and killer of the victim. (Trial Transcript, pg 121, ln 10-20). As such, this narrows the scope of this analysis to whether there is evidence that Appellant participated in the murder by way of aiding and abetting Travis Polite. The only evidence as to the incident came from Jessica Power. Jessica Power did not see the shooting, did not see Appellant shooting. There is no forensic evidence or

identification evidence from any other source which implicate Appellant. In the light most favorable to the State, the sum of Jessica's testimony is that she alleged Appellant was in the trailer, that the victim never made into the trailer, that Appellant gave Travis Polite a gun and Travis Polite exited the trailer, she later heard a gunshot, and that Appellant left the trailer and she hears more gun shots. (Trial Transcript, pg 257, ln 17-25; pg 258, ln 1-15). Jessica Power never saw who shot first, what happened between Travis Polite and the victim, who fired any of the shots after she alleges Appellant left the trailer. In other words, Jessica Power could only testify to events in the trailer. It important to note that the jury did not find her credible and acquitted Appellant of all conduct inside the vehicle relating to the alleged kidnapping inside the trailer. As such, the State's case against Appellant is circumstantial.

This Court's circumstantial evidence jurisprudence centers primarily on the distinctions between direct and circumstantial evidence. Beginning with State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955), this Court recognized that the jury's evaluation of circumstantial evidence requires a particular and discrete instruction. In Littlejohn, the Court explained, "[I]t is necessary that every circumstance relied upon by the state be proven beyond a reasonable doubt; and that all of the circumstances so proven be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that they create a probability, though a strong one; and if, assuming them to be true, they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed. Id. (citing State v. Kimbrell, 191 S.C. 238, 242, 4 S.E.2d 121, 122 (1939)); see Edwards, 298 S.C. at 275, 379 S.E.2d at 889 (clarifying the proper standard trial courts should utilize in ruling on directed verdict motions in circumstantial evidence cases),

abrogated by Cherry, 361 S.C. at 601–02, 606 S.E.2d at 482. See also State v. Logan, 405 S.C. 83 (2013).

IV. THE TRIAL COURT ERRED BY FAILING TO GRANT APPELLANT A DIRECTED VERDICT ON ARMED ROBBERY AS THERE WAS INSUFFICENT EVIDENCE PRESENTED BY THE STATE.

A review of the indictment breaks down the essential elements which the State must present evidence beyond a reasonable doubt to obtain a conviction. To wit: that on or about September 6, 2012; the Appellant [Defendant]; by use of force, threats or intimidation and while armed with a deadly weapon; did take and carry away goods and/or monies from the person or immediate presence of Quantize Greer or Jessica Power.

It is undisputed that Appellant was never in the presence of Quantize Greer at the time of the alleged incident. Further, there is no evidence in the record to establish that anything was taken from Quantize Greer outside the trailer. This narrows the analysis as to whether the State presented any evidence to prove that some property was taken from Jessica Power. In the light most favorable to the State, Jessica Power is the only witness that claims that property was taken. Jessica Power claimed that her purse was taken and that money was taken from her purse. (Trial transcript pg 255, ln 17-25).

However, it is clear from the jury's guilty verdict only to the lesser included offense of attempted armed robbery and acquittal of kidnapping, that the jury did not believe that anything was taken from Jessica Power. It is also problematic that the jury even considered attempted armed robbery which was not argued by the State, nor was there any evidence of an "attempt only" ever presented. That is, to argue "attempt" the State would have to impeach

its own witness, Jessica Power, and force her to admit that she was in on the criminal enterprise. Such an argument, and evidence in support of it, is mutually exclusive to a theory of armed robbery as contained in the indictment. A person is guilty of attempted armed robbery if the person ***has a specific intent to commit armed robbery***. State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866-67 (Ct.App. 2001). "Robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear." State v. Bland, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995). The crime is "armed robbery" when a person commits a robbery while armed with a deadly weapon. State v. Tasco, 292 S.C. 270, 272, 356 S.E.2d 117, 118 (1987). Simply put, you cannot intend to arm rob a person that is conspiring with you to take the money of another. This truism is fatal to both armed robbery and attempted armed robbery. Therefore, the Court should have granted a directed verdict to the armed robbery count.

After the jury returned a verdict, the jury's verdict was consistent with the lack of evidence that any crime was committed inside the trailer. But it also again demonstrates why the trial court should have granted the directed verdict. The case against Appellant is circumstantial and depends entirely upon Jessica Power being a victim of an armed robbery ***to the exclusion of all other hypothesis of innocence of the Appellant.*** See State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955) The fact that it cannot be excluded that Jessica Power set up a drug transaction with the intent of defrauding the victim, conspired with Appellant, and is fact an unindicted codefendant is fatal to the State's case and requires a directed verdict for Appellant. It is important to note the testimony of Jessica Power's

boyfriend, James "Chip" Jabar who testified that after the shooting, Jessica hid a bag full of money under his trailer. (Trial Transcript, pg 496, ln 10-25; pg 497, ln 1-17). Accordingly, there is insufficient evidence to support the conviction of Appellant for armed robbery or attempted armed robbery. The Trial Court erred by failing to grant a directed verdict of acquittal as the State case could not and did not exclude every reasonable hypothesis of innocence.

CONCLUSION

For the above reasons and citations of authority, Appellant requests as follows:

1. That this Court reverse and set aside the convictions of the Appellant and enter judgments of acquittal for Appellant;
2. That this Court reverse and set aside the convictions of the Appellant and grant Appellant a new trial;
3. In the alternative, that this Court remand this case back to the Trial Court for an evidentiary hearing on juror misconduct and further proceedings; and
4. For such other and further relief which this Court deems just and proper.

This February 2, 2016.

Respectfully submitted,

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/s/ Robert E. Ferguson, Jr.

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I CERTIFY that I have this day served the within and foregoing:

- **Final Brief of Appellant**

upon all parties to this matter by depositing a true copy of the same in the United States Mail with proper postage affixed thereto and addressed as follows:

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