ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Thomas W. Cooper, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

AARON YOUNG, SR.,

Appellant

Appellate Case No. 2016-000873

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

ANTHONY MABRY
Senior Assistant Attorney General
S.C. Bar No. 11973
P.O. Box 11549
Columbia, SC, 29211-1549
(803)-734-3665

ISAAC MCDUFFIE STONE
Solicitor, 14th Judicial Circuit
P.O. Box 1880
Bluffton, SC 29201

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Thomas W. Cooper, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

AARON YOUNG, SR.,

Appellant

Appellate Case No. 2016-000873

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

ANTHONY MABRY
Senior Assistant Attorney General
S.C. Bar No. 11973
P.O. Box 11549
Columbia, SC, 29211-1549
(803)-734-3665

ISAAC MCDUFFIE STONE
Solicitor, 14th Judicial Circuit
P.O. Box 1880
Bluffton, SC 29201

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CASES

Cases

Statutes

Other Authorities

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in refusing to direct a verdict of acquittal when the State's evidence of murder was dependent upon a combination of mutual combat, accomplice liability and transferred intent to an innocent third party not engaged in mutual combat?

2. Did the trial judge err in refusing to direct a verdict of acquittal for murder when the State failed to establish mutual combat at the time of the fatal shooting?

RESPONDENT'S COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Whether Judge Cooper abused his discretion in finding mutual combat, transferred intent, and accomplice liability could form the basis for a murder conviction and thereby properly denied Appellant's motion for a directed verdict where the direct and substantial circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove Appellant's guilt under South Carolina law?

2. Whether Judge Cooper abused his discretion in denying Appellant's motion for a directed verdict, where the direct and substantial circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove Appellant, his son, and Tyrone Robinson were engaged in mutual combat at the time of the victim's death?

STATEMENT OF THE CASE

On September 1, 2012, Appellant, his son, and Tyrone Robinson murdered eight (8) year-old Khalil Singleton on Hilton Head Island in Beaufort County while the three (3) men were engaged in mutual combat with firearms. All three (3) defendants were arrested that same day. The Beaufort County Grand Jury indicted Appellant for the murder of Khalil Singleton (Ind. # 2012-GS-07-2173) and for the attempted murder of Tyrone Robinson (Ind. # 2014-GS-07-1941). On August 10, 2015, Appellant proceeded to a jury trial before Circuit Court Judge Thomas W. Cooper. Robert Ferguson, Esquire, represented Appellant. Solicitor Isaac McDuffie Stone and Deputy Solicitor Sean P. Thornton represented the State. On August 12, 2015, the jury returned verdicts of guilty of murder and attempted murder.[1] Judge Cooper sentenced Appellant to thirty (30) years for murder and twenty (20) years for attempted murder. The sentences were ordered to run concurrently. (R. 354-60, 497-561, 565-608, 613-57, 674-732, 736-49, 758-94, 796-828, 830-38, 843-48, 851-61; State's Ex. 1-27; Indictments; Sentencing sheets). Appellant appeals the murder conviction only raising two (2) directed verdict issues. (IBOA, p. 1).

[1] Appellant's co-defendants, Tyrone Robinson and Appellant's son Aaron Young, Jr., were tried in separate trials before juries of their peers. Robinson was convicted of murder and sentenced to life in prison by Judge Cooper. Aaron Young, Jr. was convicted of murder and attempted murder and sentenced to thirty (30) years for murder and thirty (30) years concurrent for attempted murder by Judge Cooper.

RESPONDENT'S STATEMENT OF FACTS

On the afternoon of September 1, 2012, eight (8) year-old Khalil Singleton's life abruptly ended. Khalil, an innocent bystander, was shot to death in the midst of an ongoing running gun battle between three (3) adult men. One (1) of the three (3) men responsible for taking the child's life was Appellant, Aaron Young, Sr. (hereinafter "Appellant"). Within the course of an hour, a volatile conflict between Appellant, his son Aaron Young, Jr., and Tyrone Robinson erupted and traversed several different locations on Hilton Head Island, eventually ending in front of a group of children jumping on a trampoline. It was there that Khalil Singleton was murdered trying to flee home on foot to safety away from the running gun battle. (R. 354-60, 497-561, 565-608, 613-57, 674-732, 736-49, 758-94, 796-828, 830-38, 843-48, 851-61; State's Ex. 1-27; Indictments; Sentencing sheets).

How the Conflict Erupted

Earlier that afternoon, Tyrone Robinson ("Robinson") and Jontu Singleton, Sr. ("Jontu") were socializing at a friend's home. Around 4:00 p.m., Jontu decided to ride with Robinson to the store in Robinson's car. On the way to the store, the two (2) men stopped by the residence of Appellant and his son Aaron Young, Jr. ("Young, Jr.") on Wild Horse Road because Jontu needed money to buy cigarettes and wanted to ask Appellant for the money. Appellant, his girlfriend Ebony Campbell ("Ebony"), and Young, Jr. were outside in the yard when Robinson and Jontu drove up. (R. 565-81; State's Ex. 17, Interview of Appellant).

Jontu exited the car and spoke with Appellant about borrowing the money. Robinson then exited his car approaching Young, Jr. with a .38 caliber revolver in his hand. Robinson and the two (2) Young(s) had animosity towards each other due to prior altercations. After seeing Robinson with the gun, Appellant moved towards Robinson and tried to take the gun away from

Robinson but it accidently fired. Appellant backed away as Robinson fired several more shots into the ground near Appellant's feet. Robinson then got into his car and drove away. Jontu remained in the yard with Appellant and Young, Jr. Neither Appellant nor Young, Jr., Ebony, or Jontu called the police and reported the shooting. (R. 565-81; State's Ex. 17, Interview of Appellant; State's Ex. 3, 911 calls).

The Running Gun Battle or Shootout resulting in the Death of an 8 year old child

Instead of calling the police and reporting the shooting, Appellant and Young, Jr. decided to go after Robinson and shoot or kill him. Moments after Robinson left, Appellant and Young, Jr. went inside a nearby residence [either Appellant's or his mother's], and Appellant emerged with a black bag containing a "Tech Nine" 9MM semi-automatic pistol, a thirty (30) round magazine, and a box of ammunition. A "Tech Nine" resembles a small submachine gun. (R. 565-81; State's Ex. 17, Interview of Appellant; State's Ex. 3, 911 calls).

The three (3) men [Appellant., Young, Jr., and Jontu], leaving Ebony behind, got into Appellant's grey Ford F-150 pick-up truck, drove out of the yard and onto the public street in front of Appellant's home, and began searching for Robinson on the public roads of Hilton Head Island. (R. 565-81; State's Ex. 17, Interview of Appellant; State's Ex. 3, 911 calls).

Appellant drove the truck while Jontu was seated in the center of the front seat and Young, Jr. was seated in the passenger seat. As he was driving, Appellant handed the bag containing the "Tech Nine" to his son, Young, Jr. The three (3) men drove down Spanish Wells Road and veered off on Oakview Road after Appellant thought he saw Robinson driving down that road. Young, Jr. then pulled the contents out of the black bag, and with Appellant giving his son instructions on how to assemble the "Tech Nine," Young, Jr. began assembling the weapon. Appellant stopped and inquired of a person who resided nearby in the Oakview community

whether that person had seen Robinson, to which he received a negative response. (R. 565-81, 727-28; State's Ex. 17, Interview of Appellant; State's Ex. 3, 911 calls).

Unable to catch up with the vehicle Appellant saw earlier and unable to find Robinson, the three (3) men continued their search and headed towards Robinson's house on Allen Road located off of Marshland Road. When they arrived there, Robinson was nowhere to be found. (R. 565-81; State's Ex. 17, Interview of Appellant; State's Ex. 3, 911 calls).

Jontu got out of the truck to talk to his son, who lived in that neighborhood, but no one was home. Because the three (3) men could not locate Robinson, they drove back to Appellant's home on Wild Horse Road and Jontu got out of the truck. Appellant and Young, Jr. drove off again in the grey truck, with the loaded "Tech Nine," in search of Robinson. (R. 565-81, 727-28; State's Ex. 17, Interview of Appellant; State's Ex. 3, 911 calls).

Minutes later, Appellant and Young, Jr. finally tracked down Robinson on Oakview Road. Young, Jr., holding the "Tech Nine" 9 mm weapon, leaned out the passenger window of the truck with the gun, and tried to shoot Robinson, who was in his car, but the gun jammed. According to Appellant, when they saw Robinson on Oakview Road, Robinson brandished his weapon out his car window and also fired his gun at them.[2] Robinson left the area, and Appellant and Young, Jr. decided to continue the pursuit and drive back to Robinson's home on Allen Road. (R. 565-81, 696, 700-01, 718; State's Ex. 17, Interview of Appellant/ Interview 1 and 7; State's Ex. 3, 911 calls).

While Appellant and his son were driving down Marshland Road and eventually onto Allen Road, a group of children was playing on a trampoline a short distance away from where

[2] As the gun battle was occurring, one (1) witness called 911 to report the crime and told the dispatcher two (2) cars were shooting at each other near Spanish Wells Road. She identified the two (2) cars involved as a grey truck and a grey Lexus. The woman told the dispatcher the man driving the car was Tyrone Robinson. (State's Ex. 3, 911 calls).

Appellant and Young, Jr. spotted Robinson's car parked at his residence on Allen Road. Appellant was still driving the grey truck. When the two (2) men arrived at Robinson's residence, Appellant drove into Robinson's yard and Young, Jr., now alone in the passenger seat, drew his weapon again. Robinson came out of somewhere on foot and began firing bullets with his .38 revolver at Appellant and his son in the pick-up truck, and Young, Jr. began firing bullets at Robinson with the "Tech Nine." Appellant and his son drove away back up Allen Road and then onto Marshland Road. (R. 565-81, 727-28, 507-49; State's Ex. 17, Interview of Appellant; State's Ex. 3, 911 calls).

Charlese Mitchell ("Charlese"), who lived just off the beginning of Allen Road on Marshland Road, testified she heard three (3) different sets of gunshots around 4:00 p.m. that afternoon. After the first (1st) round of shots, she saw a grey truck driven by her cousin, Appellant, speeding down the road away from Allen Road with someone in the passenger seat. She testified this first (1st) set of gunshots were rapid gunshots that sounded like maybe ten (10) shots.[3] (R. 507-37).

After Charlese heard the first (1st) round of gun shots and saw Appellant driving away, co-defendant Robinson, also a relative of Charlese's, came to her door. She let him in her home and observed a gun sticking out of his pocket. Robinson, who appeared scared, told Charlese, "those M.F. was shooting at me." Charlese asked Robinson to leave. (R. 507-37).

Appellant and Young, Jr. did not stop after the exchange of gunfire with Robinson at Robinson's residence. On the way up Marshland Road coming from Allen Road, Appellant

[3] At approximately this same time, Kathleen Fayfich called 911 from 23 Peregrine Point off of Marshland Road. Allen Road bordered her neighborhood. She informed 911: "we just heard eight gunshots in rapid succession coming from Allen Road" right behind her neighborhood. She called because of her concern for children in her neighborhood. She informed 911 the gunfire sounded like pistol gunfire from a 9mm or .40 caliber. (State's Ex. 3, 911 calls).

forced an oncoming vehicle off the side of the road. Tyrone Delaney ("Delaney"), Charlese's boyfriend, was driving down Spanish Wells Road between 4:00 and 5:00 p.m. on his way home from work when a grey truck [Appellant's truck] sped towards him and forced Delaney to pull over to the side of the road to avoid a collision with the oncoming vehicle. When Appellant's truck forced Delaney off the road, Appellant was coming from the direction of Robinson's home on Allen Road and Charlese's and Delaney's home on Marshland Road. (R. 507-49).

Moments later, when Delaney arrived home at his and Charlese's residence, Robinson was still there in the yard [after talking to Charlese], and Robinson asked Delaney if he had seen a grey truck.[4] Delaney told Robinson of his encounter with the grey truck. Robinson replied, "yeah they was shootin at me so I shoot back at them." Robinson was brandishing a .38 revolver when stating this. Robinson then left the yard. Charlese also confirmed when Delaney arrived home from work, Delaney and Robinson spoke in the yard briefly and Robinson then left her yard. Delaney then came inside their home. (R. 507-49).

Appellant and his son did not stop their pursuit of Robinson after running Delany off the road. Appellant and Young, Jr. turned around and drove back down Marshland Road toward Allen Road for the third (3rd) time that day. On this occasion, with Appellant still driving the grey truck, Young, Jr. again fired out the window of the truck with the "Tech Nine." Young, Jr. fired multiple shots into Robinson's car, which was parked in a yard at the end of Marshland Road, shooting holes in the car's exterior and passenger compartment. Appellant and his son then drove down and back up Allen Road looking for Robinson. (R. 565-81, 700-04, 715-18, 720, 507-49, 550-60; State's Ex. 17, Interview of Appellant; State's Ex. 3, 911 calls).

[4] Delaney did not hear the first round of rapid shots as he was headed home from work at the time those were fired.

Charlese confirmed that minutes after Robinson left their yard, she heard another set [a second (2^{nd}) set] of rapid gunshots [Young Jr. shooting Robinson's car]. These gunshots sounded like they were coming from the left of Charlese' home on Marshland Road. At this point, because of the gunfire, Charlese told the children playing on the trampoline to come inside. Delaney also testified that a few minutes after Robinson left his yard, and after Delaney entered his home, Delaney heard rapid gun shots [Young Jr. shooting Robinson's car] coming from near Charlese's residence. Delaney testified Charlese then told the children on the trampoline to get inside. Charlese's child came in her home. But, the other two (2) children, including eight (8) year old Khalil, headed toward their own homes on foot. (R. 507-49).

Within minutes after Appellant and Young Jr. shot up Robinson's car, Robinson fired three (3) shots at Appellant and Young, Jr. with the .38 revolver as they turned onto Marshland Road off of Allen Road. Charlese was standing in her doorway and saw Appellant in his grey truck turn onto Marshland Road off of Allen Road with his tires squealing and as this was occurring she heard three (3) distinct gunshots that sounded like they were fired from a different gun than the gun firing the earlier rapid shots. Then, Charlese heard someone screaming and discovered Khalil Singleton had been shot trying to make his way home to safety on foot from the running gun battle. Delaney also testified that minutes after the 2^{nd} round of rapid shots, he heard three (3) separate gunshots that seemed to have come from a different type of weapon [Robinson shooting]. He then heard someone screaming outside. (R. 507-49).

Dominque Griffin, who lived at 215 Marshland Road, which is at the end of Marshland Road, testified he was at home with his three (3) week old baby son watching television at around 4:00 p.m. His step-son, Jontu Singleton, Jr. ("Little Jontu") was outside playing with Khalil and Charlese's child. While watching T.V., Mr. Griffin heard what sounded like

"machine gun fire" from the direction of Indigo Plantation [Marshland Road.] Mr. Griffin testified it sounded like a machine gun because it was continuous: "It was pow, pow, pow." Mr. Griffin got on top of his infant son on the floor of his living room to protect his son. When the gunshots ended, Mr. Griffin then ran out his back door to check on his step-son. As he came out the back door, Little Jontu was already at the back porch. Little Jontu, age nine (9), was crying and pointing at Robinson, who was in Griffin's yard, saying: "he shot Khalil, he shot Khalil." Robinson was walking near a utility shed that belonged to Griffin, i.e. Robinson had fired the three (3) shots at Appellant and his son from Griffin's yard as Appellant's truck turned onto Marshland Road, after Appellant and his son shot up Robinson's car and after they drove down and back up Allen Road looking for Robinson. Griffin then saw Robinson walking quickly toward his car which was parked near a pine tree in Griffin's yard. Griffin noticed Robinson's vehicle had bullet holes in the back window. Robinson got in his car hurriedly and backed up into some lumber Griffin had placed in his yard holding up a fig tree. When Robinson's car struck the lumber, glass fell out of Robinson's back car window into Robinson's car. Robinson then left out of Griffin's driveway and drove off toward Spanish Wells Road. (R. 550-59).

Charlese also confirmed that minutes after she heard the three (3) distinct gunshots from the left of her residence, she then saw Robinson drive by her home headed up Marshland Road toward Spanish Wells Road. Charlese testified Robinson's back car window was shot out, and Robinson drove up Marshland Road fast. (R. 526-28).

The bullets Robinson fired from Griffin's yard did not hit their intended targets, but instead one (1) found its way to eight (8) year old Khalil.[5] Robinson fled the area in his bullet-riddled car, and Appellant and Young, Jr. absconded from the area as well in Appellant's grey truck. Khalil was struck in the chest and died within seconds or minutes. (R. 550-61, 715-17; State's Ex. 3, 911 calls; State's Ex. 17, Statements of Appellant).[6]

Between 5:00 and 5:30 p.m. that same day, Appellant and Young, Jr., and Appellant's girlfriend, Ebony, were pulled over by police in Appellant's grey truck. While on the side of the road, officers located three (3) spent shell casings matching a 9 MM firearm in the back bed of the truck. At the scene of his arrest, after Miranda warnings, when asked why his son was leaning out the truck window shooting, Appellant stated to the arresting officer that his son was shooting at Robinson because Robinson was shooting at them. Appellant and his son were then taken to the police station where they were Mirandized and interviewed. Appellant eventually told officers where they could retrieve the Tech Nine 9mm weapon. (R. 581-608, 684).

After officer's located and arrested Robinson, they processed his car for evidence. They located numerous fired bullets and a bullet fragment [five (5) in all] that were lodged in Robinson's car. These bullets and the fragment along with the shell casings found in the bed of Appellant's truck were sent off for forensic examination. Agent Dan DeFreese, an expert in

---

[5] At approximately this time, another individual called 911 reporting gunshots on Allen Road. The caller stated there were "multiple gun fires." They heard six (6) or eight (8) gunshots that sounded like automatic weapons. "[T]hen it was at one end of the Road and then it sounded like they drove to the other end and...it just fired again." "It was bad." (State's Ex. 3, 911 calls).

[6] At approximately this time, Ms. Washington [first name unknown] called 911 extremely upset because she had found a young child lying on the ground with a gunshot wound and the child was not breathing. Washington told the 911 operator: "We heard gunshots. We heard about ten gunshots." Washington became more hysterical when she realized the child was Khalil. Washington, who was nurse, was eventually able to calm herself enough to perform C.P.R. but Khalil was already dead. During the call, Washington identifies "T" [Tyrone Robinson] as being involved in the shooting of Khalil. (State's Ex. 3, 911 calls).

firearm's and tool mark examination and ballistics, with S.L.E.D., was able to determine the bullets and fragment fired into Robinson's car originated from the same weapon, a 9 MM semi-automatic weapon, not a .38 caliber weapon. He also determined all of the fired shell casings recovered from the bed of the truck were fired by the same weapon, a 9 MM semi-automatic weapon, not a .38 caliber weapon. DeFreese also testified the bullets fired into Robinson's car entered the car from different angles, which was consistent with Robinson's car being shot on more than one (1) occasion on the afternoon of September 1st, not just in Griffin's yard. (R. 606-14, 613-22, 623-46).

Appellant was interviewed by police at the police station after being given Miranda warnings and admitted he and his son were armed with the "Tech Nine" and went looking for Robinson to shoot and kill him. Appellant was angry because Robinson had fired in the ground at his feet at Appellant's home and Robinson was attempting to kill Appellant's son. Appellant admitted he wanted to kill Robinson. Appellant admitted he did not call police after this initial incident at his residence. Appellant also admitted there was bad blood between he and Robinson from a prior occasion. (State's Ex. 17, Interview of Appellant).

Appellant admitted he and his son first looked for Robinson in the Oakview Community because that was one (1) of Robinson's known hangouts. Appellant admitted his son, Young, Jr., attempted to shoot or kill Robinson on Oakview Road, but the "Tech Nine" jammed when Young, Jr. attempted to fire the weapon into Robinson's occupied car as Robinson drove past them headed in the opposite direction. Appellant admitted Robinson fired several times at them at this time with his weapon. (State's Ex. 17, Interview of Appellant/Interview 1 and 7).

Appellant also admitted they located Robinson on Allen Road, and Young, Jr. fired several shots at Robinson that missed. Appellant explained the reason they fired at Robinson at

Robinson's residence was because Robinson had been shooting at them at that location, when they pulled in Robinson's yard in Appellant's grey truck. (State's Ex. 17, Interview of Appellant).

According to Appellant, he and Young, Jr. then fled from Robinson's residence and as they attempted to flee the area, Robinson then fired at them several times as they turned onto Marshland Road at the end of Allen Road. (State's Ex. 17, Interview of Appellant).

The last witness to testify for the State at Appellant's trial was Dr. Lee Tormos, the forensic pathologist who performed the autopsy on eight (8) year old Khalil. She observed that one (1) bullet had entered into Khalil's chest, piercing his lungs and heart, before coming to rest in his arm. Dr. Tormos concluded the cause of death was a gunshot wound to the left lateral chest and the manner of death was homicide. The bullet was removed and turned over to the Beaufort County Sheriff's Office for analysis. Indisputably, the bullet recovered from Khalil's body was fired from Robinson's gun, a .38 caliber revolver. (R. 647-53).

Appellant called two (2) witnesses in the defense case. Appellant called Dr. Amanda Salas, who testified to her opinion that Appellant's statements were coerced; however, she gave detailed testimony about what Appellant told her about the incident that further incriminated Appellant. Appellant also testified in his own defense and further incriminated himself. (R. 674-710, 711-31).

Dr. Salas admitted Appellant told her the following: Appellant, Young, Jr., and Robinson did not get along because of a prior disagreement. Robinson came to Appellant's house earlier in the day; they got into a fight; they struggled; Robinson fired a gun at Appellant's feet, and Robinson left Appellant's yard. Appellant went and got a gun. Appellant described obtaining the gun from his mother's residence; it was in a bag, unloaded with bullets nearby, and one (1)

magazine for the gun stayed loaded with thirty (30) rounds, and there was an extra box of bullets. The gun was not kept in Appellant's residence, but in another location, his mother's residence. Appellant got in the truck with his son and they ran into Robinson at the Oakview neighborhood. When they ran into Robinson at Oakview, Young, Jr. pointed the gun at Robinson. Robinson's car was going one (1) way and Appellant's truck was going in the other direction. Young, Jr. was not able to shoot Robinson because the gun he was holding jammed or was not put together properly so it would not fire. Appellant and his son then returned to Appellant's house. Appellant and his son went back out driving to send a message to Robinson. According to this statement, they were only going to shoot up Robinson's car. Appellant and his son drove to Allen Road. Appellant was driving the truck and his son was doing the shooting. When they got to Allen Road, Appellant's son fired the weapon they were using while Appellant was driving. (R. 694-708).

Dr. Salas admitted Appellant told police, when asked why his son [Aaron Young, Jr.] was hanging out the window of the truck shooting at Robinson, that his son was shooting because Robinson was "shooting at us." Dr. Salas admitted this statement was made before any alleged element of coercion was introduced into any interrogation. (R. 706).

Appellant testified at trial as follows: Robinson came to his home on the afternoon of September 1st and stated he wanted to talk to Appellant's son. Robinson then pulled a gun and threatened to kill Appellant. Appellant claimed Robinson had been coming to his house for years just terrorizing his family. Appellant alleged Robinson had been burning down houses, hitting people with cars, and just being a menace to the community, and no one did anything about it. Appellant claimed Robinson shot at him, at his son, and at his family at his home on September 1st. Appellant admitted after Robinson shot at him in his yard that he [Appellant]

"just lost it." He claimed he was like a "battered spouse." Appellant stated he was not in his right mind psychologically. Appellant admitted he went to another residence, obtained the "Tech Nine," and brought it out and gave it to his son to use. He admitted he chased after Robinson in his truck. (R. 711-31).

Appellant testified he and his son went to Oakview and while he was driving the truck his son brandished the "Tech Nine" out the window of the truck, but Appellant claimed at trial there was no exchange of gunfire there. Appellant admitted no gunshots were fired on Oakview Road by his son because his son was having trouble assembling the weapon. (R. 711-31).

Appellant admitted he returned to his home and thought about what he was doing and whether it was wrong. Appellant admitted his son tried to talk him out of pursuing Robinson any further. Appellant admitted he did not listen to his son. (R. 711-31).

Appellant admitted during the pursuit of Robinson he came across a relative of Robinson. He asked this relative if he had seen Robinson, and the relative said no. Appellant also admitted he does not like Robinson and told police he wished Robinson were dead. (R. 727-28).

Appellant then testified he and his son then pursued Robinson in the Allen Road area but claimed they never saw him on Allen Road. Appellant claimed they pulled in a yard; he lined up his truck with Robinson's car, his son shot the car up, and they left. Appellant admitted he knew there were kids playing in the area at the time they shot up the car, but claimed he and his son were careful to only shoot the car and not endanger the children who were playing nearby. Appellant claimed what happened after that he did not know. Appellant admitted as he was leaving the area of Allen Road, he did hear gunshots. Appellant claimed they only went down Allen Road one (1) time, and then as they were leaving after shooting the car, Robinson fired at them. (R. 711-31).

ARGUMENT

I. This issue is not preserved for appellate review; however, Judge Cooper did not abuse his discretion and properly denied Appellant's motion for a directed verdict because under South Carolina law mutual combat, transferred intent, and accomplice liability could form the basis for a murder conviction.

The first directed verdict issue raised by Appellant is not preserved for appellate review because it was not raised to Judge Cooper at the directed verdict motion. Notwithstanding Appellant's argument to the contrary, Judge Cooper did not abuse his discretion in holding mutual combat, transferred intent, and accomplice liability were valid legal principles on which to base a murder charge and conviction. (R. 656-57). Accordingly, Judge Cooper did not abuse his discretion in denying the motion for directed verdict. This appellate issue has no merit and must be denied.

Relevant Facts and Proceedings

Motion to Quash the Indictment

After jury selection, Appellant made a motion to quash the murder indictment. (R. 481-82). Appellant claimed the indictment provided inadequate notice and was improper because of the included language regarding mutual combat. The indictment read that Appellant and his son were engaged in mutual combat with Tyrone Robinson and thereby proximately caused the death of Khalil Singleton. (R. 483-85, murder Indictment). Judge Cooper denied the motion to quash the indictment finding the indictment was sufficient because it put Appellant on notice of the charge he must meet, informed him of when the crime was alleged to have occurred, and informed him of how the crime was alleged to have occurred so Appellant could mount and present a defense. (R. 483-85). Specifically, in denying the motion to quash the indictment, Judge Cooper held:

> And we know that the law is, or at least I think that the law is, that in the context of mutual combat the cases indicate that whoever is shot on either side, all who are involved can be guilty of the crime of murder if the person who is shot dies.
>
> And we dealt last time with the case of Aaron Young, Jr. with whether or not that transferred intent that would go from one combatant to another combatant in mutual combat also transfers to an innocent victim. That matter is yet to be decided by an appellate court. It's on appeal now. But it is that particular factual distinction, I think, or that factual anomaly in this case does not render the indictment invalid, because the facts in this case indicate that there was mutual combat. Suggested there was mutual combat, and that an innocent person was killed in the course of that.

(R. 484, lines 3-19). Appellant does not appeal Judge Cooper's denial of the motion to quash the indictment. (IBOA).

Motion for Directed Verdict

At the close of the State's case and Appellant's case, Appellant made a motion for a directed verdict on murder. (R. 654-57, 749).[7] Particularly, Appellant argued that no evidence was presented of the elements of the crime of murder; no evidence was presented of mutual combat between Appellant and Robinson; and no evidence was presented that the victim's death was a natural consequence of that mutual combat. (R. 654-57, 749.). Specifically, Appellant's directed verdict motion was as follows:

> At this point, we would make a motion for a directed verdict.
> Essentially, it is our contention that the elements of murder have not been met. What we have is essentially Tyrone Robinson admittedly committing murder. Aaron Young, Senior is not aiding, abetting, or assisting Tyrone Robinson. He's not Conspiring with Tyrone Robinson. In fact, under the State's theory, is his opposing Tyrone Robinson.
>
> There is no indication that Aaron Young, Senior ever fired a weapon. There is no testimony that Khalil's death was a natural consequence of the actions that we allege were conducted by Mr. Young, and that being the shooting up of a car.
> Natural consequences, trying to predict what Tyrone Robinson is going to do is a difficult task, to say the least. He is an unpredictable individual. You know, the

[7] At the close of the defense case, Appellant simply renewed his previous motion for directed verdict on the same basis as that made at the close of the State's case. (R. 749).

theory of the State that the Youngs shot the car to draw him out of hiding, I think is just their theory.

Your Honor, you know, we would ask that you direct the verdict at this point just based on the fact that the elements of murder have not been satisfied, that mutual combat has not been proven, and that if Your Honor finds that mutual combat, there is evidence for that, that they haven't shown that the death of Khalil Singleton was a natural consequence thereof.

(R. 654, l. 14 – 655, l. 15). The State responded to the motion as follows:

MR. STONE: Just briefly, Your Honor. I would agree that I do not believe that, nor have I argued that Tyrone Robinson and the Youngs were working in concert. It is not a theory that the hand of one is the hand of all, in that context.

I do, however, believe that there's been ample testimony that this was a shootout. I think you have heard it from witnesses describing the rapid fire shots compared to the three - - the three other shots to definite sets of shots at Allen Road. You have testimony as to different trajectories of the, which also, I think, indicates that the car may have been shot in two different locations.

Even taking Aaron Young's statement, he makes the statement that he shot back at them because they shot at - - because Tyrone Robinson was shooting at him. The son is clearly the shooter in the truck, we do not argue that Aaron Young, Senior is the shooter. However, I think that is where the hand of one is the hand of all comes into play.

I think this is a mutual combat situation. I think under a number of people's testimony, it is. And I don't think - - I think from that standpoint, that is the State's - - that's the State's theory on this.

(R. 655, l. 18 – 656, l. 16). Judge Cooper denied the motion for a directed verdict on murder holding as follows:

THE COURT: Mr. Ferguson, it is, in fact, in my view a factor of the law rather than the narrow facts themselves, which impose liability - - a potential liability on Mr. Aaron Young, Senior.

The law that we've already talked about, the law of mutual combat, the law of transferred intent are the sort of things that come together in a legal scenario, and they create responsibility. And, of course, laws can do that and do that quite often.

And so for that reason I feel that the elements of murder as they apply in this particular case of mutual combat, along with the transferred intent aspect of that

as well, that the State has satisfied its burden in that regard sufficient to sustain the motion for a directed verdict at this juncture. That's respectfully denied.

(R. 656, l. 17 – 657, l. 6). Judge Cooper correctly denied Appellant's motion for a directed verdict. Appellant now appeals the denial of the motion for directed verdict for two (2) reasons, one (1) which was not raised below at the directed verdict stage [Argument I.] and one (1) which was raised below and denied [Argument II.].

Lack of Preservation of the 1st Issue Raised on Appeal

Appellant now argues on appeal he was entitled to a directed verdict because he alleges mutual combat is not a criminal offense, but rather a bar to self-defense; transferred intent should not be applied to a mutual combat situation; and accomplice liability should not apply in a mutual combat situation. This issue is not preserved for appellate review because it was not raised to the trial court at the directed verdict motion.[8] Instead, Appellant argued the State had not proved: (1) the elements of murder; (2) there was mutual combat at the time of Khalil's death; or (3) Khalil's death was a foreseeable result of the mutual combat. Appellant's argument on appeal is completely different from what he raised at the directed verdict motion. Appellant now raises a legal argument not the factual argument he raised below. Appellant now argues that he could not be convicted of murder under South Carolina law under legal principles of mutual combat, transferred intent, and accomplice liability. In reviewing a denial of a directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214, 221 (Ct. App. 1998), *aff'd*, 524 S.E.2d 837 (1999); State v. Jordan, 255 S.C. 86, 177 S.E.2d 464 (1970). A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not

[8] Again, although Appellant quotes Judge Cooper's ruling on the motion to quash the indictment in his brief, Appellant does not appeal Judge Cooper's denial of the motion to quash the indictment but the denial of his directed verdict motion. (IBOA).

presented to the trial court below. *See* State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal."). As a result, Appellant's current Argument I. on appeal is not preserved for appellate review. Regardless, even if Appellant had preserved the issue he now argues to this Court, there is no merit to his argument.

General Standard of Review
(Appellate)

In criminal cases, this Court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Thus on review, the appellate court is limited to determining whether the trial court abused its discretion. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Garrett, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002).

Standard of Review / Directed Verdict
(Appellate)

A defendant may only appeal from a trial judge's denial of a motion for a directed verdict of acquittal where there is a total failure of competent evidence tending to establish the charge laid in the indictment, and absent an error of law, the ruling must stand. State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984); State v. Tyner, 273 S.C. 646, 258 S.E. 2d 559 (1979); State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978). In reviewing a denial of a directed verdict, this Court must view the evidence ***and*** all reasonable inferences in the light most favorable to the State. State v. Pearson, 415 S.C. 463, 783 S.E.2d 802 (2016); State v. Bennett, 415 S.C. 232, 781 S.E.2d 352, 753 (2016); State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014); State v. Lemire, 406 S.C. 558, 753 S.E.2d 247 (Ct. App. 2013), *citing* State v. Weston, 367 S.C.

279, 292, 625 S.E.2d 641, 648 (2006).

The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Brown, 402 S.C. 119, 740 S.E.2d 493, 495 (2013); State v. Gilliand, 402 S.C. 389, 741 S.E.2d 521, *3 (Ct. App. 2012). If there is any direct evidence, or if there is substantial circumstantial evidence, reasonably tending to prove the defendant's guilt, this Court must find the trial court properly submitted the case to the jury. Brown, 740 S.E.2d at 495; State v. Rogers 405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013), *citing* State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011); Gilliand at *3. This Court considers only the existence or non-existence of evidence, not witness' credibility or the evidence' weight, in reviewing the denial of a directed verdict. Bennett, 415 S.C. 232, 781 S.E.2d at 353; State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478-79 (2004); Rogers *supra*, n. 5, 748 S.E.2d 265, n. 5.

Our courts have repeatedly held, where the evidence is circumstantial, the evidence will be considered as a whole, not in isolation, in determining whether there was sufficient evidence to submit the case to the jury. State v. Frazier, 386 S.C. 526, 532-33, 689 S.E.2d 610,613-14 (2010)(viewing circumstantial evidence "collectively" and "as a whole" to hold directed verdict properly denied); Cherry, 361 S.C. at 595, 606 S.E.2d a5 478 (finding circumstantial evidence, when combined, was sufficient to for the fact finder to infer guilt); State v. Buckmon, 347 S.C. 316, 323-24, 555 S.E.2d 402, 405-06 (2001); Rogers, 405 S.C. 554, 748 S.E.2d 265.

If the State has presented any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must affirm the trial court's decision to submit the case to the jury. State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013). "The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling." State v. Stanley, 365 S.C. 24, 42, 615 S.E.2d 455,

464 (Ct. App. 2005). In reviewing the trial judge's denial of a motion for a directed verdict, this Court is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis. Pearson, 415 S.C. 473-74, 783 S.E.2d 907-08; Bennett, 415 S.C. 232, 781 S.E.2 at 354, *citing* State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996). If examining the evidence in the light most favorable to the State, there is evidence in the record which could induce a reasonable juror to find the defendant guilty, then this Court must affirm the trial judge's denial of the motion for a directed verdict. Pearson, 415 S.C. at 474, 783 S.E.2 808; Bennett, 781 S.E.2d at 354.

This Court must concern itself solely with the existence of evidence from which a jury could reasonably infer guilt. Bennett, 415 S.C. at 237, 781 S.E.2d at 354. This objective test is founded upon reasonableness. Id. "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [appellate court] must find the case was properly submitted to the jury." Weston, 367 S.C. at 292, 625 S.E.2d at 648.

The "any evidence" standard also requires that "the existence of 'any direct evidence' proving the defendant's guilt mandates the denial of a directed verdict motion." State v. Phillips, 411 S.C. 124, 133, 767 S.E.2d 444, 448 (Ct. App. 2014), *reh'g denied* (Jan. 27, 2015). Direct evidence is based on personal knowledge or observation which, "*if true,* proves a fact without inference or presumption." Id. (*quoting* Rogers, 405 S.C. at 563, 748 S.E.2d at 270 (internal quotation marks and citation omitted) (alteration in original)). This is because "[t]he presentation of direct evidence 'immediately establishes the main fact to be proved.'" Phillips at 133, 767 S.E.2d at 448 (*quoting* State v. Salisbury, 343 S.C. 520, 524 n. 1, 541 S.E.2d 247, 249 n.1 (2001)).

Moreover, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt. Bennett, 415 S.C. at 237, 781 S.E.2d at 354. Recently, in Pearson, our Supreme Court made it clear the State need not present evidence sufficient to exclude every other hypothesis at the directed verdict stage. Pearson, 415 S.C. 473-74, 783 S.E.2d 802.

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)). The United States Supreme Court noted the following:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, **and to draw reasonable inferences from basic facts to ultimate facts**.

Jackson, at 319 (second emphasis added).

Where co-defendants **are not** tried jointly, and the appellant testifies and calls witnesses in appellant's case in chief, the waiver rule applies and the appellate court, including this Court, will consider all the evidence in the record in determining whether or not the trial judge erred in denying the motion for a directed verdict. State v. Phillips, 416 S.C. 184, 195-97, 785 S.E.2d 448, 453-54 (2016)(explaining Hepburn waiver rule); State v. Hepburn, 406 S.C. 416, 429-42, 753 S.E.2d 402, 410 (2013), *adopting* State v. Harry, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996); *Cf.* State v. Thompkins, 220 S.C. 523, 68 S.E.2d 465 (1951)(citation omitted).

Discussion

Mutual combat, transferred intent, and accomplice liability are valid legal principles under South Carolina law which can form the basis of a murder conviction.

Appellant now argues on appeal he was entitled to a directed verdict because he alleges mutual combat is not a criminal offense, but rather a bar to self-defense; transferred intent should not be applied to a mutual combat situation; and accomplice liability should not apply in a mutual combat situation. However, contrary to Appellant's assertions, under South Carolina law, mutual combat is a valid recognized legal principle under which one can be charged and convicted of murder, despite the fact it has fallen out of common use. State v. Brown, 108 S.C. 490, 95 S.E. 61 (1918); State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003); State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973); State v. Andrews, 73 S.C. 257, 53 S.E. 423 (1906). While mutual combat is a bar to a self-defense claim, the theory is not limited to that one (1) purpose. Brown, *supra*. In Brown, the State used mutual combat to convict multiple defendants for the death of one (1) of the combatants[9] And, transferred intent, a valid legal principle under South Carolina law, would be applicable to Appellant's case since an innocent bystander, a child, was killed, during the mutual combat, instead of a combatant. Finally, accomplice liability, a valid legal principle under South Carolina law, would be appropriate where Appellant provided his son with the "Tech Nine" firearm to use during the running gun battle, told his son how to assemble the weapon, and drove his truck at all times while his son was firing the Tech Nine out of his truck during the ongoing running gun battle with Robinson that led to the innocent child's death.

[9] Brown, 108 S.C. 490, 95 S.E. 61.

The doctrine of mutual combat has existed in South Carolina law since 1843. Taylor, 356 S.C. at 231. The Supreme Court in Taylor acknowledged the doctrine had "fallen out of common use in recent years" but still found it to be binding law. Id. The escalating urban warfare in present-day society has resurrected the need for the doctrine of mutual combat. Here, the State took the long-standing and viable law of mutual combat and applied it to modern day facts.[10] Appellant argues the doctrine of mutual combat can only be used for the sole purpose of barring a plea of self-defense. This is an incorrect limitation of the law on mutual combat. Although mutual combat is commonly analyzed when a claim of self-defense is raised,[11] that is not its only application.

Numerous South Carolina cases have used the legal principle of mutual combat to hold a defendant guilty of murder. "Where two persons mutually engage in combat, and one kills the other, and at the time of the killing it be maliciously done, it is murder. If, on the other hand, it be done in sudden heat and passion on sufficient provocation without premeditation, or malice, it would be manslaughter." Andrews, 53 S.E. at 424;[12] *see also* State v. Hammond, 36 S.C.L. 91, 102 (S.C. App. L. 1850) ("Even in cases of mutual combat, if one begin the fight with a mortal

---

[10] Although the doctrine of mutual combat has fallen out of common use, the present case is not the only recent case in which the State has successfully prosecuted for murder both participants in armed mutual combat who were on opposite sides, where a 3rd person who was present, but not a participant in the armed mutual combat, was killed. *See e.g.* Final Brief of Respondent in State v. Eugene D. Patterson, *Unpublished Opinion* No. 2013-UP-154 (Ct. App. Filed April 17, 2013) and Final Brief of Respondent in State v. Andre Tayson Boone *Unpublished Opinion* No. 2013-UP-155 (Ct. App. Filed April 17, 2013). Respondent is not citing either of these Unpublished Opinions as precedential authority. Rule 268 (d)(2), SCACR.

[11] *See* Taylor, 356 S.C. at 232; Graham, 260 S.C. at 450, 196 S.E.2d at 495 ("Whether or not mutual combat exists is significant because the plea of self-defense is not available to one who kills another in mutual combat.").

[12] Judge Cooper instructed the jury on both murder and voluntary manslaughter. The jury returned a verdict of guilty of murder.

weapon, it is murder..."); State v. Turner, 63 S.C. 548, 41 S.E. 778 (1902) ("Where there is evidence from which a jury may infer that there was mutual combat, on a trial for murder an instruction as to such combat is not error."); State v. Mathis, 174 S.C. 344, 177 S.E. 318, 319 (1934) ("There was evidence of threats which, if true, justified a verdict of premeditated murder. There was testimony that the appellant and the deceased were on the lookout for each other; that they were armed in anticipation of a combat; that each drew his pistol and each fired upon the other. There was no error in charging and arguing the law of mutual combat.").

The 1918 case of State v. Brown utilized the doctrine of mutual combat to hold multiple defendants accountable for the death of one (1) of the combatants. 108 S.C. 490, 95 S.E. 61. Much like the facts of Appellant's case, all of the defendants were held responsible for the death of the victim even though only one (1) of them had inflicted the fatal injury. In Brown, many employees at a local mill began to strike and picket after the mill organized a labor union. Id., 95 S.E. at 62. One morning, a fight erupted between current employees and strikers. Id. One (1) of the men involved in the melee pulled out a knife and killed David Freize, another participant in the fight. Id. Two (2) of the strikers and three (3) of the employees were indicted for the murder of Freize. Id. On appeal, the defendant's alleged that it was improper to charge the law of mutual combat. Id. at 61. The Supreme Court affirmed the convictions and held, "That everyone is presumed to know the consequences of his act, and if one voluntarily enters a mutual combat where deadly weapons are used, knowing that they are being used, and death results to one of the participating parties, every one engaged in such combat is equally guilty, regardless of whether he used a deadly weapon or not. And regardless of whether he was on one side or the other makes no difference, and where all are participating in the mutual combat, all are equally responsible for the natural consequences." Id. at 63.

In order for the doctrine of mutual combat to apply, multiple factors must be shown. In determining whether mutual combat exists, there must be evidence of a "mutual intent and willingness to fight." Jackson v. State, 355 S.C. 568, 571, 586 S.E.2d 562, 563 (2003), *quoting* Graham, 260 S.C. at 450, 196 S.E.2d at 495. One looks to the "acts and conduct of the parties and circumstances attending and leading up to the combat" to determine mutual intent. Id. Also, there must be an antecedent agreement to fight. Taylor, 356 S.C. at 234, 589 S.E.2d at 4. This agreement can be shown by evidence of "ill-will between the parties," threats, and an "apparent willingness of each to engage in an armed encounter with the other" Id. The parties must also be armed and know the other to be armed. Id.

As discussed below under Argument II. of this brief, the State presented overwhelming evidence of all the factors for mutual combat and thus the legal principle was appropriately applied to this case. Appellant contends it was error for the State to use the theory of mutual combat to prove murder. Specifically, he claims the State failed to prove the elements of murder in general. However, the State did prove the elements of murder, and the jury was instructed on the law of murder and they found the State had met its burden of proof in establishing the elements of murder beyond a reasonable doubt. The State proved Appellant did act with malice by attempting to murder Robinson and in doing so engaged in a running gun battle with Robinson in residential neighborhoods in broad daylight with children playing nearby constituting a depraved and wicked heart and one acting with gross recklessness. *See* State v. Wilds, 355 S.C. 269, 276-77, 584 S.E.2d 138, 141-42 (Ct. App. 2003)(defining malice). The State proved Khalil Singleton was killed as a direct and proximate result of the running gun battle between Appellant, his son, and Robinson. *See* State v. Dantonio, 376 S.C. 594, 605, 658 S.E.2d 337, 343 (Ct. App. 2008)("A defendant's act may be regarded as the proximate cause if it

is a contributing cause of the death of the deceased."); Id. ("The Defendant's act need not be the sole cause of the death, provided it is a proximate cause actually contributing to the death of the deceased."); State v. Fennell, 340 S.C. 266, 272, 531 S.E.2 512, 515 (2000)("[A] defendant may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of transferred intent."); State v. Heyward, 197 S.C. 371, 377, 15 S.E.2d 669, 672 (1941)("If there was malice in [defendant's] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake."). Judge Cooper instructed the jury, "Murder is defined in the law as the killing of any person with malice aforethought, either express or implied." (R. 806, 832). Judge Cooper defined the terms "malice" and "aforethought". (R. 806-07, 832-33). Further, he instructed the jury, "the state is required to prove malice beyond a reasonable doubt." (R. 806, 808, 833). And, Judge Cooper instructed the jury Appellant did not have to prove the absence of malice, but the State had to prove the presence of malice beyond a reasonable doubt. (R. 808, ll. 7-9, 833, ll. 18-20). And, Judge Cooper instructed the jury the State must prove beyond a reasonable doubt that the Defendant killed a person. (R. 806, 832). Thereafter, Judge Cooper explained to the jury that the murder charge against Appellant rested on the theory of mutual combat. (R. 808-10, 833-34). Judge Cooper instructed the jury twice on the elements of mutual combat. (R. 808-10, 833-35). Therefore, the jury was well aware that not only must mutual combat be proven, but the elements of murder as well, and they found Appellant guilty of murder and attempted murder beyond a reasonable doubt.[13]

[13] There was no objection to the jury charge on murder by Appellant and he does not raise a jury instruction issue on appeal. Further, as Appellant admits in his brief, there was no objection to the jury instruction on the law of mutual combat and he does not raise that issue on appeal. (IBOA, p. 8, fn. 1).

Next, Appellant asserts that it was error for Judge Cooper to consider the legal principle of transferred intent. Respondent submits Judge Cooper properly considered the law of transferred intent. The law on mutual combat in South Carolina has yet to address the scenario where an innocent bystander is killed instead of a combatant. Nevertheless, it is only logical that transferred intent would apply in such a situation. Transferred intent applies to cases where an innocent bystander is killed, rather than the intended victim. South Carolina recognizes that "if there was malice in [defendant's] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake." Heyward, 197 S.C. 371, 377, 15 S.E.2d at 672. Thus, transferred intent holds the defendant liable for the harm caused to an innocent bystander. *See, e.g.,* Fennell, 340 S.C. at 272, 531 S.E.2d at 515 (A person who, acting with malice, unleashes a deadly force in an attempt to kill or injure an intended victim should anticipate that the law will require him to answer fully for his deeds when that force kills or injures an unintended victim.). It would make no sense for "mutual combat" to hold participants liable for the death of another participant but not for that of an innocent bystander caused by the participants' mutual combat.

The California Supreme Court upheld a murder conviction based on the theories of mutual combat and transferred intent in a similar setting. People v. Sanchez, 26 Cal. 4th 834, 29 P.3d 209 (2001). In referencing the concurring opinion's analysis of transferred intent, the majority opinion stated in a footnote:

> For purposes of applying the rule of transferred intent, it does not matter whether defendant himself fired the fatal shot or instead induced or provoked another to do so; in either situation, defendant's culpable mental state is determined as if the person harmed were the person defendant meant to harm.

26 Cal. 4th at 850, 29 P.3d at 220.

In concluding that each defendant was equally liable for the innocent bystander's death, the Court stated:

> Because defendant and co-defendant, rival gang members, had equally culpable mental states and engaged in precisely the same conduct at the same time and place in exchanging shots in a gun battle, it was not unfair to hold them equally responsible for an innocent bystander's death, without regard to which of them actually fired the bullet

26 Cal. 4th at 854, 29 P.3d at 144.

Accordingly, the doctrine of transferred intent was properly applied to Appellant's case. If Young, Jr. had been killed, then there would be no question that both Appellant and Robinson would be responsible for his death under mutual combat. Since an innocent bystander was killed rather than one (1) of the combatants, the doctrine of transferred intent was properly utilized to transfer Appellant's, Young, Jr.'s, and Robinson's criminal intent to the unintended victim. Hence, there was no error in charging the jury on the law of transferred intent.

Additionally, Appellant argues that the State must present evidence of some doctrine that would allow for one (1) defendant to be responsible for another defendant's actions. Appellant's examples of such doctrines are conspiracy, accomplice liability, and felony murder. However, much like the above theories, mutual combat is a recognized doctrine in which a defendant can be held accountable for the actions of another defendant. *See* Brown, 95 S.E. at 63 ("[E]very one engaged in such combat is equally guilty, regardless of whether he used a deadly weapon or not."); *see also*, Taylor, 356 S.C. at 235, 589 S.E.2d at 5 ("The mutual combat doctrine is triggered *when both parties contribute* to the resulting fight."). Mutual combat with firearms is an unlawful act and one inherently dangerous to others including bystanders. Further, attempting to murder someone with a firearm is also an unlawful act inherently dangerous to others.

To further counter Appellant's argument, Respondent submits a review of other states' case law on mutual combat with relation to other theories of culpability is beneficial. *See* State v. Spates, 779 N.W.2d 770, 779 (Iowa 2010) ("Our cases support a conclusion that the acts of a defendant engaged in mutual combat can be the proximate cause of injury to an innocent bystander that directly results from the act of another combatant."); Roy v. United States, 871 A.2d 498, 509 (D.C. 2005), *cert. denied*, 547 U.S. 1162 (2006) ("While the evidence was unclear as to whether Roy's or Settles' bullet was responsible for the fatal shot, such a determination is unnecessary if both men prepared for and undertook to participate in the gun battle where it was clearly foreseeable that others would be endangered."); Alston v. State, 662 A.2d 247, 254 (Md. 1995) ("Though the groups were adversaries at one level of analysis, at the level of analysis relevant to depraved heart murder, each group aided, abetted, and encouraged the other to engage in urban warfare."). *See also* Reyes v. State, 783 So.2d 1129, 1133 -1134 (Fla. App. 3 Dist. 2001) (noting Alston and adopting logic citing other jurisdictions with similar holdings). The logic of these cases is instructive.

In State v. Spates, 779 NW.2d at 772, the Supreme Court of Iowa reviewed a murder conviction where the victim had been a bystander killed "during a gun battle between rival groups...." The Court considered both theories of aiding and abetting and mutual combat. In light of the applicability of those theories, the court concluded:

> We agree with those courts that have concluded participants in mutual combat encourage each other to engage in the potentially lethal conduct that leads to the injury of innocent bystanders, thereby supporting liability as an aider and abettor.

779 N.W.2d at 780.

Iowa had previously reached a similar conclusion in State v. Brown, 589 N.W.2d 69 (Iowa App. 1998), *reversed on other grounds,* State v. Reeves, 636 N.W. 2d 22 (Iowa 2001). In

that case, the victim was killed when she unwittingly drove between rival gangs in the midst of a shootout. However, a rival gang member, not Brown, actually fired the fatal bullet. Brown contested his second degree murder conviction as there was no evidence connecting him personally to the fatal bullet.[14] The court, considering proximate cause, rejected Brown's assertion finding:

> Brown's engagement in conduct that created a very high risk of death or serious bodily injury to others was a proximate cause of Davis's death. *See* State v. Marti, 290 N.W.2d 570, 579 (Iowa 1980). This is true whether it was the defendant or another participant in the shoot-out who fired the shot that killed the innocent bystander. *See* id. ("It is not essential for conviction in all cases that the accused actively participated in the immediate physical impetus of death").

589 N.W.2d 69, 74 -75.

The Maryland Court of Appeals considered similar circumstances in regard to a conviction for a "depraved murder"[15] conviction, and reasoned as follows:

> The "bottom line" is that when a group, or two groups, of hoodlums deliberately engage in a gang-war style of shoot-out in a crowded urban area, they collectively

---

[14] Though "second degree murder," the malice requirement is substantially the same as South Carolina's malice requirement for murder. In Iowa, "[m]alice is required for both degrees of murder. *See* Iowa Code § 707.1 (1997) ('A person who kills another person with malice aforethought either express or implied commits murder.'). However, first-degree murder requires proof of deliberation and premeditation in addition to malice aforethought. *See* Iowa Code §§ 707.1, 707.2(1). Second-degree murder, on the other hand, does not require deliberation and premeditation; it requires only proof of malice aforethought. *Compare* Iowa Code § 707.2(1) *with* § 707.3." Reeves, 636 N.W.2d at 25. Thus, the charge would be in definition comparable to murder in this State.

[15] Again, this charge appears similar to the "second degree murder" charge in Iowa, and omits only an otherwise required deliberation or premeditation element of first degree. *See* Owens v. State, 906 A.2d 989, 1026 (Md. App. 2006)(describing one way of proving second degree murder as "what has become known as depraved heart murder--a killing resulting from 'the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not.'"). It is not, however, limited to unintentional acts, but apparently professed unintentional results. Robinson v. State, 307 Md. 738, 745-746, 517 A.2d 94, 98 (Md. 1986). The inclusion of the "depraved heart" and "reckless and wanton" aspect, places the charge on similar footing with our requirement of malice. State v. Wilds, 355 S.C. 269, 276-277, 584 S.E.2d 138, 142 (Ct.App. 2003) ("Implied malice is when circumstances demonstrate a 'wanton or reckless disregard for human life'").

> trigger an escalating chain reaction creating a high risk to human life. When instead of taking their gunslinging vendetta to an uninhabited island or some remote spot in the desert, they arrogantly indulge in their homicidal insanity in the middle of a crowded block of residences, each participant in such collective madness displays a wanton and depraved indifference to any human life that might randomly fall within their overlapping and deadly enfilades. Should death to one of the innocent bystanders or homeowners ensue, each participant in the lethal encounter has exhibited the *mens rea* that qualifies him for depraved-heart murder.

Alston v. State, 643 A.2d 468, 469 (Md. App. 1994). The affirmance was upheld on appeal, with the higher court noting: "Though the groups were adversaries at one level of analysis, at the level of analysis relevant to depraved heart murder, each group aided, abetted, and encouraged the other to engage in urban warfare." Alston v. State, 662 A.2d 247, 254 (Md. 1995). *See also* Reyes, 783 So.2d at 1133 -1134 (noting Alston and adopting logic citing other jurisdictions with similar holdings).

Similarly, in a 2005 case, the Court in the District of Columbia, in reviewing a causation charge, reasoned that "while proximate causation as a theory of second-degree murder liability has been recognized in our case law for some time, the factual scenario of a 'gun battle' on city streets, as in this case, is relatively new." Roy v. United States, 871 A.2d 498, 507 (D.C. 2005), *cert. denied*, 547 U.S. 1162, 126 S.Ct. 2346 (2006). The Court easily acknowledged "the application of proximate cause liability to those participants who willfully choose to engage in these battles." Id. In upholding the application in that specific case as reflected in the contested charge on causation, the Court reasoned: "While the evidence was unclear as to whether Roy's or Settles' bullet was responsible for the fatal shot, such a determination is unnecessary if both men prepared for and undertook to participate in the gun battle where it was clearly foreseeable that others would be endangered." 871 A.2d at 509.

Therefore, under the law of South Carolina and many other states, if both parties contributed to the mutual combat (which by definition they must), then both parties are actors in the gunfire and both parties are culpable for the resulting injury.

Furthermore, the law of parties to a criminal offense would be applicable to Appellant who retrieved the "Tech Nine" weapon from a residence, was angry at Robinson and wanted to kill him, handed the gun to his son to use, told him how to assemble the weapon, and drove his truck throughout the running gun battle with Robinson as his son fired out the passenger window of the same. "Under the 'hand of one is the hand of all' theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." State v. Gibson, 390 S.C. 347, 701 S.E.2d 766, 769 (Ct. App. 2010). It is clear there is evidence in the record from which the jury could find beyond a reasonable doubt that Appellant and his son, acting together, aiding and abetting each other, participated in a running gun battle [mutual combat] with Tyrone Robinson, attempting to murder Robinson, that proximately resulted in the death of an innocent child bystander, eight (8) year old Khalil Singleton.

Finally, Appellant argues that South Carolina should not allow for a murder conviction to rest upon the legal principles of mutual combat and transferred intent because, if the legal theory was accepted, any time an individual fought with an opponent, the individual would be criminally responsible for the harm caused by his opponent's conduct. This is simply not true. If a person was truly acting lawfully in self-defense, the legal principles of mutual combat and transferred intent would not apply. Mutual combat is different. The parties agree to fight and to

fight with firearms. They are by definition not acting in self-defense. *See* Taylor, 356 S.C. at 232; Graham, 260 S.C. at 450, 196 S.E.2d at 495.

Respondent submits that is the precise reason mutual combat with firearms can be and should be used for a murder conviction. Much like accomplice liability, both parties should be held equally accountable for the consequences that result from creating a zone of danger. Mutual combatants' activities are comparable to those of aiders and abettors because they encouraged each other to engage in a dangerous urban or residential conflict. Reyes, 783 So.2d at 1133-1134. Here, Appellant, his son, and Robinson encouraged each other to engage in a lethal running gun battle that resulted in the death of an innocent child. Even though Robinson fired the bullet that killed Khalil, it is just as probable that one (1) of Appellant's and Young, Jr.'s bullets could have injured or killed an innocent bystander who was merely caught in the crossfire of the havoc the men created. Further, if not for the running gun battle instigated and continued by Appellant and his son, eight (8) year old Khalil would not have been killed. Therefore, not to hold Appellant accountable for the death of Khalil would be an injustice, for this case and future cases.

In conclusion, the deep-rooted doctrine of mutual combat is a valid legal principle on which to base a murder charge or conviction. Here, Appellant, Young, Jr., and Robinson mutually engaged each other in an armed conflict with deadly weapons in which it was reasonably foreseeable that someone could be killed. The fact that an eight (8) year old child was killed, instead of one (1) of the three (3) men engaged in mutual combat, does not excuse the combatants of their culpability. In fact, it makes it more egregious. The State properly prosecuted Appellant for murder under the theory of mutual combat, transferred intent, and accomplice liability; and, Judge Cooper correctly denied the motion to quash the indictment and

the motion for a directed verdict. Judge Cooper did not abuse his discretion in holding that mutual combat, transferred intent, and accomplice liability were valid legal principles on which to base Appellant's murder charge and conviction. The motion for directed verdict was appropriately denied, and thus, this appellate issue has no merit and must be denied.

II. Overwhelming direct and circumstantial evidence of mutual combat was presented at trial to withstand the directed verdict motion.

Appellant argued below that no evidence was produced at trial that Appellant and Robinson were engaged in mutual combat at the time of the murder. This issue was preserved for appellate review; however, there is no merit to it. Judge Cooper properly denied Appellant's motion for a directed verdict because the State presented both direct and substantial circumstantial evidence that Appellant, his son, and Robinson were engaged in mutual combat when eight (8) year old Khalil Singleton was killed. (R. 654-57, 749). In failing to view the evidence in the light most favorable to the State, Appellant's argument is wholly without merit. At trial, the State produced ample direct and circumstantial evidence showing Appellant, his son, and Robinson were engaged in mutual combat on the afternoon of September 1, 2012.

As previously stated, there must be a "mutual intent and willingness to fight" to constitute mutual combat. Taylor, 589 S.E.2d at 3. The required mutual intent can be inferred from the parties' acts and conduct, and the circumstances of the combat. Id. Mutual combat also requires the combatants to be armed and know the other to be armed with deadly weapons. Id.; *see also* State v Mathis, 174 S.C. 344, 177 S.E. 318 (1934) (finding mutual combat charge proper based on testimony that appellant and deceased were on the lookout for each other, that each was armed in anticipation of meeting the other, and that each drew and fired his pistol at the other); Brown, 95 S.E. at 63 ("That everyone is presumed to know the consequences of his act, and if one voluntarily enters a mutual combat where deadly weapons are used, knowing that they are being used, and death results to one of the participating parties, every one engaged in such combat is equally guilty, regardless of whether he used a deadly weapon or not. And regardless of whether he was on

one side or the other makes no difference, and where all are participating in the mutual combat, all are equally responsible for the natural consequences."); *See also* 40 C.J.S. Homicide Section 197 ("Mutual combat usually arises when the parties are armed with deadly weapons and mutually agree or intend to fight with them."). In finding that evidence of mutual combat existed to submit the issue to the jury, the Court in Graham held:

> There was ill-will between the parties. They had threatened each other and it is inferable that they had armed themselves to settle their differences at gun point. Under these circumstances, the apparent willingness of each to engage in an armed encounter with the other, sustained an inference that they were engaged in mutual combat at the time of the killing, and required that the issue be submitted to the jury for determination.

260 S.C at 452, 196 S.E.2d at 496.

Mutual intent and willingness to fight

The State presented direct and substantial circumstantial evidence that Appellant and Robinson mutually intended to fight. At trial, the chain of events surrounding Appellant and Robinson's extensive armed chase and running gun battle were presented to the jury by numerous witnesses and evidence.

Robinson approached Young, Jr. with a .38 caliber gun in his hand. Appellant tried to take the gun away but it accidently fired. Appellant backed away as Robinson fired several shots into the ground at his feet. Robinson then got into his vehicle with his gun and drove away. (R. 565-81; State's Ex. 17, Statements of Appellant).

Seconds after Robinson left, Appellant and Young, Jr. did not call police and report the shooting but retrieved a black bag containing a "Tech Nine," a 9MM semi-automatic weapon, a thirty (30) round magazine, and a box of ammunition. Appellant admitted he and his son conferred and decided to go after Robinson. Appellant admitted he wanted to kill Robinson for

firing at his feet or legs and threatening his son. Jontu testified both men were angry when they went in search of Robinson. (State's Ex. 17, Interview of Appellant, R. 565-81).

Appellant and his son got into Appellant's grey truck with Appellant driving. Appellant handed the 9mm weapon to his son. In Appellant's grey truck, Appellant and Young, Jr. began searching for Robinson on the public roads of Hilton Head Island. (State's Ex. 17, Interview of Appellant, R. 565-81).

As they were driving looking for Robinson to shoot him, Appellant handed the black bag containing the "Tech Nine" to his son; Young Jr. removed the contents of the bag, and Appellant instructed his son how to assemble the weapon for firing. Young Jr. assembled the "Tech Nine." (R. 565-81).

After one (1) failed attempt at locating Robinson, Appellant and Young, Jr. finally tracked Robinson down on Oakview Road. With Appellant's knowledge and assistance, his son, Young, Jr. pulled his weapon out, leaned out the window of Appellant's truck, and with Appellant still driving the truck, Young, Jr. tried to shoot Robinson but the gun jammed. According to Appellant's own statement to police that was admitted in evidence, at this time Robinson also brandished his .38 caliber weapon out the window of his car and fired several shots at Appellant and Young, Jr. (State's Ex. 17, Interview of Appellant/Interview 7). A woman who called 911 reported that a grey truck and a car driven by Robinson were shooting at each other near Spanish Wells Road. (State's Ex. 4, 911 calls).

Appellant and his son decided to continue the pursuit and drive back to Robinson's home on Allen Road for the 2nd time that day. Appellant drove to Robinson's residence, and with Appellant driving and with his knowledge and consent, Young, Jr. began firing numerous bullets at Robinson using the "Tech Nine" as Appellant drove into Robinson's yard. Robinson came out

of some location and fired at Appellant and his son with his .38. Appellant then drove he and his son away. (State's Ex. 17, Interview of Appellant; State's Ex. 3, 911 calls). Another citizen who lived one (1) street over from Allen Road called 911 and reported numerous shots being fired on Allen Road. Charlese Mitchell also testified to hearing what sounded like ten (10) rapid shots being fired near her home. This was the 1st set of rapid shots.

Delaney testified Robinson approached him during the running gun battle and told him that the men in the grey truck [Appellant and Young, Jr.]: "yeah they was shootin at me so I shoot back at them". The shooting at Robinson's residence would have been the 3rd time Robinson had brandished his pistol and fired bullets at or near Appellant and Young Jr.

Appellant and his son did not stop their pursuit of Robinson. They continued up Marshland Road running Delaney off the road, but they then turned around and drove back down Marshland Road. Once they arrived there, they spotted Robinson's car parked in Mr. Griffin's yard near a pine tree. Again, while Appellant was acting as the driver, Young, Jr. shot Robinson's car multiple times with the "Tech Nine." The two (2) men then turned around and drove down Allen Road again in search of Robinson. (R. 507-61, 716-17, 718)

After Robinson left Delaney's residence, Delaney entered his home and heard a series of rapid shots sounding like they came from a submachine gun [the "Tech Nine"]. His girlfriend, who had been home earlier and heard the first (1st) set of rapid shots, testified after Delaney arrived home and Robinson left, she also heard this second (2nd) set of rapid shots. She then saw Appellant coming from the direction of Robinson's residence in his grey truck. This was the 2nd time she saw Appellant coming from the direction of Robinson's residence after gunfire. Another nearby resident called 911 and reported numerous gunshots being fired on or near Allen Road. Charlese then saw Appellant with another male in the passenger seat, squeal his tires as

he turned off of Allen Road and onto Marshland Road. She then heard three (3) separate shots from a different kind of weapon [Robinson's .38] as Appellant drove away. (R. 507-50).

Charlese Mitchell and Domonique Griffin established that Robinson was in Griffin's yard when he fired the three (3) shots at Appellant and his son as they turned off of Allen Road onto Marshland Road. This was the 4th time Robinson had fired his .38 at Appellant and Young, Jr. the afternoon of September 1st. It was then that Khalil was shot and died.

Appellant and Robinson's actions and conduct that afternoon indisputably prove the required mutual intent and willingness to fight for mutual combat. This intent is further demonstrated by Appellant's own admission to participating in a running gun battle with Robinson. (State's Ex. 17, Statements of Appellant).

Agreement to Fight

Also, there must be an antecedent agreement to fight. Taylor, 356 S.C. at 234, 589 S.E.2d at 4. This agreement can be shown by evidence of "ill-will between the parties," threats, and an "apparent willingness of each to engage in an armed encounter with the other" Id.

The State presented direct evidence of Appellant and Robinson's animosity towards each other. Appellant had the following conversation with police discussing his relationship with Robinson:

(A) Man, Dude started fucking with us (inaudible) is all I got to say.

(A) He came down and shot at me and my car and all I did was defend myself. Now what happened after that, I went down there to confront him and he started shooting at us and we got the fuck from around there. And then ...

(Q) Why was your son shooting out the window?

(A) Because he was shooting at us, cause he was shooting.

(A) ...I was like ... I'm thinking ... like, I ain't even gone lie to y'all. I'm thinking I'm gone kill him. 'Cause he tried to kill me.

(A) 'Cause this ain't the first time. He shot at my car one time...

(A) ...So we went after him [Robinson]...

(A) But him [Robinson], I'll kill him in a heartbeat, because he doesn't deserve to be here. [Then discussing remorse for the death of the child].
But him [Robinson], I have no remorse. You understand I wish he was dead right now.

(State's Ex. 17, Statements of Appellant). This colloquy, coupled with the chain of events on September 1, 2012, clearly shows Appellant and Robinson had ill-will towards each other.

Appellant's incriminating statements to law enforcement, the testimony of the eyewitnesses to the running gun battle, the physical evidence, and the 911 calls admitted in evidence show each of the three (3) men agreed to and did mutually participate in running gun battle [mutual combat] on the streets, roads, and in the yards of Hilton Head Island including on Oakview Road, Allen Road, and Marshland Road.

Armed and knew the other to be armed

The parties must also be armed and know the other to be armed. Id. The State presented direct and circumstantial evidence that Appellant and his son were armed with a "Tech Nine", 9MM semi-automatic pistol. During Appellant's interview with police, Appellant admitted to his son using the 9MM to try to shoot Robinson on more than one (1) occasion and to shooting at Robinson. Additionally, Appellant admitted his son attempted to shoot Robinson earlier on Oakview Road with the 9 mm gun but it jammed. (State's Ex. 17, Interview of Appellant).

The State also presented evidence that Appellant and his son were armed through Jontu, Sr.'s testimony. According to Jontu, Appellant was driving and he handed his son a bag, and Appellant's son pulled a gun out of a black bag and began assembling the weapon while they

were searching for Robinson. (R. 565-81). Agent DeFreese's testimony corroborated Jontu's testimony and Appellant's admission in determining that the bullets in Robinson's car originated from Appellant's and his son's 9 MM semi-automatic pistol. (R. 626-46).

Also, the State introduced direct evidence that Appellant knew Robinson was armed with a weapon. During Appellant's interview, he discussed knowing what type of gun Robinson used during the conflict:

> (Q) What ... What did he have?
>
> (A) Who?
>
> (Q) Tyrone.
>
> (A) A pistol.
>
> (A) I know what I took from him in my yard was a ... a thirty-eight. [Appellant then admits he did not actually take the .38 away from Robinson but just knocked it or slapped it away].

(State's Ex. 17, Statements of Appellant)

Furthermore, the State produced other evidence that Appellant knew Robinson was armed. Jontu testified that Robinson approached Appellant's son with a gun in his hand on Wild Horse Road. Appellant then attempted to take the gun away from Robinson but was unsuccessful. Robinson then fired the gun several times in front of Appellant. Robinson then left Appellant's home with the handgun. (R. 565-81). Appellant also confirmed Jontu's testimony in this regard. (State's. Ex. 17, Interview of Appellant).

Appellant also knew Robinson was armed after the encounter on Oakview Road. Appellant told police:

> We know his usual spots. Okay, so we pass him ...and when we pass him ...he's hanging out the road...out his window brandishing his pistol again ... (motioning with hands) ...so at this point, I was like, well...I mean,, he's going to try and kill us...all right?

(State's Ex. 17, Interview of Appellant). Appellant knew Robinson was armed.

And, the State proved Robinson knew that Appellant and his son were armed. Robinson saw Appellant's son try to shoot him when he drove past them on Oakview Road. After Appellant and his son shot at Robinson on Allen Road, Robinson told Delaney and his wife separately that those "M.F.'s shooting at me, so I shoot back." And, Robinson returned fire on the last occasion minutes after Appellant and his son fired into Robinson's car. (R. 507-50, 550-61, 647-53, 696-97, 699-701, 702-03, 706). Robinson knew Appellant and his son were armed.

Natural Consequences

Additionally, Appellant admitted Khalil and the other children were playing outside. (R. 720). During Appellant's interview, he admitted multiple times to engaging in a gun fight in the area where children were present:

> (A) So we went down to Allen Road and when we got down to Allen Road, I saw his car. We turned around in the driveway, and that's when he came out shooting...
>
> (Q) Okay, how many shots did your son shoot down there on Marshland Road...on Allen, Allen, Allen Road. Whatever they call it...how many shots did he...he's right next to you in your car. I mean its all right...
>
> (A) Probably like four or five shots, man.
>
> (Q) Okay where at? Towards Tyron or at the car?
>
> (A) Toward...toward's Tyrone...Tyrone was running back...

(State's Ex. 17, Statements of Appellant).

While discussing seeing the children, Appellant testified:

> Because his window was down and nobody was in it. And it doesn't take a rocket scientist to see, if he was inside that car and we shot it up that many times, somebody would have been dead, you know. We made sure that, you know, it's bad that it was kids in the community playing, but we made sure that we was away from all those kids that were playing. They were playing on the trampoline when we left out.

You know, its bad that the kids were in that neighborhood, I'm not going to sit here and say that it wasn't. But we didn't put anybody in harm's way.

(R. 720, ll. 1-11). This clearly demonstrates that Appellant was aware that innocent bystanders were in the vicinity. But this fact did not stop Appellant from continuing the conflict with Robinson, shooting up his car, and driving down Allen Road and back up Allen Road in pursuit of Robinson personally. Additionally, the running gun battle occurred in broad daylight in residential neighborhoods. Furthermore, the actions of Charlese Mitchell in calling the children in during the running gun battle, and Kathleen Fayfich of Peregrine Point in calling 911 proves any reasonable person would have anticipated the danger to children in the area. Accordingly, Appellant knew the natural consequences of his actions could lead to a bystander's death.

In conclusion, overwhelming direct and circumstantial evidence was presented to the jury tending to prove Appellant, and his son, were engaged in mutual combat with Robinson. The State introduced evidence Appellant, his son, and Robinson had a mutual intent to fight, they had ill-will between each other, and all came to the fight armed and knew the other to be armed. And, they continued to engage in the running gun battle even after the first direct encounter with firearms on Oakview Road. The elements of mutual combat were clearly established. Thus, Judge Cooper did not abuse his discretion in denying Appellant's motion for directed verdict on this basis.

To the extent Appellant argues he withdrew from the mutual combat, and as a result he should have been granted a directed verdict on the murder charge, **this issue is not preserved for review since Appellant did not request a directed verdict on the basis of a withdrawal**

from mutual combat.[16] From a review of the trial record, Appellant only discussed the end or withdrawal from mutual combat when he requested a jury instruction on the law after he had already argued his motion for a directed verdict and it had been denied. In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214, 221 (Ct. App. 1998), *aff'd*, 524 S.E.2d 837 (1999); State v. Jordan, 255 S.C. 86, 177 S.E.2d 464 (1970). A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not presented to the trial court below. *See* State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal."). Here, Appellant did not argue withdrawal from mutual combat when he made a motion for a directed verdict. The trial judge only had the opportunity to consider this issue when Appellant asked for a jury charge on the law of withdrawal. Therefore, Appellant is barred from asserting this point as a basis for a directed verdict in his appeal. Id.

Regardless, Appellant would not be entitled to relief even if he properly raised this issue at the directed verdict stage. In order to bring mutual combat to an end, one (1) of the combatants must withdraw from the conflict in good faith and make that fact known to his adversary. Graham, 260 S.C. at 451, 196 S.E.2d at 495–96. Here, there was no evidence presented by the State that would allow for the judge to find definitely that Appellant withdrew from the conflict. Appellant's action of driving away after firing multiple bullets into Robinson's car, then driving down Allen Road and returning back up Allen Road to Marshland Road, and then turning onto Marshland Road and driving away when shots were fired, must be

[16] Appellant does not argue in his brief either that he withdrew from the mutual combat; however, Respondent anticipates Appellant may attempt to argue this unpreserved issue at the oral argument.

taken in context with the entire conflict. The chain of events that unfolded on September 1, 2012, included numerous instances of Appellant and Robinson driving to and away from multiple locations shooting at each other or attempting to shoot at each other. Appellant's other comings and goings were not viewed as withdrawals because they were simply in furtherance of his pursuit of Robinson. This instance should not be viewed as any different. Also, Appellant's recorded statements that were published to the jury show he did not intend to withdraw. As to Appellant's claim of withdrawal from mutual combat,[17] this claim is not supported by a review of the trial record. Evidence was produced at trial that Appellant did not withdraw from the combat in good faith or communicate the same to Robinson.

Discussion

According to Appellant's argument on the jury instruction below, the actions of Appellant and Young, Jr. driving down Marshland Road after shooting Robinson's car and after looking for Robinson again on Allen Road, constituted an end to the mutual combat. Essentially, Appellant's position is that driving away should be viewed as a withdrawal from the conflict entitling him to a directed verdict. Appellant is wrong.

Analysis

"Where a person voluntarily participates in mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary in the course of such conflict on the ground of self-defense, regardless of what extremity or imminent peril he may be reduced to in the progress of the combat, unless, before the homicide is committed, he **withdraws and endeavors in good faith to decline further conflict**, and, either by word or act, **makes that fact**

[17] Mutual combat case law uses the term "withdraw" not "ending mutual combat" when discussing this issue. *See* Graham, 260 S.C. at 451, 196 S.E.2d at 495–96. Therefore, Respondent shall use "withdraw" when addressing when mutual combat ends.

known to his adversary." State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). Thus, two (2) elements must be satisfied in order to successfully withdraw from mutual combat. Here, neither of these elements has been met.

Appellant argued below on the jury instruction issue that he withdrew from the conflict when he drove away after shooting holes in Robinson's car, thereby ending the mutual combat. However, the key component to withdrawal from a conflict is that it must be done in **good faith**. In order to actually withdraw in good faith from a conflict, the aggressor must have truly desired to withdraw from or abandon the conflict, and must not have merely paused in his assault. *Comment Note: Withdrawal, After Provocation of Conflict, As Reviving Right Of Self-Defense*, 55 A.LR.3d 1000, 1003 (1974). Thus, there is no withdrawal where Appellant simply steps back to assume a better strategic position or if he leaves and then returns to the scene with the same threatening or hostile intentions. Id. An aggressor does not abandon a conflict if he merely leaves to obtain a weapon, to wait for his adversary in ambush elsewhere, or because he is convinced that he has disabled or killed his adversary. Id.

Although South Carolina case law maintains that a withdrawal must be done in good faith, it does not specifically address what constitutes a "good faith withdrawal." However, other states have addressed this very issue. In addressing this issue, the Supreme Court of Missouri explained the difference between a good faith withdrawal and a mere retreat. "There is a wide difference between a withdrawal and a mere retreat. A retreat may be and often is a continuance of hostilities. A withdrawal is the abandonment of the struggle by one of the parties, and such abandonment must be perceived by the other." State v. Heath, 237 Mo. 255, 141 S.W. 26, 29 (Mo. 1911).

Additionally, the Kentucky Court of Appeals in Hellard v. Commonwealth rejected the defendant's assertion that he withdrew from the combat in good faith. Hellard v. Commonwealth, 84 S.W. 329, 329 (Ky. 1905). The Court held, "A retreat is not necessarily an abandonment. It may be only the falling back on a better position, or for strategic reasons, with intention to continue the battle when the advantage warranted it." Id.

Also, the Supreme Court of Louisiana, in State v Kellogg, analyzed the reinstatement of a claim of self-defense if the defendant withdrew from the combat in good faith. State v. Kellogg, 29 So. 285 (La. 1901). The Court stated that self-defense could not be asserted under the basis of withdrawal if the conduct was "a mere momentary cessation of hostilities, with no bona fide, clearly expressed intention to withdraw from the conflict." Id. at 291.

Here, there was certainly no evidence presented by the State that indicated Appellant withdrew or desired to withdraw from the conflict in good faith. Appellant's explanations or protestations at trial of his intent are irrelevant to the directed verdict analysis. State v. Larmand, 415 S.C. 23, **31**, 780 S.E.2d 892, **896** (2015). Appellant's act of driving away minutes after firing multiple bullets into Robinson's car at Griffin's residence, and after driving down Allen Road and back up Allen Road in search of Robinson personally, was not a desire to end the fighting. Appellant's actions were not a withdrawal, but a continuation of the hunt for Robinson or at most a retreat when Appellant saw Robinson about to shoot at him from Griffin's yard. Appellant's act of driving away must be viewed in relation to the whole incident and all of the direct and substantial circumstantial evidence. Id. at 31-33; 780 S.E.2d at 895-896.

The entire conflict revolved around Appellant and Robinson chasing after each other. Appellant traveled down numerous roads and made many stops in his search for Robinson. These other comings and goings were not withdrawals but rather mere continuations of

Appellant's pursuit of and hunt for Robinson. Appellant's act of turning onto Marshland Road from Allen Road and driving down the road, after shooting Robinson's vehicle and then pursuing Robinson personally on Allen Road, again should not be viewed as any different. The judge or jury could infer Appellant was merely unsuccessful in locating Robinson on Allen Road, or Appellant squealed his tires and took off on Marshland Road because he saw Robinson about to fire at him from Griffin's yard. Nor should Appellant's turning onto Marshland Road from Allen Road and driving away be viewed as any different than when Appellant drove down Allen Road and later turned onto Marshland Road after shooting at Robinson the 1st time on Allen Road at Robinson's residence.

Assuming Appellant intended to withdraw, which the evidence suggests otherwise, neither his words nor actions communicated this intent to Robinson. The Court in Graham explained that a withdrawal must be "communicated to the victim by word or act". 260 S.C. at 451, 196 S.E.2d at 496. Appellant did not attempt to verbally communicate a desire to end the conflict with Robinson. Moreover, Appellant's act of driving down the road would not have been reasonably interpreted by Robinson that Appellant intended to cease fighting. Instead, Appellant's act of shooting Robinson's car, then driving down Allen Road and returning up Allen Road and turning on Marshland Road, would have communicated to Robinson that Appellant and his son were still searching for Robinson personally. As stated above, the conflict included multiple instances of driving to and from different locations that did not amount to a withdrawal. It would be unreasonable to assume Robinson viewed this instance as anything different.

Therefore, since Appellant did not withdraw from the conflict in good faith or inform Robinson of an intended withdrawal, a directed verdict was properly denied. Therefore, there was no error. Appellant's argument to the contrary, if made, should be rejected.

CONCLUSION

For all of the foregoing reasons, Appellant's conviction and sentence for murder must be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY BROWN
Senior Assistant Deputy Attorney General

ANTHONY MABRY
Senior Assistant Attorney General

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Circuit

By: _____
ANTHONY MABRY
S.C. Bar No. 11973

South Carolina Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 743-3665
ATTORNEY FOR RESPONDENT

September 19, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Thomas W. Cooper, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

AARON YOUNG, SR.,

Appellant

Appellate Case No. 2016-000873

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."

ANTHONY MABRY
Senior Assistant Attorney General

September 19, 2017