STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID LEE WALKER,

APPELLANT

APPELLATE CASE NO. 2015-000519

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On February 21, 2014, the Laurens County Grand Jury indicted Appellant David Lee Walker for murder. R. 482. On February 23-27, 2015, Appellant proceeded to trial before the Honorable Frank R. Addy, Jr., and a jury.

Elizabeth P. Wiygul represented Appellant, and Assistant Solicitor O. Warren Mowry represented the State. The jury found Appellant guilty as charged. R. 468, l. 7 - 469, l. 23. The trial court sentenced Appellant to life imprisonment. R. 473, l. 7 - 474, l. 13.

ARGUMENT

I.

The evidence adduced at Appellant's trial did not support the court's jury instruction concerning the accomplice liability principle of "hand of one is the hand of all" as an alternative theory of Appellant's criminal liability.

Relevant Facts

Laurens County Sheriff's deputies responded to a 911 call regarding a shooting at a single-wide trailer located outside of Enoree, South Carolina. R. 141, l. 3 - 147, l. 18. Arriving at the trailer, law enforcement encountered Appellant sitting in a chair on the front porch with a gunshot wound at the base of his neck. *Id.* Deputy Marty Crain, the officer first to arrive, heard frenzied screaming coming from inside the trailer. *Id.*

Crain knocked on the door. After a few minutes, a hysterical Kelly Ball opened it. Ball attempted to explain to Cain what happened, but was so frantic that she was unintelligible. Upon entering the trailer, Crain immediately saw that the trailer's owner and Ball's boyfriend, Johnny Cheeks, had also been shot. R. 121, l. 1 - 122, l. 22.

Crain and the other deputies administered first aid to Cheeks until EMS arrived. Both Cheeks and Appellant were taken to Greenville Hospital. Cheeks died the next day. R. 367, ll. 3-16. Laurens County Sheriff's Lieutenant Bryant Cheek was the lead investigator. He arrived shortly after the 911 call. R. 354, l. 7 - 355, l. 24.

He spoke briefly to Johnny Cheeks before Cheeks was taken to the hospital. Lt. Cheek would claim at trial that, "I heard Mr. Cheeks state that they came to rob him. [That Appellant] shot him. He shot [Appellant]. And then [Appellant] shot him again. *Id.* Police recovered a Lorcin .38 caliber semi-automatic pistol from Cheeks' yard. R. 279, l. 6 - 284, l. 4. At the hospital, Lt. Cheek performed a gunshot residue test on Appellant. R. 360, l. 18 - 361, l. 17.

Appellant's Trial

Appellant proceeded to trial alone. His two alleged co-defendants, Christopher Wells and Johnny Lee Saxon, did not stand trial with him. Appellant moved pre-trial to relieve his appointed defense attorney, explaining to the court that he did not believe she had adequately prepared his defense. R. 7, l. 2 - 13, l. 14. The trial court, noting that Appellant had successfully relieved several other attorneys that were appointed to represent him, denied the motion. Appellant then refused to participate in or attend his trial. *Id.*

State's Opening Argument

The State's theory of the case was that Appellant, Johnny Lee Saxon, and Christopher Wells attempted to rob Cheeks. R. 66, l. 14 - 70, l. 10. Assistant Solicitor Mowry promised jurors, "[w]e submit to you that David Lee Walker was the shooter, and we will present to you scientific evidence that will support that conclusion. Mr. Walker was also found at the scene. He also had been shot. We submit to you that he was shot by Johnny Lee Cheeks." *Id.* The State also explained the "hand of one is the hand of all" principle of accomplice liability. *Id.*

Trial Testimony of Toris Moore

The State's first witness was Appellant's niece, Toris Moore. R. 75, l. 23 - 76, l. 4. Moore claimed that on the night of the shooting, Appellant stopped by her house and asked to borrow her mother's gun. R. 76, l. 21 - 78, l. 24. Christopher Wells and Johnny Lee Saxon were with him.

Moore alleged that Appellant told her he needed a gun because the three were "going to Enoree to rob an older man at his house." R. 78, ll. 7-20. Moore lied to Appellant and claimed that her mother had sold the pistol. *Id.* Moore further testified that Wells already had a gun on him and that she lied to Appellant because she did not want to be involved. R. 79, l. 2 - 80, l. 12.

Trial Testimony of Kelly Ball

At trial, Ball testified that she and Cheeks had just arrived at Cheeks trailer after picking up food at a nearby Waffle House when there was a knock at the front door. R. 90, l. 9 - 91, l. 22. Cheeks went to answer the door while Ball remained in the living room. From her vantage point Ball could not see the front door. *Id.* Ball reluctantly admitted that Cheeks was a drug dealer and sold both drugs and moonshine out of his residence. *Id.* After Cheeks opened the front door and stepped on to the front porch, Ball heard an argument ensue between Cheeks and at least one other person. R. 92, l. 3 - 95, l. 24.

Shortly after the argument began, Ball claimed that she heard a loud thud and then multiple gunshots. *Id.* Ball stated that she then ran towards the still open front door to check on Cheeks. *Id.* Once she reached Cheeks, she saw Appellant also lying shot in the yard. *Id.* Ball further claimed that she saw a third individual she later identified as Christopher Wells, standing in the yard. Wells fled after seeing Ball. R. 96, ll. 4-21

Ball alleged that after she pulled Cheeks into the trailer and closed the door, Appellant knocked on the door pleading to be let in. Ball recalled that Cheeks told her "'[d]o not open that door. That is who shot me.'" R. 101, ll. 1-16. A few minutes after Ball pulled Cheeks inside the trailer, law enforcement and EMS arrived. R. 102, ll. 2-13.

Ballistic and Gunshot Residue Evidence

Law enforcement was unable to develop any latent prints from the Lorcin pistol recovered from Cheeks' yard. R. 305, ll. 10-11. SLED technician Jennifer Stoner completed gunshot residue tests on the samples taken by Lt. Cheek. R. 318, ll. 9-17. She testified that particles found on Appellant's hands were consistent and associated with gunshot residue. R. 321, ll. 2-23. Bullets removed from Cheeks were a ballistic match for the Lorcin pistol. R. 344, l. 11 - 346, l. 24.

Jury Instructions

Defense counsel objected to the State's request that the court instruct the jury on the accomplice liability principle of "hand of one is the hand of all." R. 404, l. 24 - 409, l. 14. Defense counsel argued that, based on the evidence the State presented at trial, the only way for the jury to find Appellant guilty was by concluding that he shot Cheeks. *Id.* Counsel also argued that the State had made a deliberate decision not to try Appellant with this alleged co-conspirators and had not charged Appellant with attempted robbery or criminal conspiracy. *Id.*

The State countered "except for Toris Mooer, Your Honor," implying that Moore's testimony regarding Appellant looking for a gun provided the State with a basis to allege "hand of one is the hand of all". R. 405, l. 5. The trial court summarily dismissed Appellant's objections and charged the jury

> Ladies and gentlemen, I instruct you that if a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probably or natural consequence of the act done in carrying out the common plan and purpose.

R. 453, ll. 11-17; *see also* R. 409, ll. 10-14. During prolonged deliberations, jurors requested and re-heard the testimony of Toris Moore and Kelly Ball. R. 467, ll. 16-17.

After two days of deliberations, the jury found Appellant guilty of murder, but **not guilty of possession of a weapon during the commission of a violent crime**. R. 469, ll. 12-20.

Discussion

There was no evidence produced at Appellant's trial to support charging the jury with the "hand of one is the hand of all" theory of accomplice liability. From the beginning of the trial, the State's theory was that Appellant was the shooter. R. 67, l. 14 - 68, l. 15. Nevertheless, the State successfully sought to have the jury instructed on the principle of "hand of one is the hand of all" accomplice liability. Accordingly, the trial court committed a reversible error in instructing the jury on the "hand of one is the hand of all" theory as the instruction was not warranted by the evidence. R. 453, ll. 11-22.

The trial court is required to charge only the current and correct law of South Carolina. *Sheppard v. State,* 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "The law to be charged must be determined from the evidence presented at trial." *State v. Knoten,* 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Mattison,* 388 S.C. 469, 478–79, 697 S.E.2d 578, 583 (2010).

Under the 'hand of one is the hand of all' theory, a person who joins with another to accomplish an illegal purpose is liable criminally for everything done by any co-conspirator incidental to the execution of their common objective. *State v. Mattison,* 388 S.C. 469, 478–79, 697 S.E.2d 578, 583 (2010).

In *Barber v. State*, our Supreme Court analogized jury instructions on alternate theories of liability as the prosecutorial equivalent of jury instructions on lesser included offenses:

> In *State v. Funchess,* 267 S.C. 427, 229 S.E.2d 331 (1976), and other cases, this Court has held that a lesser-included offense **may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence**. . . .

> Like a lesser-included offense, an alternate theory of liability may only be charged **when the evidence is equivocal on some integral fact** and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact.

Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011) (*emphasis added*). In *Barber*, the State alleged that the defendant and three others conspired to rob a drug dealer. During the course of the robbery the drug dealer was shot with a semi-automatic handgun. *Id.* The defendant's co-conspirators testified at trial and identified him as the shooter. *Id.* at 235, 712 S.E. 2d at 438.

However, defense counsel elicited testimony on cross-examination that one of the co-conspirators also had a semi-automatic handgun with him **during the robbery**. *Id.* On appeal, Barber alleged that the jury instruction on "hand of one is the hand of all" was improper. *Id.* at 236, 712 S.E. 2d at 438. The Supreme Court disagreed holding that the testimony elicited by defense counsel that a co-conspirator was armed **at the time of the robbery with the same kind of weapon as was used to kill the drug dealer permitted the charge.** "[T]he sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter." *Id.* at 236, 712 S.E. 2d at 439

Conversely, in *Wilds v. State*, this Court recently held that appellate counsel was ineffective for failing to challenge on appeal the trial court's decision to instruct the jury on the principle of the "hand of one is the hand of all" in response to a jury question. *Wilds v. State*, 407 S.C. 432, 440, 756 S.E. 2d. 387, 391 (Ct. App. 2014). Wilds was charged with the robbery and murder of Anthony Rumph. At trial, the State alleged that Wilds and two co-defendants passed Rumph on the street and that Wilds, believing Rumph was carrying money, led the group in robbing Rumph. *Id.* at 436-437, 756 S.E. 2d. at 389.

The co-defendants testified that Wilds shot Rumph in the chest after Rumph refused to surrender his wallet. *Id.* No weapon was ever recovered. During deliberations, the jury sent a note

asking the trial court "'if we say [Wilds is] guilty of murder, are we saying he of the three [alone] actually pulled the trigger?'" *Id.* at 437, 756 S.E.2d at 389. In response, the trial court instructed the jury on "hand of one is the hand of all" accomplice liability. Defense counsel objected, but appellate counsel did not raise the issue on appeal. *Id.*

In affirming the PCR court's granting of a new trial, this Court contrasted *Wilds* with *Barber* and concluded that "no evidence in the instant case indicated anyone other than Wilds was the shooter." *Id.* at 439-440, 756 S.E.2d at 390-391. Specifically, this Court determined that while the jury may have found the co-conspirators' testimony not credible, "an alternate theory of liability, such as accomplice liability, 'may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence.'" *Id.*

Therefore, to support an accomplice liability "hand of one is the hand of all" charge, the State must present evidence that a co-conspirator was the shooter and that Appellant was acting in concert with this co-conspirator when the robbery took place. *See State v. Dickman*, 341 S.C. 293, 295–96, 534 S.E.2d 268, 269 (2000). Like a defense counsel's request for instructions on a lesser included offense, in order to secure a charge on the accomplice liability theory of "hand of one is the hand of all," the State must present evidence "from which the jury could infer the defendant" was an accomplice rather than the shooter. *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439

In Appellant's case, the State presented no evidence indicating that anyone other than Appellant was the shooter under its theory of the case. As the assistant solicitor stressed in his opening argument, "[w]e submit to you that [Appellant] was the shooter, and we will present to you scientific evidence that will support that conclusion." R. 67, ll. 6-15. Two pistols were recovered from the incident scene. One belonged to Cheeks. The other was the murder weapon. According to Kelly Ball, Cheeks identified Appellant as the shooter. R. 101, ll. 4-9.

By contrast, in *Barber* there was evidence that two of the robbers were armed with .38 caliber pistol **at the time of the robbery**. 393 S.C. at 236-237, 712 S.E.2d at 439. The decedent was killed by a .38 caliber bullet. *Id.* While the defendant in *Barber* was identified by co-conspirators as the shooter, the jury could still conclude that the other co-conspirator with the second pistol shot the decedent and that the defendant was merely participating in the robbery. *Id.*

Here, the State's only argument in support of the "hand of one is the hand of all charge" was that Appellant's niece, Toris Moore, claimed that, **several hours before the incident**, Appellant tried unsuccessfully to borrow her mother's handgun and that Christopher Wells had a handgun with him at that time. R. 77, l. 17 - 79, l. 16. This is insufficient to justify a charge on an alternate theory of liability as it does not present a coherent alternative narrative "from which the jury could infer the defendant" was only an accomplice rather than the shooter.

The assistant solicitor was unequivocal in his belief that Appellant was the shooter. R. 67, ll. 6-15. The defense countered that Appellant was merely present at Cheeks' trailer when the shooting occurred. R. 73, l. 16 - 74, l. 24. Clearly the jury was influenced by the "hand of one is the hand of all" instruction as they returned a guilty verdict as to murder, but a not guilty verdict as to possession of a weapon during the commission of a violent crime. R. 469, ll. 12-20. However, given the facts presented by the State at trial, there was simply no evidence to support charging the jury with the "hand of one is the hand of all" theory of accomplice liability.

Accordingly, the trial court erred and Appellant is entitled to a new trial.

II.

The trial court committed an error of law by denying Appellant's motion for a continuance so as to allow Appellant, who was indigent, the chance to secure an expert in gunshot residue analysis where the trial court had only approved funding for such an expert one week before trial, thus denying Appellant's right to equal protection and due process right to present a complete defense.

Relevant Facts

Prior to trial, defense counsel moved for a continuance so that she would have the opportunity to retain a gunshot residue (hereinafter "GSR") expert. R. 28, l. 2 - 31, l. 8. Counsel explained that she had been appointed to Appellant's case only three months before Appellant's trial. R. 30, l. 7 - 31, l. 8. Counsel reminded the trial court that it had approved funding for an expert witness only a week before the trial. R. 26, ll. 20-25; *see also* R. 475 - 476.

Defense counsel further explained that, given the voluminous discovery, her need to prepare for trial, and the eve-of-trial provision of funding for an expert witness, she had hastily retained a former law enforcement officer whom she believed to be qualified as an expert on gunshot residue evidence. R. 26, l. 20 - 29, l. 6. On the day of Appellant's trial, the State's gunshot residue expert, SLED technician Jennifer Stoner, informed defense counsel that the individual she had retained was not qualified to provide expert testimony on gunshot residue. *Id.*

Accordingly, defense counsel requested a continuance so that she could retain and thoroughly vet a new GSR expert. *Id.* Counsel argued that without a defense expert, Appellant would be unable to present a complete defense. *Id.* Specifically, counsel highlighted discrepancies between the SLED GSR report and the actual results of the GSR test kit. *Id.*

Stoner's report concluded that "several [r]ound particles associated with gunshot residue were found" on the back of Appellant's left hand. The report also stated that one round particle associated with GSR was found on Appellant's left palm and the back of Appellant's right hand. *Id.*

The GSR test kit recorded that the "several round particles" were actually only two particles. Only four particles out of a total of six-hundred fifteen tested from four samples, registered as consisted with GSR. *Id.*

Defense Counsel posited, "[o]ur concern is that hearing from only one expert [the jury] is going to hear only what the State wants them to hear and we're not going to have the opportunity to explain how many particles you would actually expect to find on a person that has fired a gun." R. 26, l. 20 - 29, l. 6. In addition, counsel noted that the defense was entitled to have access to expert witnesses and that the State had only provided the GSR kit and SLED case file the week before trial. R. 26, l. 20 - 27, l. 12; R. 29, ll. 19-22.

The State countered that their expert "would be the perfect person" to fully and fairly explain GSR tests and its implications to the jury. R. 29, ll. 7-18. The State assured the court that SLED technician Stoner would testify on the environmental factors that could lead to a false positive GSR test result. R. 30, ll. 11-15. Without taking further argument, the trial court denied the continuance while imploring defense counsel to try and locate an expert in GSR analysis before the close of the State's case. *Id.* at ll. 16-17; R. 59, l. 24 - 61, l. 6.

Trial Testimony of SLED Technician Jennifer Stoner

Stoner testified that the GSR tests had been properly administered on Appellant and that GSR consists of three elements: barium, antimony, and lead. R. 318, l. 9 - 321, l. 5. Test results revealed that there were no GSR particles on Appellant's right palm. *Id.* There was "one round particle" consistent with GSR on the back of Appellant's right hand. *Id.* Appellant's left palm also had one round particle consistent with GSR on it. *Id.* The back of Appellant's left hand had "several round particles associated with gunshot residue." *Id.* As noted above, in actuality there were only two "round particles" on the back of Appellant's left hand.

Confirming defense counsel earlier concerns, despite only **four of the six hundred fifteen particles** being consistent with GSR, Stoner concluded, "**I found particles that were consistent and associated, which I feel are from gunshot residue, but I cannot call them gunshot residue because it was not the three component particles.**" R. 321, ll. 2-5 (*emphasis added*). On cross-examination, Stoner conceded that no GSR particles were found, but reiterated that she found particles consistent with GSR. R. 326, l. 1 - 327, l. 4.

Nevertheless, she assured jurors that, "we see them so much with gunshot residue. When we see them, it fits morphology and this composition, we feel that it is from gunshot residue. But due to the definition, we cannot call it gunshot residue. But in my opinion it is what I see when I have gunshot residue." *Id.* Likewise, Stoner dismissed the risk of environmental contamination or false positives resulting from Appellant's job as a car mechanic. Again, **Stoner expressed this level of certainty based on .65% of the six hundred and fifteen tested particles being partially consistent with GSR.**

During a brief re-direct, Stoner stressed that she had conducted GSR tests in over 2,000 cases during her sixteen year career. R. 327, ll. 19-22. Defense counsel was unable to secure a GSR expert before the end of trial. R. 402, l. 11 - 403, l. 24.

Discussion

"The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion." *State v. Yarborough,* 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *State v. Irick,* 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001).

However, even if there was no evidentiary support, "[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant." *State v. Preslar,* 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct.App.2005); *see also State v. Wyatt,* 317 S.C. 370, 372–73, 453 S.E.2d 890, 891 (1995) (stating that error without prejudice does not warrant reversal).

In holding that the trial judge did not abuse his discretion in refusing to grant a continuance, the South Carolina Supreme Court in *State v. Squires,* 248 S.C. 239, 149 S.E.2d 601 (1966) stated in pertinent part that "[t]here is no showing that any other evidence on behalf of the appellant could have been produced, or that any other points in their behalf could have been raised had more time been granted for the purpose of preparing the case for trial." *State v. Tanner*, 299 S.C. 459, 385 S.E.2d 832 (1989) (citing *Squires,* 248 S.C. at 244, 149 S.E.2d at 603).

In addition, if a defendant is not granted sufficient opportunity to present a complete defense, including the right to present favorable witnesses, the denial of a continuance can constitute an error of law. *State v. Cooper*, 747 S.E. 2d. 398, 404 (N.C. Ct. App. 2013) (holding that the denial of a defendant's right to present a witness through denial of a continuance, and the denial of a defendant's right to present a witness through a misapplication of a rule of evidence are constitutionally indistinguishable).

Given the pro-prosecution interpretation offered by SLED technician Stoner, it is abundantly clear that Appellant needed his own expert witness to challenge Stoner's conclusions. Concomitant with the need to retain an expert is the necessity for sufficient time to retain and consult with that expert. Accordingly, the trial court erred in not granting a continuance so as to allow Appellant the chance to secure a qualified expert.

An Accused's Right to Present a Complete Defense

The state and federal constitutions guarantee equal protection of the laws. U.S. Const. Amend. XIV; S.C. Const. art. I, § 3 and § 19. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038 (1973); *see also California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, (1984) (finding the Due Process Clause of the Fourteenth Amendment affords criminal defendants a meaningful opportunity to present a complete defense); *State v. Hutton,* 358 S.C. 622, 631, 595 S.E.2d 876, 881 (Ct.App.2004) (recognizing fundamental fairness requires criminal defendants be granted a meaningful opportunity to present a complete defense).

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers,* 410 U.S. at 294, 93 S.Ct. 1038. In South Carolina, our State's Constitution specifically enumerates that, "[a]ny person charged with an offense shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense." S. C. Const. art. I, § 14; *see also* S.C. Code Ann. § 17-23-60 (every person accused of a crime has the right to "produce witnesses and proofs in his favor").

The right to present a complete defense encompasses the right to call expert witnesses to rebut evidence and testimony put forward by the State. *Cooper*, 747 S.E.2d at 412 (holding that trial court violated defendant's constitutional right to present a complete defense by excluding defense expert's testimony); *Chambers*, 410 U.S. at 302, 93 S.Ct. at 1049 (the right to call witnesses in one's own behalf are essential to due process).

Indigent Defendants Right to Funds for Expert Witnesses

Indigent defendants are entitled to the assistance of expert witnesses. S.C. Code Ann. 17-3-50(B); *see also Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) *citing Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985) (holding that a "defendant must have 'a fair opportunity to present his defense,' thereby requiring the State to provide the 'basic tools' for an adequate defense to an indigent defendant.").

An indigent defendant's right to the assistance of an expert witness is rooted in equal protection, as our Supreme Court observed in *Ex Parte Lexington County*:

> **Any time criminal procedures discriminate against defendants by reason of their indigent status, such procedures violate the guarantee of equal protection.** Where the indigent defendant is subjected to a process which is required of an indigent defendant and not of a non-indigent defendant, then the process becomes invidiously discriminatory and violative of equal protection.

314 S.C. 220, 228, 442 S.E.2d 589, 594 (1994) (holding that *ex parte* hearings on expert funding for indigent capital defendants should be closed to the public) (internal citations omitted)(*emphasis added*); *see also Williams v. Vermont*, 472 U.S. 14, 105 S.Ct. 2465 (1985) (holding that a state violates equal protection by creating arbitrary classifications among similarly-situated persons); U.S. Const. Amend. XIV; S.C. Const. art. I, § 3; S.C. Const. art. I, § 19.

Trial courts should approve "such reasonable expenses as are plainly necessary for the defendant to have his day in court and to permit counsel to fairly and adequately present the case." *Bailey v. State*, 309 S.C. at 459, 424 S.E.2d at 506. Implicit in this responsibility is the obligation to approve funding in a timely manner that allows the defense to benefit from the expert's assistance when preparing for trial.

The trial court's denial of Appellant's request for a continuance deprived Appellant of the opportunity to fairly and adequately present his case.

In Appellant's case, the trial court abused its discretion in denying Appellant a continuance because it denied Appellant the opportunity to hire an expert in GSR analysis. R. 59, l. 10 - 61, l. 6. Crucially, the trial court had only approved the *ex parte* funding order the week before trial. R. 26, l. 20 - 27, l. 23; R. 475 - 476; *Bailey v. State*, 309 S.C. at 459, 424 S.E.2d at 506. Moreover, the State only provided defense counsel with SLED's GSR report the week before trial. *Id.* In an effort to be ready for trial, defense counsel had secured the services of someone she believed was qualified to testify as an expert in GSR evidence. *Id.*

She was informed on the day of trial by the State's expert witness, Jennifer Stoner, that this individual, a former SLED investigator, was not qualified to render expert opinions on GSR. *Id.* Clearly under these circumstances, counsel's motion for a continuance was not intended to delay Appellant's trial, but to allow time for counsel to secure an expert witness whose testimony was necessary to present a complete defense.

In denying the motion for a continuance, the trial court (with the wholehearted agreement of the assistant solicitor) opined that the defense could safely rely on the State's expert testimony to present unbiased scientific evidence. R. 60, l. 8 - 61, l. 8. Forcing an indigent defendant to rely on the State's expert witness because his attorney was unable to secure a defense expert in the week between the approval of funding for an expert witness and the start of Appellant's trial, violated Appellant's right to equal protection. *Ake*, 470 U.S. 68, 77, 105 S.Ct. 1087, 1093 (meaningful access to justice and fundamental fairness entitles indigent defendant to access to funds for expert witnesses). A non-indigent defendant would not have had to delay hiring an expert witness on the court's approval. *Ex Parte Lexington County*, 314 S.C. at 228, 442 S.E.2d at 594.

A review of SLED technician Jennifer Stoner's testimony demonstrates how reliance on an opponent's expert to testify in a neutral manner is totally improper in our adversarial justice system. *Ake*, 470 U.S. at 83, 105 S.Ct. at 1096 (holding that due process gives defendants the right to experts who will "assist in evaluation, preparation, and presentation of the defense"). The "pro-prosecution bias" of State crime laboratory experts has been widely criticized. *See* Andre A. Moenssens, *Novel Scientific Evidence in Criminal Cases: Some Words of Caution*, 84 J. Crim. L. & Criminology 1, 6 (1993) (noting that crime labs "may be so imbued with a pro-police bias that they are willing to circumvent true scientific investigation methods for the sake of 'making their point'").

In its opening argument, the State alluded to "scientific evidence" that will help jurors conclude Appellant was guilty. R. 67, ll. 6-15. This objective permeated Stoner's testimony. She repeatedly stressed that the particles found in the GSR kit were "consistent and associated" with GSR. R. 321, ll. 2 - 23.

Further, she misleadingly phrased her finding two particles consistent with GSR on the back of Appellant's left hand as "several" particles. R. 319, l. 5 - 321, l. 23. Finding two particles consistent with GSR (the particles are missing one of three GSR elements) falls well below the FBI's minimum threshold of three particles of actual GSR per sample (all three elements present) required before they will report a positive GSR test result. Michael A. Trimpe, *The Current Status of GSR Examinations*, FBI Law Enforcement Bulletin, May 2011, *available at* https://leb.fbi.gov/2011/may/the-current-status-of-gsr-examinations. An expert retained to assist the defense would not have reported these results as Stoner did.

Likewise, Stoner dismissed the multitude of environmental factors that could also lead to these elements being found on Appellant's hands, unrelated to firing a gun. R. 314, ll. 13-22. Appellant repaired cars for a living, auto mechanics frequently test positive for GSR as a result of

materials and substances they come in contact with. R. 28, l. 18 - 29, l. 6; *see* Diana M. Wright and Michael A. Trimpe, "Summary of FBI Laboratory's Gunshot Residue Symposium, May 31 - June 3, 2005," *Forensic Science Communications*, July 2006, *available at* https://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/july2006/research/ 2006_07_research01.htm.

The risk of contamination was particularly high in this case as Appellant was himself shot and then transported with Cheek, who had also been shot. In addition, Lt. Cheek collected GSR samples from Appellant several hours after the incident. R. 361, l. 1 - 362, l. 18. This gap, between the incident and the collection of evidence, presents a substantial risk of sample contamination. R. 357, l. 14 - 358 l. 18; *see* Wright and Trimpe, *supra.*

Stoner also minimized the inconvenient fact the particles could be present as a result of Appellant having been shot and not as a result of Appellant being the shooter. R. 322, ll. 1-17. Despite the weakness and ambiguity of the GSR evidence, Stoner claimed, with near absolute certainty, that the particles found on Appellant's hands were the result of the firing a weapon. R. 327, l. 19 - 328, l. 4; *see Watson v. Ford Motor Co.*, 389 S.C. 434, 449, 699 S.E. 2d 169, 177 (2010) (observing that conferring the "expert" label upon a witness may cause juries to give excessive or undue weight to the "expert" testimony).

Like many other formerly unassailable fields of forensic science, GSR evidence has come under scrutiny as more rigorous scientific evaluation is conducted. Jessica D. Gabel & Margaret D. Wilkinson, *"Good" Science Gone Bad: How the Criminal Justice System Can Redress the Impact of Flawed Forensics*, 59 Hastings L.J. 1001, 1020 (2008); *see also* Dennis L. McGuire, "The Controversy Concerning Gunshot Residue Examinations", *Forensic Magazine*, Aug.-Sept. 2008. **Notably, the FBI stopped conducting GSR tests in 2006**. Julie Bykowicz, *FBI Lab Scraps Gunfire Residue: Agency Won't do Analysis, Putting Evidence in Doubt*, Baltimore Sun, May 26,

2006, *available at* http://articles.baltimoresun.com/2006-05-26/news/0605260327_1_gunshot-residue-forensic-evidence-analysis.

Since Appellant was not afforded a reasonable opportunity to retain an independent defense expert, the jury was never informed of the weakness of the State's scientific evidence. *Ake,* 470 U.S. at 83, 105 S.Ct. at 1096; *see also U.S. v. Stafford*, 721 F.3d. 380, 393-395 (6th Cir. 2013) (conducting a lengthy review of GSR evidence and holding that the scientific dispute regarding the reliability of GSR evidence went to the weight not the admissibility of the evidence); *State v. Council*, 335 S.C. 1, 515 S.E. 2d. 508 (1999) (holding that once evidence is admissible under Rule 702, SCACR, and determined to be probative, it is admissible and the jury may "give it such weight as it deems appropriate.").

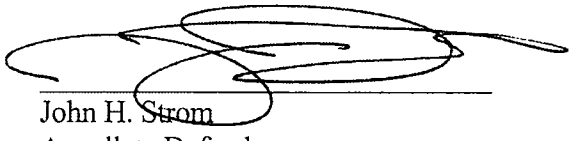
A non-indigent defendant would not have faced this court imposed funding hurdle. *Ex Parte Lexington County*, 314 S.C. at 228, 442 S.E.2d at 594. The defense expert's role is to aid the defendant and function as a "basic tool" for the defense. *Id.* at 77, 105 S.Ct. at 1093. To fulfill this function, an expert must be made reasonably available to "assist in evaluation, preparation, and presentation of the defense." *Id.* at 83, 105 S.Ct. at 1096. Such availability and assistance requires more than *pro forma* assurances of neutrality on the part of the State's expert and the opportunity for cross-examination. R. 59, l. 10 - 61, l. 6.

The trial court committed an error of law in denying Appellant a continuance to allow Appellant, who was indigent, the additional time necessary to retain an expert in gunshot residue analysis when the trial court had only approved funding for such an expert the week before trial and, thus, denied Appellant his right to equal protection and his due process right to present a complete defense. Accordingly, Appellant should be granted a new trial.

CONCLUSION

For the foregoing reasons, Appellant David Lee Walker respectfully requests that this Court reverse his convictions and remand this case to the Laurens County Court of General Sessions for a new trial.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of November, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

November 3, 2016

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

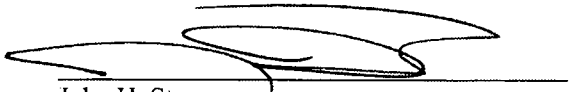
DAVID LEE WALKER,

APPELLANT

APPELLATE CASE NO. 2015-000519

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Sherrie Butterbaugh, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 3rd day of November, 2016.



John H. Strom
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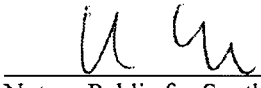
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 3rd day of November, 2016.



(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Laurens County
Frank R. Addy, Circuit Court Judge

THE STATE,

Respondent,

v.

DAVID LEE WALKER,

Appellant.

Appellate Case No. 2015-000519

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I. The evidence adduced at Appellant's trial did not support the court's jury instruction concerning the accomplice liability principle of "hand of one is the hand of all" as an alternative theory of Appellant's criminal liability.

II. The trial court committed an error of law by denying Appellant's motion for a continuance so as to allow Appellant, who was indigent, the chance to secure an expert in gunshot residue analysis where the trial court had only approved funding for such an expert one week before trial, thus denying Appellant his right to equal protection and his due process right to present a complete defense.

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. The trial court did not abuse its discretion instructing the jury on accomplice liability where the evidence presented at trial supported the charge and supported the theory that appellant and two co-defendants planned the robbery that led to the murder, and the evidence presented was equivocal as to who shot the victim. Further, the jury charge was correct, as a whole, and any error by the trial court during its instructions was harmless beyond a reasonable doubt.

II. The trial court did not abuse its discretion in denying a motion for a continuance where appellant cannot demonstrate what evidence or other point a second defense expert could have raised on his behalf, the record clearly shows defense counsel had adequate time to prepare for trial, and appellant had engaged in previous delay tactics. Further, any error by the trial court was harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

A Laurens County Grand Jury indicted appellant, David Lee Walker, for murder and possession of a weapon during the commission of a violent crime. (R.pp.482-84). Appellant proceeded to a jury trial on February 23, 2015 and was represented by Elizabeth P. Wiygul, Esquire.[1] (R.p.1). O. Warren Mowry, Jr., Esquire, and Ruston W. Neely, Esquire, of the Eighth Circuit Solicitor's Office represented the State. (R.p.1).

On February 27, 2015, the jury found appellant guilty of murder, but not guilty of the weapons charge. (R.p.469, lines 12-20). The Honorable Frank R. Addy, Jr., sentenced appellant to life imprisonment. (R.p.474, lines 2-4).

This appeal follows.

[1] Appellant refused to appear in court during the majority of the trial and chose to remain at the detention center. (R.p.7, lines 2-12; p.7, line 18-p.8, line 12; p.19, line 23-p.24, line 5; p.54, lines 8-18; p.239, line 17-p.240, line 2; p.406, lines 4-13). However, appellant was in court for the verdict and sentencing. (R.p.468, lines 7-11).

STATEMENT OF FACTS

Deputies were not sure what they would find when they drove up to a possible shooting scene at a mobile home in Laurens County on Halloween night—October 31, 2013. What they heard was a panicked and screaming woman inside, trying to help her friend who had been shot at least twice. What they saw was another potential victim outside, collapsed on the porch. What deputies would later learn through their investigation was about the plan between three men to rob the victim, Johnny Cheeks, which led to his violent death. (R.p.77, line 16-p.78, line 13; p.140, line 25-p.145, line 21; p.356, lines 1-16; p.356, line 24-p.357, line 3; p.374, lines 21-23).

At trial, the State presented evidence of the plan to rob the victim. Toris Moore (Moore), appellant's niece, testified appellant stopped by to see her on the night of the shooting. (R.p.75, line 25-p.76, line 4; p.76, line 17-p.77, line 15). Appellant was with two other men—Christopher Wells (Wells)[2] and a second co-defendant—and appellant asked Moore if she had a gun he could borrow. (R.p.77, line 16-p.78, line 8). Moore testified appellant told her the three men were "going to Enoree to rob an older man at his house"[3] and said they only had one gun and wanted another. (R.p.78, lines 9-11; p.79, lines 10-18). Appellant further told Moore the man sold drugs and liquor out of his home. (R.p.78, lines 12-17). Moore testified she lied to appellant and told him her mother pawned the gun because Moore did not want to be a part of the robbery. (R.p.78, line 18-p.79, line 5). Appellant, Wells, and the third man left the house. (R.p.79, lines 6-9).

Kelly Ball (Ball) corroborated Moore's testimony about the number of men involved in

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[2] Moore knew Wells as "Nightmare" and did not learn his real name until after the shooting. (R.p.77, line 21-p.78, line 2).

[3] The victim was sixty-one years old when he died. (R.p.249, lines 15-19).

the robbery. Ball was with the victim on the night of the shooting. (R.p.86, lines 9-24). The two had just returned to the victim's mobile home when someone knocked on the door, and the victim answered it. (R.p.91, lines 3-12). Ball testified the victim walked out, carrying keys and money in his pockets, and a gun. (R.p.92, lines 2-17; p.103, lines 10-13). Ball heard arguing and "some cursing," and testified she heard three voices, but only recognized that of the victim. (R.p.92, line 18-p.93, line 1). Ball stated she also heard "scuffling," a loud thud, and seconds later she heard a gunshot. (R.p.93, lines 2-6). Ball ran down a short hallway toward the front door and subsequently heard four more gunshots. (R.p.93, lines 9-20; p.127, lines 12-21). The door was not closed, so Ball could see out into the yard. (R.p.93, line 21-p.94, line 2). Ball crouched down in the doorway and yelled, asking if the victim was okay, and he told her he had been shot and to get help. (R.p.94, lines 2-5).

Ball testified when she looked outside, she saw a man lying on the ground, later identified as appellant, and a second man standing near him. (R.p.94, lines 6-10; p.124, lines 2-20). The second man was standing under a street light and Ball stated she made eye contact with him and got a good look at his face before he took off running away from the shooting scene. (R.p.95, line 20-p.96, line 8). Ball later identified the man under the light as Wells, one of appellant's two co-defendants. (R.p.96, lines 9-19; p.120, lines 4-14). Ball testified Wells ran to a waiting vehicle, got in the back seat, and the driver sped away. (R.p.97, lines 4-25).

Ball dragged the victim inside the house, called 911, and testified appellant was still on the ground. (R.p.98, lines 1-11). Ball stated the victim was panicked and said he was "going to lay here and die." (R.p.99, lines 19-24). A few minutes later, someone banged on the door and Ball asked who was there, and the person replied, "David." (R.p.100, line 5-p.101, line 3). Ball testified the victim told her, "Do not open that door. That is who shot me." (R.p.101, lines 4-

10). The knocking soon stopped. (R.p.101, lines 17-22). As Ball and the victim waited for emergency crews to arrive, the victim told Ball the men took everything he had on him, including his money, keys, and jewelry.[4] (R.p.129, lines 12-14; p.137, lines 13-24). Law enforcement arrived minutes later. (R.p.101, line 23-p.102, line 1).

Lieutenant Marty Crain (Crain) was the first deputy to approach the mobile home, and testified he saw appellant collapsed in a chair on the porch and he heard a woman screaming inside. (R.p.140, lines 19-21; p.140, line 25-p.141, line 4; p.141, lines 22-23; p.142, lines 5-13; p.143, lines 1-3). Ball opened the door and Crain saw the victim on the floor, bleeding, with at least one gunshot wound to his neck. (R.p.143, line 22-p.144, line 17). Crain testified the victim was conscious and talking, and said the man on the porch shot him. (R.p.144, line 22-p.145, line 5). Another deputy who arrived shortly after Crain found a gun on the ground in the yard, which was later determined to be a .380 Lorcin handgun. (R.p.167, lines 2-5; p.170, lines 4-13; p.279, lines 6-13).

Sergeant Robert Timmons (Timmons) remained on the porch with appellant until medical crews arrived. (R.p.209, lines 20-22; p.213, lines 4-9). Timmons testified appellant was not a suspect at the time, and deputies thought he might be a victim even though appellant said he had not been shot, but had been "jumped." (R.p.214, lines 4-14; p.353, line 21-p.354, line 17). Specifically, appellant told Timmons a few people "jumped on [him] and his arm was broken in two places." (R.p.214, lines 15-21). Appellant said his attackers took off in a tan Ford Bronco before law enforcement arrived. (R.p.214, lines 22-24).

The lead investigator, Lieutenant Bryant Cheek (Cheek), testified the victim was alive

[4] The victim still had his gun and told Ball to put it under the mattress in his bedroom, "where it goes." (R.p.103, line 23-p.104, line 8). Ball later showed investigators where to find the gun. (R.p.104, lines 14-23).

and talking when he arrived at the scene. (R.p.352, lines 8-21; p.360, lines 7-17). The victim told him "they" came to his home to rob him, and that appellant shot him, the victim fired back, and appellant shot him again. (R.p.355, lines 1-5). Both appellant and the victim were taken to the hospital. Cheek testified he did not realize how serious the victim's injuries were until he arrived at the hospital to continue his investigation. (R.p.360, lines 18-24). The gunshot wound to the victim's neck was not life-threatening. (R.p.250, lines 1-13; p.251, lines 1-5). However, the bullet that entered the victim's abdomen caused severe internal bleeding and damage to multiple organs as it passed through his body, eventually leading to his death. (R.p.251, lines 8-24; p.260, line 20-p.261, line 1).

While at the hospital, appellant consented to a gunshot residue (GSR) test of his hands.[5] (R.p.361, line 1-p.362, line 7). The results of the tests revealed the presence of particles associated and consistent with GSR, and a bullet that fell out of the victim's clothes at the scene was later matched to the Lorcin gun found in the yard. (R.p.148, lines 6-10; p.343, lines 11-20; p.368, line 11-p.369, line 1). Based on that evidence and information from Toris Moore, Kelly Ball, and the victim's statements before he died, investigators arrested appellant and his two co-defendants for the murder of Johnny Checks.

[5] Cheek testified he also wanted to take samples from the victim, but he was in surgery. (R.p.366, lines 1-6). However, Cheek stated he would not have been surprised to find GSR on the victim's hands because he had previously admitted to shooting appellant.. (R.p.366, lines 7-24).

ARGUMENTS

I.

The trial court did not abuse its discretion instructing the jury on accomplice liability where the evidence presented at trial supported the charge and supported the theory that appellant and two co-defendants planned the robbery that led to the murder, and the evidence presented was equivocal as to who shot the victim. Further, the jury charge was correct, as a whole, and any error by the trial court during its instructions was harmless beyond a reasonable doubt.

How the Issue Was Raised

During his opening statement, the solicitor told the jury the State would present evidence that appellant and two men went to the victim's mobile home to rob him. (R.p.66, lines 4-8). While the State believed appellant was the shooter, the solicitor also informed the jury it could find appellant guilty under the theory of accomplice liability because he and his co-defendants planned the robbery and the victim was murdered during the commission of that crime. (R.p.66, lines 14-20; p.69, line 2-p.71, line 2).

Prior to the jury charge, defense counsel objected to the proposed instructions on accomplice liability and the felony murder inference, and argued the State had not presented sufficient evidence to support either of the theories. (R.p.404, line 20-p.405, line 12). Counsel asserted the State maintained at trial that appellant was the shooter, and the State's strategic decision not to charge appellant with armed robbery evinced its theory that no one other than appellant shot the victim. (R.p.407, line 11-p.408, line 9). However, counsel acknowledged she would request a "mere presence" charge, if the court instructed the jury on accomplice liability. (R.p.405, lines 19-21).

The State countered that witnesses' testimony established appellant and two men "intended to go as a group to Enoree and rob a drug dealer" who lived there. (R.p.408, lines 10-

24). The State argued it asserted appellant was the shooter because the victim said he was, but there remained sufficient evidence presented to support the "hand of one, hand of all" and felony murder inference instructions because "clearly there was a robbery planned," appellant was present, and the homicide was a logical extension of the robbery.[6] (R.p.408, line 10-p.409, line 9).

The trial court ruled it would charge the jury on both theories because there was evidence "from which one could conclude, that the hand of one instruction is appropriate as well as the felony murder inference." (R.p.409, lines 10-14).

The trial court subsequently instructed the jury at length on the law of the case, including the elements of the charged crimes, reasonable doubt, witness credibility, and burden of proof. (R.p.444, line 16-p.460, line 13). The court also charged the jury on accomplice liability, explaining, "Whether two or more acting with a common plan or intent are present at the commission of the crime, it doesn't matter who actually commits the crime. All are guilty. The hand of one is the hand of all." (R.p.453, line 11-p.454, line 21). The court then defined the necessary element of intent before cautioning the jury:

> [M]ere presence at the scene isn't sufficient to prove someone guilty of a crime. The Defendant's presence where a crime is being committed, or mere association with a person who commits a crime, doesn't make a Defendant an accomplice or an aider and abettor of the person committing the crime. The burden is on the State to prove every element of the crime charged. If you find after reviewing all the evidence that the State has proven that the Defendant was only present at the scene of the crime and that they have not proved beyond a reasonable doubt any other participation in the crime, then you should find – then you must find the Defendant not guilty. The law is that proof of being at the scene of the crime is not sufficient to find someone guilty.

[6] The State further explained it did not charge appellant with armed robbery because he remained at the scene after being shot, and did not flee with any of the victim's belongings. (R.p.408, lines 20-24).

(R.p.454, line 21-p.455, line 23). Additionally, when charging malice to the jury, the court explained:

> I instruct you that if one intentionally kills another during the commission of a felony, the inference of malice may arise. If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you along with all other evidence in the case and you may give it the weight that you decide it should receive.

(R.p.456, line 25-p.457, line 8). Following the instructions, the jury deliberated for about four and a half hours before retiring for the evening, then continued deliberating for another hour the following morning, and returned with a guilty verdict for murder. (R.p.461, lines 12-13; p.462, lines 4-5; p.466, lines 4-22; p.468, lines 2-10; p.469).

Standard of Review

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). In reviewing jury charges for error, appellate courts must consider the trial court's charge as a whole and in light of the evidence and issues presented at trial. *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013) (citation omitted). "A jury charge is correct if, when read as a whole, the charge adequately covers the law." *Id.* at 90-91, 747 S.E.2d at 448. A charge that is substantially correct and covers the law does not require reversal. *Id.*

Analysis

Under the "hand of one is the hand of all" theory, a person who joins with another to accomplish an illegal purpose is criminally liable for everything done by his accomplice incidental to the execution of the common plan. *State v. Langley*, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). Our Supreme Court has further held that "[l]ike a lesser-included offense, an

alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of a fact." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011). In *Barber*, four men committed an armed robbery and, during the robbery, one of the men shot two of the victims. *Id.* at 234-35, 712 S.E.2d at 437-38. Three of the robbers pled guilty and all testified at Barber's trial that Barber shot the victims. *Id.* at 235, 712 S.E.2d at 438. On appeal, Barber argued the evidence at trial did not support a jury charge on accomplice liability. *Id.* at 236, 712 S.E.2d at 438. Our Supreme Court noted "[t]o support an accomplice liability charge in this case, the question is whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him when the robbery took place." *Id.* at 237, 712 S.E.2d at 439. Under this test, the Court ultimately found the trial court did not err in instructing the jury on accomplice liability because "the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter." *Id.* at 236, 712 S.E.2d at 439.

Here, the evidence presented at trial supported the inference that appellant and his accomplices conspired to rob the victim, leading to his murder. *See State v. Fleming*, 243 S.C. 265, 274, 133 S.E.2d 800, 805 (1963) (holding the State need not show a formal expressed agreement to prove parties acted as accomplices, but may prove the agreement by circumstantial evidence and the conduct of the parties). Appellant's niece testified appellant, Wells, and a third man were together on the night of the murder when appellant asked her if she had a gun he could borrow because they planned to rob a man in Enoree. (R.pp.75-79). The victim's friend corroborated that testimony when she stated she saw two men outside the victim's home that she did not recognize and saw a third man in the getaway vehicle. (R.pp.94-97; p.120; p.124). She later identified two of those men as appellant and Wells. The victim's friend also testified to

hearing several voices, including at least one she did not recognize. (R.pp.92-93). Moreover, an investigator testified the victim told him "they" came to his house to rob him. (R.p.355). Such testimony supported the theory that appellant and his co-defendants planned the robbery together and the victim died as a consequence. Accordingly, the evidence was sufficient to support an accomplice liability charge. *See Langley*, 334 S.C. at 648, 515 S.E.2d at 101 (explaining that under the "hand of one is the hand of all" theory, a person who joined another to accomplish an illegal purpose is liable for everything done by his accomplice in the commission of the common plan); *see also State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (holding the trial court should grant a requested instruction if there is any evidence presented at trial to support the charge).

Moreover, similar to the facts in *Barber*, the evidence presented in appellant's case was equivocal as to who fired the shot that ultimately killed the victim. *See Barber*, 393 S.C. at 236, 712 S.E.2d at 439 (holding an alternate theory of liability may be charged when the evidence is equivocal on some integral fact and the jury was presented with evidence supporting the existence or nonexistence of a fact). While the victim told his friend and investigators that appellant shot him, the victim was in pain and bleeding from two gunshot wounds at the time. More importantly, the jury also heard evidence that the gun used in the murder did not belong to appellant. (R.p.79). The victim's niece testified appellant told her he and his accomplices wanted another gun to use during the robbery because they only had one, which belonged to Wells. (R.pp.77-79). Further, a deputy testified a gun and two bullet casings were found in the yard, near the area where the victim's friend saw both appellant and one of his co-defendants, and it was not clear who actually fired the gun before it was dropped to the ground. (R.pp.94-96; p.124; p.170; pp.279-80; p.285, lines 1-8). The co-defendant standing near appellant was later

identified as Wells—the owner of the only gun used during the robbery. Accordingly, the evidence presented at trial was equivocal as to who was the shooter, and the trial court was correct in charging the jury on the theory of accomplice liability. *See Barber*, 393 S.C. at 237, 712 S.E.2d at 439 (noting to support an accomplice liability charge, the relevant question is whether there is any evidence that another co-conspirator was the shooter and appellant was acting with him when the robbery took place).

Finally, the trial court did not abuse its discretion in its instructions where the record shows the jury charge, as a whole, was correct. *See Logan*, 405 S.C. at 90, 747 S.E.2d at 448 (holding appellate courts must consider the jury charge as a whole and in light of the evidence presented at trial when reviewing the instructions for error). The court instructed the jury at length on the law of the case, including the elements of the charged crimes, witness credibility, and reasonable doubt. (R.pp.444-60). During the accomplice liability charge, the court also cautioned the jury that a defendant's mere presence at the scene was insufficient to prove he was guilty, reminding the jury that they must find the State demonstrated, beyond a reasonable doubt, that appellant actively participated in the crime. (R.pp.454-55). The record shows the jurors thoroughly and thoughtfully considered the entire charge, as they deliberated for close to six hours over the course of two days. (R.pp.461-62; p.466, p.468). *See Logan*, 405 S.C. at 90-91, 747 S.E.2d at 448 (holding a jury charge is correct if, when read as a whole, it adequately covers the law, and such a charge does not require reversal).

Therefore, the trial court did not err in charging the jury on accomplice liability as the evidence presented at trial supported the instruction.

Harmless Error

Even if this Court were to find an abuse of discretion, any error in the jury instructions

was harmless beyond a reasonable doubt. *See State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("Errors, including erroneous jury instructions, are subject to harmless error analysis."). When considering whether an error with respect to a jury instruction was harmless, an appellate court must determine that the error complained of did not contribute to the verdict. *Taylor v. State*, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993). Harmless error review looks to the basis upon which the jury rested its verdict. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). The appellate court must find that error unimportant in relation to everything else the jury considered on the issue as revealed in the record, which is a fact-intensive inquiry. *See State v. Jefferies*, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994) ("We must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict") (citation omitted).

Here, there were two other theories under which the jury could find appellant guilty, even if it did not hear the accomplice liability charge. First, the trial court properly charged the felony murder inference. The court explained the jury could find an inference of malice sufficient to support a guilty verdict for murder, if the State proved beyond a reasonable doubt that the victim was killed during the commission of a felony. (R.pp.456-57). The felony murder inference instruction given in this case was similar to that which was characterized as a "proper charge on implied malice" by our Supreme Court. *See State v. Norris*, 285 S.C. 86, 92, 328 S.E.2d 339, 343 (1985) (*overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)) (stating South Carolina makes no distinction between murder and felony-murder and suggesting a proper implied malice charge); *cf. Lowry v. State*, 376 S.C. 499, 506, 657 S.E.2d 760, 764 (2008) (holding a presumed malice approach to felony murder unconstitutionally shifts the State's burden of proof on the issue of malice, while noting courts may charge juries using

permissive language that indicates an inference of malice may arise from an act occurring during the commission of a felony and the inference may be accepted or rejected by the jury as it deems appropriate); *see also Lyles v. Reynolds*, No. 6:15-cv-04229-RMG, 2016 WL 4940319, at *6 (D.S.C. Sept. 14, 2016) (contrasting the language used in *Lowry* with the permissive language used by the state court in the felony murder inference instruction at issue to find federal habeas relief was not warranted).

The testimony presented at trial was clear that appellant and his co-defendants came up with a plan to rob "an older man" in Enoree who sold liquor and drugs out of his mobile home, and that the victim died during the commission of that crime. The victim told investigators before he died that the men had been there to rob him and he told his friend the men took his money, keys, and jewelry. Further, at least one bullet that hit the victim was fired from the gun found in the yard where appellant and a co-defendant were seen, the gun did not belong to the victim and was taken to the scene by appellant and his accomplices, and the victim's gold chain and pendant were yanked off his neck and found outside. Therefore, the jury could find the victim's murder was a logical consequence of the robbery in which appellant actively participated.

Second, there was sufficient evidence presented that appellant was the shooter. The victim's friend testified he told her appellant shot him, a lieutenant testified the victim said the man on the porch, identified as appellant, shot him, and the lead investigator testified the victim stated appellant shot him first and he fired back. Finally, particles consistent and associated with GSR were found on appellant's hands and, as noted, the gun that fired a shot that hit the victim was found in the yard near where appellant was lying.

Accordingly, while respondent submits the trial court's instruction on accomplice liability

was not error, any alleged error was harmless as the jury could find appellant guilty of murder under other properly charged theories of liability supported by the facts presented to the jury at trial.[7]

[7] Appellant argues the jury was clearly influenced by the accomplice liability charge as the jurors returned a guilty verdict for murder, but a not guilty verdict for the weapons charge. (App.Br.p.13). Respondent submits this argument references the inconsistent verdict rule, which was abolished in our state. *See State v. Alexander*, 303 S.C. 377, 383, 401 S.E.2d 146, 150 (1991) (abolishing the rule against inconsistent verdicts, in part, because it was "severely criticized and rejected by most courts"). Accordingly, appellant's assertion should not be used as a reason to grant relief.

II.

The trial court did not abuse its discretion in denying a motion for a continuance where appellant cannot demonstrate what evidence or other point a second defense expert could have raised on his behalf, the record clearly shows defense counsel had adequate time to prepare for trial, and appellant had engaged in previous delay tactics. Further, any error by the trial court was harmless beyond a reasonable doubt.

How the Issue Was Raised

On the morning of trial, defense counsel moved for a continuance to obtain a different expert in gunshot residue (GSR) testing. (R.p.26, line 20-p.27, line 12). Counsel acknowledged the trial court granted a first funding request for an expert the previous week, after she requested and received the GSR case file from South Carolina Law Enforcement Division (SLED), but counsel explained she had just learned that morning the person she hired was not actually an expert in GSR. (R.p.26, line 22-p.27, line 6). Counsel argued GSR was "very, very scientific" and she needed an independent expert to explain to the jury that there were environmental factors that could contribute to particles being found on a person's hands, such as the work they did for a living. (R.p.27, line 24-p.29, line 1).

The State pointed out that defense counsel had the results from the GSR tests from "the outset," but it was only the previous week that counsel requested SLED's entire case file "that led to the generation of the report." (R.p.29, lines 8-12). The State noted the expert it intended to call would testify she found particles consistent and associated with GSR on appellant's hands, but she could not say the particles were *in fact* GSR. (R.p.27, lines 18-23; p.30, lines 7-15). The State further noted its expert would testify to the information counsel alluded to, including how easily GSR could transfer to someone's hands and what factors might lead to a false positive result. (R.p.30, lines 7-15; p.34, line 22-p.35, line 4).

The trial court denied the motion for a continuance, ruling:

> As far as the GSR and the motion to continue because of that, I do understand where the Defense is coming from and I would encourage you to go ahead and figure out who you can get to take a second look at this on behalf of [appellant]. I'm more than happy to sign whatever funding orders are necessary to make that happen. At the same time, it also sounds as if the SLED agent would be in a position to address some or most, if not all, of the Defense concerns.

(R.p.32, line 17-p.33, line 11). The next day, defense counsel renewed the motion for a continuance and explained she attempted to contact two experts, who did not return her calls. (R.p.59, line 24-p.60, line 5). The court told the parties:

> The way I'm going to handle this particular motion, [defense counsel], is I understand the questions you're going to want to pose to a GSR expert. Clearly those questions can be asked of [the SLED agent]. I will hold in abeyance any ruling on your motion, and should the court find that the Defense would be warranted in getting an expert and you're unable to locate one, the court will entertain a motion for a mistrial. But I would ask that you continue to look for that expert, get one on retainer, so that you can have an independent review as you requested and as the law suggests you may be entitled to. At the same time, if that same testimony can be elicited from [the SLED agent], that may solve the problem going forward.

(R.p.60, line 15-p.61, line 5). On the third day of trial, counsel updated the court that her search for a GSR expert continued to be unsuccessful. (R.p.242, line 20-p.243, line 7).

Subsequently, the State called Jennifer Stoner (Stoner) from SLED as an expert in GSR. (R.p.311, line 11-p.314, line 5). Stoner first testified about her general duties. Stoner stated she analyzed samples collected from the hands or clothing of suspected shooters for the presence of GSR. (R.p.315, lines 4-10). Stoner explained GSR particles were round, must contain the three elements of barium, antimony, and lead, and did not remain on a person's hands for more than six hours whether that person shot a gun or touched something with GSR on it. (R.p.315, lines

7-9; p.316, lines 9-21).

In this case, Stoner examined samples taken from appellant's hands. (R.p.318, lines 7-17). Stoner testified she found nothing on the right palm, but found one round particle consistent with GSR on the back of appellant's right hand. (R.p.319, lines 4-11). Stoner explained "consistent with" meant the particle "may have an environmental source." (R.p.319, lines 11-13). Stoner testified she also found one particle on appellant's left palm and several on the back of his left hand that were associated with GSR. (R.p.319, lines 13-14; p.320, lines 2-3). Stoner explained "associated with" was a particle with only a single element or combination of two elements, whereas GSR must contain all three elements of barium, antimony, and lead. (R.p.319, lines 14-25). Stoner clarified further that particles consistent or associated with GSR could come from an environmental source, such as the use of certain power tools. (R.p.320, lines 4-23).

Based on her findings, Stoner testified it was her belief the particles she found came from firing a gun, but she admitted she could not definitively say the particles were GSR because they did not contain all three elements. (R.p.320, line 24-p.321, line 5, p.321, lines 15-23). Further, Stoner admitted she did not know if appellant fired a gun or if the particles were transferred to his hands when the victim shot him. (R.p.321, line 24-p.322, line 6).

On cross-examination, defense counsel emphasized how easy it was for a person to pick up GSR particles:

> [DEFENSE COUNSEL]: When – and you already stated that when identifiable gunshot residue is on a person that has been shot, you can't tell whether it's because the person shot a gun or because they had been shot, correct?
>
> [STONER]: That's correct.

(R.p.324, lines 3-7). Counsel further stressed that Stoner did not find any actual GSR particles

from the samples taken from appellant's hands:

> [DEFENSE COUNSEL]: How many gunshot residue particles were found in this case?
>
> [STONER]: I do not have any.
>
> [DEFENSE COUNSEL]: So none?
>
> [STONER]: Particles of gunshot residue, no.
>
> [DEFENSE COUNSEL]: Correct. So in this case you just simply can't tell whether [appellant] fired a gun or not, correct?
>
> [STONER]: (Non-verbal response).

(R.p.324, line 23-p.325, line 5). Counsel also reiterated both of these points during re-cross-examination. (R.p.327, lines 7-13).

At the close of the State's case, defense counsel renewed her motion for a continuance, which the trial court denied, stating:

> THE COURT: [W]hen Agent Stoner testified, in all candor, it wasn't testimony that the Court found terribly damning from the State's perspective. Clearly there was particulate matter found. But my recollection of her testimony and my notes reflect that she was not able to definitively say that GSR was present because only some particles were found and not all the particles that one would typically find. She said that you would usually want to see lead, barium, and I believe it was antimony.
>
> . . .
>
> And that – I do understand your position, [defense counsel], and you're protected on the record. But I have gotten parts of my notes where they reflect [Stoner] can't tell if it's from him, the Defendant shooting a gun, or it's from being shot or from close proximity. Cannot tell if Defendant fired a shot or not. So I do understand your position. I appreciate it. Motion for continuance is denied.

(R.p.402, line 11-p.403, line 4; p.403, lines 17-24). Following the ruling, the trial continued with closing arguments and jury instructions, prior to deliberations.

Standard of Review

A trial court's denial of a motion for a continuance will not be disturbed absent a clear abuse of discretion resulting in prejudice. *State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002); *see also State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001) (explaining an abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law). In fact, reversals of the refusal to grant a continuance are as "'rare as the proverbial hens' teeth.'" *McMillian*, 349 S.C. at 21, 561 S.E.2d at 604 (quoting *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957)).

Analysis

Appellate courts have shown great deference to trial judges on this issue. Our Supreme Court has repeatedly upheld denials of continuances "[w]here there is no showing that *any other evidence* on behalf of the appellant could have been produced, or that any other points could have been raised had more time been granted *for the purpose of preparing the case for trial.*" *State v. Williams*, 321 S.C. 455, 459, 469 S.E.2d 49, 51-52 (1996) (emphasis added). When a motion for a continuance is based on the contention that defense counsel has not had adequate time to prepare, the motion's denial has rarely been disturbed on appeal. *State v. Babb*, 299 S.C. 451, 454-55, 385 S.E.2d 827, 829 (1989). "It is axiomatic that determination of such motions must depend upon the particular facts and circumstances of each case." *Id.* (quoting *State v. Motley*, 251 S.C. 568, 572, 164 S.E.2d 569, 570 (1968)).

In *Babb*, the defendant committed check forgery and, on the morning of trial, defense counsel moved for a continuance to obtain a handwriting expert. *Babb*, 299 S.C. at 452-53, 385 S.E.2d at 828-29. Counsel argued that to properly defend Babb, due process necessitated that he obtain his own expert. *Id.* at 452-53, 385 S.E.2d at 829. The trial judge denied the motion,

finding counsel had adequate time to prepare where the public defender's office was appointed a week and a half prior to trial and counsel had not been involved in any other trials during that time. *Id.* at 454, 385 S.E.2d at 829. On appeal, Babb argued the judge abused his discretion in failing to grant a continuance because doing so denied Babb time to hire an expert to counter the one used by the State. *Id.* After detailing the tactics used by Babb to delay his trial, our Supreme Court noted, "a party cannot complain of an error which his own conduct has induced." *Id.* at 452-55, 385 S.E.2d at 828-29 (citing *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984)). The Court ultimately held the trial judge did not err where the record clearly established "that any shortage of time to prepare a defense was not the fault of the trial judge or the State, but rather the fault of Babb in failing to act." *Babb*, 299 S.C. at 455, 385 S.E.2d at 829.

Here, the record demonstrates the trial court did not abuse its discretion in denying appellant's motion for a continuance. *See McMillian*, 349 S.C. at 21, 561 S.E.2d at 604 (holding the denial of a continuance will not be disturbed absent a clear abuse of discretion resulting in prejudice). First, appellant has failed to demonstrate what evidence another GSR expert could have produced and the record does not reveal any other points which could have been raised on appellant's behalf. *See Williams*, 321 S.C. at 459, 469 S.E.2d at 51-52 (upholding the denial of a continuance where there was no showing that any other evidence or points could have been raised on appellant's behalf). During direct examination, Stoner testified she only found particles associated and consistent with GSR on appellant's hands, and admitted she did not find any actual GSR particles. (R.pp.318-21). Moreover, Stoner explained the particles she found could have come from an environmental source, rather than a gun. (R.pp.319-20). Stoner also admitted she could not determine whether appellant actually fired a weapon or if the particles

were transferred to his hands after the victim shot him. (R.pp.320-22). Such testimony was not particularly prejudicial to appellant, and was more likely to be beneficial because the jury heard from the State's own expert about the lack of GSR particles on appellant's hands.

Further, during cross and re-cross-examinations, defense counsel emphasized that Stoner found no GSR on appellant's hands, how hard it was to determine where GSR particles came from, and how easy it was for a person to pick up the particles. (R.pp.324-25). Those were the points counsel alluded to during her motion for a continuance, and the record clearly demonstrates counsel raised them sufficiently and repeatedly before the jury. Accordingly, it is unclear what other evidence or point appellant hoped to bring to the jury's attention through the testimony of an additional GSR expert, and the trial court did not err in refusing to grant a continuance.

Second, the denial of the motion for a continuance did not prevent appellant from presenting a complete defense where the record shows defense counsel had adequate time to prepare for trial, and had a thorough understanding of this issue. *See Babb*, 299 S.C. at 454-55, 385 S.E.2d at 829 (holding the denial of a motion for a continuance is rarely disturbed based on the contention that defense counsel did not have adequate time to prepare). As noted, counsel had the results of the GSR tests from "the outset," and it was only SLED's case file that she requested the week before trial. (R.pp.26-27; p.29). Nothing prevented counsel from hiring an expert in the months following her appointment, yet it was only the week before trial that she requested and received funding for an expert.[8] *See Babb*, 299 S.C. at 455, 385 S.E.2d at 829 (upholding the denial of a motion for a continuance where counsel was appointed a week and a

[8] As explained in more detail below, appellant had fired at least one previous attorney. Current counsel was appointed on November 7, 2014—more than three months before trial. (R.p.30, line 25-p.31, line 3).

half prior to trial, despite appellant's contention counsel did not have adequate time to prepare).

With no explanation on the record to the trial court, defense counsel stated during the motions hearing that she learned the day of trial the person she hired was not an expert.[9] (R.pp.26-30). There is no evidence in the record to support appellant's contention that the court violated his due process rights as an indigent defendant or treated him unfairly where the court gave counsel the funding necessary to hire the first expert, gave her the opportunity to find a second one, told her that he would sign any further funding request as required, and specifically stated he would entertain a motion for a mistrial if needed, depending on the nature of the SLED expert's testimony. (R.pp.32-33; pp.60-61). Accordingly, the record shows counsel understood the GSR issue, had the opportunity to hire a qualified expert, and was prepared to present a defense at trial, and the court did not err in refusing to grant a continuance. *See Babb*, 299 S.C. at 454-55, 385 S.E.2d at 829 (holding rulings on such motions depend upon the particular facts and circumstances of each case).

Finally, it is important to note the context in which the lower court denied the continuance, and the delay tactics appellant previously used. Prior to trial, appellant had fired at least one defense attorney. (R.p.9, lines 10-17). The morning of trial, appellant attempted to relieve current counsel, telling the court to "go ahead without" him, and that his family was going to hire a new attorney because he was being "railroad[ed]." (R.p.7, lines 2-17). The court tried to inform appellant he would be at a disadvantage if he did not participate in his defense, stating:

> THE COURT: Mr. Walker, I need – before you leave sir, I desperately need to tell you something. Okay, sir?

[9] The record does not support appellant's contention in his brief that Stoner was the person who told counsel the individual she retained was not qualified to give expert testimony on GSR. (App.Br.p.14; p.20).

> [APPELLANT]: You all can go with the trial without me. I won't be here.
>
> THE COURT: You realize, Mr. Walker, that you will be at a disadvantage if you go forward without you being present –
>
> [APPELLANT]: It doesn't matter. I'm already at a disadvantage. Y'all can call out and take my case in. My momma will get [another attorney] and he'll take my case and y'all can go from there. I don't give a damn.
>
> THE COURT: The record should –
>
> [APPELLANT]: It's going to happen without me.
>
> THE COURT: The record should reflect that Mr. Walker was quite adamant and was walking out of the courtroom as I was trying to address him about the disadvantage that he may very well be in if the case goes forward without him being present. He has decided to leave the courtroom.

(R.p.7, line 18-p.8, line 12). Counsel made a motion to be relieved, stating that "[u]p until this morning [appellant] seemed very pleased with my services." (R.p.8, lines 16-19). The State explained appellant and his co-defendants had fired multiple attorneys between them, and argued appellant was trying to further delay the trial. (R.p.9, line 8-p.10, line 23).

The trial court found appellant's actions were "nothing more than an effort at delay" and appellant voluntarily absented himself from the proceedings by his conduct and his expressed statements. (R.p.10, line 24-p.11, line 22). Noting defense counsel said she was prepared to move forward, the court stated he would proceed with the case and agreed to allow counsel to talk to appellant's family to determine if they had retained another attorney. (R.p.11, lines 7-8; p.11, lines 15-16; p.12, line 11-p.13, line 5).

Following a recess and voir dire, defense counsel informed the trial court the family did not have the means to hire another attorney and wanted to keep her. (R.p.16, line 22-p.17, line

3). Subsequently, counsel told the court the State made a plea offer, but appellant prohibited her from relaying it to him. (R.p.18, line 5-p.19, line 7). The court attempted to do so; however, appellant continually refused to listen and repeatedly interrupted the court, insisted counsel was fired, threatened to sue because "all this stuff is staged," and consistently stated he was not going to be a part of the trial, and he wanted to go back to the detention center. (R.p.19, line 8-p.23, line 24). Appellant once again left the courtroom and the court ordered defense counsel to continue as his attorney.[10] (R.p.23, line 25-p.25, line 17).

The delay tactics appellant used are similar to those utilized by the defendants in *Babb* and *Williams*, in which our Supreme Court upheld the denials of a motion for a continuance. In *Babb*, the defendant refused to hire an attorney and was ultimately appointed counsel from the public defender's office. *Babb*, 299 S.C. at 452-53, 385 S.E.2d at 828-29. The Supreme Court affirmed Babb's convictions, holding, in part, any shortage of time to prepare a defense was the fault of the defendant and his delay tactics, and a continuance was properly denied. *Id.* at 455, 385 S.E.2d at 829. Similarly, the Court in *Williams* held the refusal to grant a continuance was proper where the defendant had retained counsel fifteen months prior to trial, yet waited until the day of trial to move to relieve counsel, and counsel stated he was "comfortable proceeding with the representation." *Williams*, 321 S.C. at 459, 469 S.E.2d at 52.

Here, appellant attempted, for at least the second time, to delay his trial by firing his attorney. As defense counsel told the trial court, she had previously met with and spoken to appellant, including the night before trial, and he never indicated any problems with her representation, so she was surprised by his attempt to relieve her. Further, counsel stated she

[10] Before trial began each subsequent day, appellant sent a note to the court refusing to appear. (R.p.54, lines 8-18; p.239, line 17-p.240, line 2; p.406, lines 4-13). However, appellant was in court for the verdict and sentencing. (R.p.468, lines 7-11).

was ready to move forward and comfortable arguing the pending motions before the court. After a lengthy and thorough attempt to both inform appellant of the dangers of not appearing at trial and to relay a plea offer to him, the court found it was clear appellant was engaging in delay tactics and the court would proceed with the case. The record demonstrates counsel was working without the benefit of any input from appellant during trial as he repeatedly refused to take part in his own defense. Accordingly, appellant cannot now complain where his conduct placed counsel in the unenviable position of arguing a motion for a continuance following appellant's own numerous delay tactics. *See Babb*, 299 S.C. at 455, 385 S.E.2d at 829 (noting a party cannot complain of an error which his own conduct has induced).

Therefore, the trial court did not err in denying the motion for a continuance where appellant has failed to demonstrate to this Court what other evidence or points a second expert would have raised on his behalf, failed to show how the trial court's ruling prevented him from presenting a complete defense, and failed to demonstrate how the decision prejudiced him sufficient to warrant relief.

Harmless Error

Even if the Court were to find an abuse of discretion, any error in denying the motion for a continuance was harmless beyond a reasonable doubt. Whether an error is harmless depends on the circumstances of the particular case. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). No definite rule of law governs the finding of harmless error; rather, the error's materiality and prejudicial character must be determined from its relationship to the entire case. *Id.*; *see also State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002) (listing the factors of a harmless error analysis, including the importance of the witness's testimony, whether the testimony was cumulative, the extent of cross-examination, and the overall strength of the

State's case) (citation omitted).

Here, testimony from a defense expert would have been cumulative to the information elicited from the SLED expert, including the lack of GSR particles on appellant's hands, the environmental sources of particles, and the inability to determine whether the particles were from firing a gun or from being shot. Defense counsel also thoroughly cross-examined the SLED expert and took the opportunity to point out to the jury the general weakness of the test results, in that the samples revealed no GSR particles on appellant. Such testimony was likely beneficial to appellant rather than prejudicial.

Additionally, the State presented a strong case against appellant, such that the SLED expert's testimony likely had little impact on the jury's guilty verdict. The jury heard from witnesses about the plan between appellant and two co-defendants to rob a man in Enoree and that the victim died as a consequence. The victim told a friend and investigators before he died that the men were there to rob him, shot him, and took his belongings. Further, at least one bullet that hit the victim was fired from the gun found in the yard where appellant and a co-defendant were seen, and which belonged to that co-defendant.

Therefore, while respondent submits the trial court did not abuse its discretion in refusing to grant a continuance, any alleged error was harmless beyond a reasonable doubt as it could not have influenced the jury's verdict.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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November 16, 2016.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Laurens County
Frank R. Addy, Circuit Court Judge

THE STATE,

Respondent,

v.

DAVID LEE WALKER,

Appellant.

Appellate Case No. 2015-000519

CERTIFICATE OF COMPLIANCE

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

This 16th day of November, 2016.

SHERRIE BUTTERBAUGH
Assistant Attorney General

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
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Appeal from Laurens County
Frank R. Addy, Circuit Court Judge

THE STATE,

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v.

DAVID LEE WALKER,

Appellant.

Appellate Case No. 2015-000519

CERTIFICATE OF SERVICE

I, Sherrie Butterbaugh, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, John H. Strom, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201.

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

This 16th day of November, 2016.

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