STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Edward B. Cottingham, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

JOSHUA GRIFFITH,

Appellant

Appellate Case No. 2014-000066

AMENDED FINAL BRIEF OF RESPONDENT

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APPELLANT'S QUESTIONS PRESENTED

I, Whether the Court erred by refusing to direct a verdict of acquittal on the charge of murder since there was not direct or substantial circumstantial evidence that appellant killed the victim with malice aforethought, since the evidence against the co-defendant having been the killer was overwhelming, and the stand-alone reply testimony of appellant's former girlfriend that appellant allegedly said he saw the victim die was not substantial circumstantial evidence of his guilt?

II. Whether the Court erred by refusing to direct a verdict on two counts of Assault and Battery With Intent to Kill and criminal conspiracy since there was no direct or substantial circumstantial evidence appellant committed the battery upon the injured victims?

III. Whether the Court erred by refusing to charge the State v. Logan, circumstantial evidence charge, since that charge was needed in this overwhelmingly circumstantial evidence case, and the judge had the duty to charge the law where it was applicable, as here?

IV. Whether the Court erred by permitting appellant's former girlfriend, Kayla Houck, to testify as a reply witness where she was in violation of the sequestration order?

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Joshua "Blake" Griffith, was indicted by the Horry County Grand Jury for the offenses of murder, criminal conspiracy, and two counts of assault and battery with intent to kill (ABIK) at the December 3, 2009 and August 22, 2013 terms of the Court of General Sessions. Indictments 2009-GS-26-4833, 4834, 4835, 2013-GS-26-3198. ROA 711-18. The case involves the September 8, 2009 death of David John "D.J." Houghtaling and the assaults on Ryan Palmer and Robert Penna, and criminal conspiracy to commit murder with Blakely Brown. Co-defendant Blakely Brown was indicted for similar offenses. ROA . * The Appellant entered a not guilty plea and a jury was held January 6-10, 2014, before the Honorable Edward B. Cottingham, presiding judge. The Appellant was represented by B. Alexander Hyman and Blake A. Hewitt of the South Carolina Bar. The matter was prosecuted by Assistant Solicitors Nancy R. Livesay, Martin D. Spratlin, and Carolina F. Fox of the Fifteenth Circuit Solicitor's Office. R. 1, Tr. 1. On January 10, 2014, the jury found appellant guilty on all counts. R. 695, Tr. 854, ll. 1-17. Judge Cottingham sentenced appellant to thirty (30) years for murder and sentences of ten (10) years concurrent of each of the assault and battery with intent to kill convictions and five (5) years concurrent on criminal conspiracy. R.p. 709, ll. 6-23.

The Appellant timely appealed the conviction on January 14, 2014. This briefing follows.

ARGUMENTS

I. The Trial court correctly denied the motion for a directed verdict for the murder under an accomplice liability theory, criminal conspiracy and assault and battery with intent to kill where there is evidence taken in the light most favorable to the State that Appellant and Blakely Brown began a fight at the Afterdeck where they killed one victim and injured two others through the use of two knives with malice aforethought. (Issues I and II)

The State's theory of the case was not complex. The Appellant, Joshua "Blake" Griffith and his friend and accomplice, Blakely "Blake" Brown went to the Afterdeck Bar at Myrtle Beach with an intent to start trouble and created it resulting in the death of "D.J." Houghtaling and the stabbing injuries to Ryan Palmer and Robert Penna. The record reveals that

- Griffith, along with accomplice Blake Brown armed themselves with knives prior to entering the bar,
- Griffith shows his knife while in the bar clipped to his pocket provoking concern among those who saw it,
- Griffith is seen playing with and playing the knife.
- Griffith and Brown they volunteered to assist another group if needed earlier that evening stating "they were the two realist mother f-----s we were going to meet and they were ready to kill a mother f----r,"
- They bumped and stared down Ryan Palmer and D.J. and his group attempting to provoked them,
- They said to Palmer "You're about to get fucked up, "
- which leads to shoving directed to the Appellant and Palmer and then a fight
- where the victims are all unarmed and Brown and Griffith use their knives
    - to cut Palmer on his head and hands,

- Penna with a stab wound by Griffith into his back and
- the deadly wound through the chest and heart to Houghtaling.

- Griffith admits to Marianna Mays that he had something to do with the fight and
- then flees the scene on foot. He is chased by the manager until he heads into the woods.
- He is captured the next day on the other side of the waterway where he is asleep on the golf course without his recently purchased knife.

Relevant to the murder charge, Robert Penna stated that he thought Parker had the taller guy (Brown) under control and looked around and saw D.J. not holding his own body weight up and crouched over and then saw that Griffith was standing over D.J. R. 252-53, 257-58, Tr.p. 310-311, 315-16. Penna stated he then went over and got into a scuffle with Griffith and although he did not see the knife while Penna was on all fours he got stabbed in the back, he believed by Griffith. R. 253, 256, Tr.p. 311, 314 (shows shirt with hole in back and scar from incident). D.J. died as a result of that wound he received, although Penna was unaware at the time of its existence. Ashley McNeil describes seeing D.J. get bumped or bump and was apologetic, but then she then sees punching. R. 98, Tr.p. 153. She states that next thing she sees is D.J. down on the floor and the blood. R. 99, Tr.p. 154.

In this appeal, the Appellant contends that the evidence was insufficient to convict Griffith of murder. The Appellant apparently asserts that there was a lack of evidence that Griffith actually caused the injuries to the individual victims and complains that inconsistent testimony or the fact that they were trash talking is insufficient proof. He complains that the trial judge in denying the directed verdict motion focused on n the fact that Griffith had just purchased a knife where Brown already had a knife and that Brown's DNA was found on a

knife.[1] He further asserts that the trial judge assertion was that Griffith was acting with Brown and that both men wanted to start a fight that night which was not substantial circumstantial evidence that Appellant murdered the decedent or committed assault and battery on Palmer and Penna. *Initial Brief of Appellant*, p. 19. He even claims that reply testimony of Kayla Houck in which Appellant with remorse described the decedent falling from his blow and getting rid of the weapon would only lead to a suspicion of guilt. Id, p. 19. He concludes that his argument that Brown alone was the guilty party and complains about the sentence Brown eventually received.[2] Respondent respectfully submits that the Appellant plainly is applying the wrong standard of review since this case involves the concept of the hand of one hand of all. Further, the Appellant fails to recognize that there is a plethora of evidence that suggests the combine effort by Griffith and Brown to create the melee and their use of weapons against Ryan Palmer, Robert Penna and D.J. Houghtaling.

STANDARD OF REVIEW

"In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict." *State v. Hepburn,* 406 S.C. 416, 429, 753 S.E.2d 402, 408 (2013). "During trial, [w]hen ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *Id.* at 429, 753 S.E.2d at 408–09 (alteration by court) (internal quotation marks omitted). "The trial court should grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty, as [s]uspicion implies a belief or opinion as to guilt based upon facts or circumstances

[1] In his brief, he states that the only DNA found on "the knife belonged to Brown and the victim." Initial Brief of Appellant, p. 18. However, the DNA on Brown's knife handle was a mixture with Brown as a major contributor, but the rest was not identified with anyone or particular victim. R. 425-26, Tr.p. 505-506. The other knife that was purchased by Griffith that night was never located and never tested. R. 406, Tr.p. 483. State Exhibit 13, 14. On reply, evidence was presented that Appellant told Kayla Houck as to his weapon "that shit is long gone." R. 609, Tr.p. 768, l. 2-11. The DNA expert was unable to reach any conclusion concerning the partials or mixture and did not include or eliminate anyone. R. 425, 428, 432, Tr.p. 505, 508, 512, ll. 13-14.

[2] Brown did not testify in this case. The basis for his conviction and sentence is not part of this record.

which do not amount to proof." *Id.* at 429, 753 S.E.2d at 409 (alteration by court) (internal quotation marks omitted). "On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *Id.* (internal quotation marks omitted).

"On appeal, [w]hen reviewing a denial of a directed verdict, this [c]ourt must view the evidence and all reasonable inferences in the light most favorable to the [S]tate." *Id.* (first alteration by court) (internal quotation marks omitted). "If the [S]tate has presented any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this [c]ourt must affirm the trial court's decision to submit the case to the jury." *Id.* (internal quotation marks omitted). "Circumstantial evidence ... gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether it is sufficient to submit to the jury." *State v. Rogers,* 405 S.C. 554, 567, 748 S.E.2d 265, 272 (Ct.App.2013). : *State v. Odems,* 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) ("On appeal from the denial of a directed verdict, [an appellate court] must view the evidence in the light most favorable to the State."); *id.* ("[I]f there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury."). See *State v. Harry,* 413 S.C. 534, 539-40, 776 S.E.2d 387, 390 (Ct. App. 2015), reh'g denied (Sept. 17, 2015).

"The doctrine of accomplice liability arises from the theory that the hand of one is the hand of all." *State v. Harry*, 776 S.E.2d 391; *State v. Reid,* 408 S.C. 461, 472, 758 S.E.2d 904, 910 (2014) (internal quotation marks omitted). "Under this theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *Id.* "Where two persons combine

to commit an unlawful act and in its execution a homicide is committed as a probable or natural consequence thereof, all present and participating in the unlawful act are as guilty as the one who committed the fatal act." *State v. Fields,* 314 S.C. 144, 146 n. 1, 442 S.E.2d 181, 182 n. 1 (1994).

Except in rare situations, a person committing an unlawful act is legally responsible for all natural or necessary consequences thereof. One combining and confederating with others to accomplish an illegal purpose is criminally liable for everything done by either him or his confederates which follows incidentally in the execution of a common design as one of the probable and natural consequences, *though not intended as a part of the original design or common plan. State v. McCall,* 304 S.C. 465, 469–70, 405 S.E.2d 414, 416 (Ct.App.1991), *overruled on other grounds by Brightman v. State,* 336 S.C. 348, 520 S.E.2d 614 (1999).

The common purpose may not have been to kill and murder, but if it was unlawful, as, for instance, to break in, and steal, and in the execution of this common purpose a homicide is committed by one, as a probable or natural consequence of the acts done in pursuance of the common design, then all present participating in the unlawful common design are as guilty as the slayer. *State v. Cannon,* 49 S.C. 550, 555, 27 S.E. 526, 530 (1897). The hand of one is the hand of all theory of guilt is more often termed the natural consequences doctrine in other jurisdictions. *See State v. Delestre,* 35 A.3d 886, 896 n. 11 (R.I. 2012) (referencing the acceptance of this theory of aiding and abetting by the Second Circuit, Ninth Circuit, Eleventh Circuit, District of Columbia, and South Carolina). "In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties." *State v. Gibson,* 390 S.C. 347, 354, 701 S.E.2d 766, 770

(Ct.App.2010). *State v. Harry*, 413 S.C. 534, 540-41, 776 S.E.2d 387, 390-91 (Ct. App. 2015), reh'g denied (Sept. 17, 2015).

ORDER DENYING DIRECTED VERDICT MOTIONS

In denying the motions for a directed verdict at the conclusion of the state's case, Judge Cottingham opined that there was a plethora of evidence in the case that Appellant purchased a knife before he got to the club with testimony to suggest that he and Brown were acting together wanting to start a fight. R. 493, Tr.p. 575. Judge Cottingham noted that the deceased and his friends did not have a weapon whereas Appellant had a knife strapped to him. He stated that he and Brown came looking for trouble. R. 493, Tr.p. 575. The trial court similarly denied the motion at the conclusion of the evidence. R. 621-23, Tr.p. 780-782.

ANALYSIS

A review of the evidence reveals substantial circumstantial evidence supported that Griffith and Brown committed the crimes of murder and assault and battery with intent to kill in combination with each other at the Afterdeck in September 2009. The Appellant fails to review the evidence in the light most favorable to the State with the appropriate and necessary inferences. This case reveals planning and premeditation to do violence together that night with the natural and probable consequences that death and serious injury could arise by their use of their knives that they had armed themselves with. If there was any doubt, it was further resolved by Appellant's inculpatory statement to Kayla Houck.

A reasonable reading of the record reveals the following that the state's case was more than merely a purchase of a weapon and suspicious mugging at Appellant suggests in his brief. Rather there is evidence from the victims which rationally identifies the particular perpetrators to the exclusion of others at the Afterdeck as the perpetrators. Unlike the suggestion in their brief, the State had to show that Griffith or Brown was the actual stabber and the state sufficiently

proved it in their combination of their efforts. Plainly, Joshua Griffith was not an innocent bystander, but was a principal in all the assaults.

The Arming of Joshua Griffith

It is undisputed that immediately prior to entering the Afterdeck, the Appellant purchased a knife at the Red Hot Shoppe and was wearing the knife at the bar clipped to his pocket. State Exhibit 5. Joseph Beeson, the manager of the Red Hot Shoppe described working September 7, 2009 when two guys and two girls came in. He stated that guys went directly to look at swords and knives. R. 141, Tr.p. 199. He stated the smaller guy, the Appellant, purchased a knife similar to State Exhibit 13 and 14. R. 142-45, 148, Tr.p. 200-203, 206.

Marianna Mays testified that she and Kayla Houck was with Griffith and Brown that night. Mays and Houck had eaten separately. R. 31-33, 65, Tr. p. 86-88, 120. She said that the four got back together around 9 pm and rode around the strip. She stated that the group had gone shopping that night around 11 PM at the Red Hot Shoppe. R. 36-37, Tr.p. 91-92. She stated that Griffith bought a knife and had it clipped to him. R. 36, Tr.p. 91. Mays testified that she had seen Griffith with a knife previously and that both Brown and Griffith had knives. R. 36, Tr.p. 91. Although Mays wanted to go home to prepare to leave the beach the next day, they decided to go to the Afterdeck. R. 37-38, Tr.p. 92-93.

They go in a side door because they did not have money to pay the cover charge. R. 37, Tr.p. 92. Once inside, Mays states that she and Kayla were on their own. R. 39, Tr.p. 94. When they were ready to leave, she could not find Brown or Griffith. R. 39-40, 43-45, Tr.p. 94-95, 98-100. She tried calling Griffith's phone and they went looking in the club for them without success. R. 45-47, Tr.p. 100-102.

Back outside by their car, Mays describes seeing people busting out of the doors of the club and sees one guy being helped out. "Then all of the sudden I see Blake Brown just run out the door and take off" and does not hesitate to look around. R. 47, 68, Tr.p. 102, ll. 6-14, p. 123. Mays sees other run out of the club and sees one holding his head and saw two people bleeding when they came out. R. 47-48, Tr.p. 102-103. Mays next describes seeing Blake Griffith walking out and he's just walking to the car and he walks around to the driver's side. R. 48, Tr.p. 103, ll. 21-24. She states Griffith appeared invincible like nothing happened:

> Like he had the trauma look on his face but then again he didn't. And he was just walking like he wasn't worried about anything and he walked around to the driver's side door and he said come get me down the street and I was telling him to get in the car because I didn't know what happened, like I was worried for him. I've known him for so long. I was like, okay, **what's going on and I said did you have anything to do with this and he said yes and that's when he took off running.**

R. 49, Tr.p. 104, ll. 5-13 (emphasis added). She stated when he walked out of the club, he was angry. R. 50, Tr.p. 105. He was running toward the south within a minute after he came out of the club. When he opened the door, he told Mays to come get him down the street. R. 51, Tr.p. 106. Griffith calls him 10 minutes after he takes off running claiming he was at the beach house. R. 52, Tr.p. 107.

Mays stated she assumed that Griffith had the knife because she saw one clipped to his shorts. R. 54, Tr.p. 109. She was able to see the knife in one of the pictures. R. 63, Tr.p. 118. Mays says she did not go to the Afterdeck for a fight and did not think Griffith did. R. 68, Tr.p. 123. She thought Griffith and Brown were the only people in the club wearing wife-beaters. R. 70, Tr.p. 125-126. Mays stated that she did not see the fight. R. 74, Tr.p. 129.

Ashley McNeil testified that she was at the Afterdeck that night. She described that she and a girlfriend were standing on the steps of Afterdeck and "felt someone behind me so I looked behind me and saw two boys in white wife-beater shirts and one was holding a knife." She stated

that she told the bouncer and we saw the boys throughout the floor." R. 86, Tr.p. 141. She stated that the smaller one (Griffith) had the knife with the blade out. R. 86, Tr. p. 141, ll. 2-25, p. 148. See also, R. 107, Tr.p. 162.

She described Griffith holding the knife around his waist and playing with it. R. 87, Tr.p. 142. She said he was swinging it and showing it off. R. 87, Tr.p. 142. He was the only person she saw with a knife that night. R. 87, Tr.p. 142. She described that she had seen the two guys bump into her friend D.J. earlier that night. R. 90-91, Tr.p. 145-146. She said she had seen the two in the wife beaters walking straight, not talking to anyone, kind of bumping through people and not there for social interaction. R. 95, Tr.p. 150.

McNeil describes seeing D.J. get bumped or bump and was apologetic, but then she then sees punching. R. 98, Tr.p. 153. She states that next thing she sees is D.J. down on the floor and the blood. R. 99, Tr.p. 154.

The Presence of a Joint Intent to Fight That Night

Earlier that evening, they together approached Klevis Horanlli and Seth Rogers who had been thrown out of the club (who they did not know) and offered to help them if they had any more fights and Brown told them "they were the two realist mother f-----s we were going to meet and they were ready to kill a mother f----r." R. 438-39, 454, Tr.p. 518-519; p. 534, ll. 21-25. Rogers opined that Brown and Griffith were "looking for trouble." R. 456, Tr.p. 536, ll. 12.

Robert Bullock, a security guard at the Afterdeck described seeing the Griffith and Brown "mean mugging." R. 123, Tr.p. 178. To him, they acted like they were throwing gang signs and kept getting aggravated." R. 121, Tr.p. 176. Bullock asked another security guard to go around because it looked like something was about to happen and the fight then began. R. 122-24, Tr.p. 177-179.

The Evidence of the Two Stalking their Prey

The evidence also reveals that both defendants approached Ryan Palmer, one of the surviving victims, who stated that he had been bumped by the taller one during the evening at the Afterdeck and when he turned around, they were just both staring at him as if there was a problem. R. 165-66, Tr.p. 223-224. About twenty minutes later he sees the two staring at him again. R. 167-69, Tr.p. 225-227.

The Expressed Intent of Malice

Palmer a short time later hears someone behind him say "You're about to get fucked up." Palmer turns around and sees Brown and Griffith side by side directly behind him. R. 168-69, Tr.p. 226-227. R. 205, Tr.p. 263 ("two feet away"). One of Palmer's friends Michael Parker approached Griffith and Parker puts his hands up saying it's not worth it we're not trying to fight. R. 172, Tr.p. 230, ll. 5-6.

The Desired Violent Fight Begins

Appellant then goes to push Michael Parker according to Palmer. At that point, Ryan Palmer stumbles off a step when he goes to punch Griffith and falls into them. R. 173, Tr.p. 231. At that point Ryan Palmer realizes he cannot see out of an eye and his hand was full of blood. He did not see who had cut him on his head initially. R. 200, Tr.p. 258. He then saw that Brown (the taller one) was then walking towards him and it appeared that they were going to start fighting. Palmer said just before he was going to punch Brown was when he saw the shine of a blade in Brown's hand. Palmer states that he then went on the defense to defend himself from the knife being swung at him, resulting in Palmer being cut on his hands with Palmer fearing that he was going to die. R. 175, 177, Tr.p. 233, 235. As Palmer went down on the floor, he saw Brown walk away. R. 176, Tr.p. 234. Palmer stated that he punched Griffith because Griffith

told him that he was about to be f'd up, but admitted that he did not know their voices. R. 198-99, Tr.p. 256-257.

Michael Parker described the scene as noticing Griffith and Brown staring at Palmer and appeared to be talking trash after approaching him. R. 218, 225-26, Tr.p. 276, 283-284. He described Griffith (that gentleman" as being literally right behind Ryan which got Ryan's attention to turn around. R. 217, Tr.p. 275. Parker stated that he went up and threw his hands up like "what's going on" and they did not say anything and continued staring at him. R. 217, Tr.p. 275, ll. 17-21. He stated that he and Rob Penna were trying to diffuse the situation. Parker said he was next pushed down the stepway by someone while he was staring at the taller person (Brown). At that point, the fight broke out. R. 219, Tr.p. 277. Parker describes seeing Griffith attacking Ryan and Brown trying to help. R. 220, Tr.p. 278. Parker says that he runs to take care of the taller guy (Brown) and began fighting with him, after Ryan was already on the floor. R. 221, Tr.p. 279. Parker said he did this because "they both were attacking Ryan." R. 221, Tr.p. 279, l. 17. Parker stated that he did not see a knife and did not know then the Ryan had been stabbed. R. 221, Tr.p. 279. Parker denied that he had a knife on him that night. R. 222-23, Tr.p. 280-281. Parker stated that he was in the thick of it and was not stabbed or injured. R. 228, Tr.p. 286. Parker stated he did not see any knives. R. 229-30, 240, 242-43, Tr.p. 287-288, 298, 300-301.

Robert "Rob" Penna testified that he was also at the Afterdeck with D.J. Parker and Ryan. R. 246-47, Tr.p. 304-305. He described seeing the two men (Brown and Griffith) wearing wife-beaters tee-shirts and approach them, although he did not initially see any knives. R. 246-47, Tr.p. 304-305. Penna declared that no doubt the guy sitting there (Griffith) is "the one that stabbed me." R. 249-50, Tr.p. 307-308, l. 9. Penna described the two looking staring at them.

Penna stated he saw the taller one and Palmer and thought it was going to escalate into a fight so he went over to Griffith. Penna stated that he stated to Griffith that it's not worth it and did not get a response from him. R. 251-52, Tr.p. 309-310. The two just stood there at that time and did not walk away. R. 252, Tr.p. 310. Penna stated that pushing led to a punch and the fight escalated. Penna stated that he thought Parker had the taller guy under control and looked around and saw D.J. not holding his own body weight up and crouched over and then saw that Griffith was standing over D.J. R. 252-53, 257-58, Tr.p. 310-311, 315-16. Penna stated he then went over and got into a scuffle with Griffith and although he did not see the knife while Penna was on all fours he got stabbed in the back, he believed by Griffith. R. 253, 256, Tr.p. 311, 314 (shows shirt with hole in back and scar from incident). He thought the taller guy (Brown) never laid a hand on him. R. 254, Tr.p. 312. Penna stated he did not see any knives that night. R. 257, 260-61, Tr.p. 315, 318-319. Penna stated that he had surgery on his back and was in the hospital for two weeks. R. 258, Tr.p. 316. He stated the wound punctured his lung. R. 259, Tr.p. 317. He stated he never had the Appellant on the ground during their altercation. R. 259, Tr.p. 317.

Penna stated that Brown could not have cut him because Brown was never at his back. R. 265, Tr.p. 323, ll. 10-11. He stated that Parker had Brown turned towards the bar in a different direction. R. 265, Tr.p. 323. Penna stated that he was not looking at his friend Vitaly, but "I was looking at your client trying to stab my friend." R. 267, Tr.p. 325, ll. 10-21. He clarified "I knew he stabbed him; because I didn't see the knife didn't mean he didn't stab him. Who else would have stabbed him? " R. 268, Tr.p. 326, ll. 4-6. However, he still declared that "I know your client stabbed my friend and me" even though he never saw the knife. R. 268, Tr. p. 326, ll. 21-25.

Penna stated that he saw D.J. go down to the ground. He asserted that the Appellant was the only guy standing close enough to the victim to do it. R. 269-70, Tr.p. 327, l. 6- p. 328, l. 2. Penna confirmed that his statement stated he saw D.J. "in the corner of my eye drop and then I attacked the short male..." R. 275, Tr.p. 333, ll. 6-11.

The manager of the Afterdeck, Kenneth Muth described seeing the Appellant after an employee came out of the bar and stated to Muth that's the guy that did this pointing to Appellant. R. 283, Tr.p. 343. Muth tried to talk with him and he took off down the road and Muth began chasing him. He grabbed his cellphone and called 911 and continued a foot chase. Muth eventually got into a cab and continued the chase, losing him behind a golf store where Appellant went down into the kudzu near the waterway. R. 286, Tr.p. 346. Muth said he is familiar with that area and would not go into those woods. R. 287, Tr.p. 347.

The Appellant was located the next day through the use of dogs along the waterway on the Waterway Golf Course. R. 316-17, 322, 340, Tr.p. 376-377, 382, 400. The Appellant did not have any knife on him when he was caught. R. 317, 336, 339-40, Tr.p. 377, 396, 399-400. He described the Appellant as having scratches from running through the woods, but other injuries. R. 323, Tr.p. 383. He was found on the other side of the waterway from the bar and that he "obviously swam" across it. R. 327, Tr.p. 387. He was about three quarters of a mile from the Afterdeck when he was found by the dogs and appeared to be asleep. The search was concluded around 7 am. R. 321-22, 325, 328, Tr.p. 381-82, 385, 388.

According to photographs presented he did not have any major wounds after his arrest. R. 345-51, Tr.p. 405-411.

The pathologist, Dr. Edward Proctor testified about the autopsy performed on D.J. Houghtaling. He stated that the only injury that he saw on the victim was the stab wound to his

chest. R. 364, Tr.p. 431. The wound was a three centimeter wound which entered the heart. R. 364-67, Tr.p. 431-434. The wound caused the loss of blood resulting in the death. R. 370-71, Tr.p. 437-438.

A green Mossy Oak Knife was recovered from the co-defendant's car at the time of his arrest. R. 406-09, 475-77, Tr.p. 483-486, 557-559. State Exhibit 72 This knife was not the same knife purchased that evening by Appellant at the Red Hot Shoppe. R. 478-79, Tr.p. 560-561. See State Exhibit 13, 14. Brown was arrested in the early morning at he waited in a vehicle with his mother at the beach house at the request of Marianna Mays. R. 473-77, Tr.p. 555-559. No other knife was found on Brown or in the vehicle.

SLED developed a DNA standard from Griffith, Brown and D.J. R. 423-25, Tr.p. 503-505. The DNA of the victim matched a blood smear on the steps inside the Afterdeck. R. 424, Tr.p. 504. On a swab of the knife blade there was a partial profile but not enough information to make a reliable interpretation. However, on the handle of the knife, it was a mixture of more than one individual and the DNA profile of Brown as a major contributor. R. 425, Tr.p. 505.

In reply, Kayla Houck testified that she had a conversation with Appellant a couple of days after he was bonded out. She stated that she went to his house to pick him up to go to a shopping center. She stated he was "very shocked acting." Appellant said "I can't believe this happened," "I'm sorry I got you guys into this" and he said but "I saw the life come out of that guys eyes." She stated he then "did a motion of falling back." R. 609, Tr.p. 768. Houck further stated we had a different discussion about the weapon and he said, quote, "that shit is long gone." R. 608, Tr.p. 767, ll. 2-11.

In his brief, the Appellant contends the evidence concerning the assault on Palmer was not sufficient because Palmer stated that Brown had bumped into him earlier and that he had told

an investigator that Brown had made the statement to him rather than not knowing if it was either Brown or Griffith who made the statement since he did not know their voices and they were both behind him. He further asserts that while he did not know who stab him in his head, he had earlier stated in a statement that he thought Brown had done it. This reveals that the Appellant is applying the wrong standard since he ignores that under hand of one hand of all, the actual stabber is not at issue, if it is a common design. Here, taking it in the light most favorable, as the state argued below, it does not make a difference if Brown stabbed him in the head while Palmer was fighting with Griffith if it was supportive of their combined efforts to do violence. The Appellant further fails to recognize that the evidence is viewed in this setting in the light most favorable to the State. Even under the Appellant's assertion, the evidence is sufficient when Brown commits the acts on Palmer.

Similarly, the assault on Penna is supported by evidence. Although Penna was fight with Griffith when he was stabbed in the back, he stated that it could not have been Brown that stabbed him because Brown was fighting with Parker at the time. Since no one else other than Griffith was seen with a knife and D.J. had just been fatally stabbed with a knife before Penna attempted to come to his rescue, it is sufficient evidence the Griffith stabbed Penna in the back while Penna was on all fours during their fight.

Therefore, a reasonable reading of the record suggests that Griffith stabbed D.J. when he was next to D.J. when he fell from a knife wound. A reasonable reading of the record suggests that Griffith stabbed Penna in the back during Penna fight with him because Brown was elsewhere with Parker fighting him. A reasonable reading of the record reveals evidence that Palmer was cut by Brown on his hands, but it is unclear whether Griffith may have also stabbed palmer in the head during their initial contact. Nevertheless, the record is clear that both Brown

and Griffith were intent on creating violence that night and provoking it expressly together. As stated previously "where two persons combine to commit an unlawful act and in its execution a homicide is committed as a probable or natural consequence thereof, all present and participating in the unlawful act are as guilty as the one who committed the fatal act." *State v. Fields*, 314 S.C. 144, 146 n. 1, 442 S.E.2d 181, 182 n. 1 (1994). Clearly the actions of Griffith with Brown satisfy this express purpose. As they declared: "they were the two realist mother f-----s we were going to meet and they were ready to kill a mother f----r." (R. 438-39, 454, Tr.p. 518-519; p. 534, ll. 21-25) and to the initial victim Palmer "You're about to get f--ked up." R. 168-69, Tr.p. 226-227. R. 205, Tr.p. 263 ("two feet away"). Contrary to the Appellant's argument, this evidence cannot be ignored.

The Appellant's apparent reliance on various state cases is grossly misplaced. Appellant seeks to compare her case to the following cases: *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984); *State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000); and *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011). In each of those cases, the South Carolina Supreme Court found that a directed verdict was warranted based on the evidence presented by the State at trial. However, the instant case is distinguishable from all of those cases. Accord *State v. Bratschi*, 413 S.C. 97, 106-14, 775 S.E.2d 39, 44-48 (Ct. App. 2015)

In all of the cases cited by Appellant, the Court specifically noted that the State had failed to present evidence placing the defendant at the scene of the crime. *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984) ("Nothing in evidence places Schrock at the scene of the crime."); *State v. Martin*, 340 S.C. 597, 602, 533 S.E.2d 572, 574 (2000) ("Most significantly, the State's evidence failed to place either defendant inside the apartment."); *State v. Bostick*, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011) ("No direct evidence linked Bostick to the crime

scene or the items found in the burn pile."). However, here, there is no question the Appellant Griffith was present at the crime. Rather it is the Appellant's suggestion that because Brown was a bad actor, all the blame should rest upon him, ignoring the Appellant's own actions in the events.

In *State v. Frazier*, 386 S.C. 526, 532, 689 S.E.2d 610, 613 (2010), the Court explained that

> [i]n *Arnold*, *Martin*, and *Schrock* we held that the State did not produce substantial circumstantial evidence of the defendant's guilt and noted that the State presented *no* evidence that the defendant was at the scene. We reject any interpretation that these cases altered or increased the sufficiency of evidence standard a trial court is to apply in a case based on circumstantial evidence.

Id. (emphasis in original).

Appellant also compares her case to *Bostick*, a case where the victim was found bludgeoned in her house, which had been set ablaze. 392 S.C. at 136, 708 S.E.2d at 775. The Court recited the following evidence that had been presented against Bostick:

> (1) [victim's] car keys, calculator, and other items from her home were found in the Bostick family's burn pile; (2) the fire in the burn pile was accelerated with either kerosene or diesel fuel, and Bostick's mother did not use those accelerants when she burned things in the pile; (3) Bostick had a pattern that matched gasoline on his shoes and gasoline was the accelerant use for the house fire; and (4) while the DNA from the blood on Bostick's jeans excluded about ninety-nine percent of the population, the blood could not be matched to [victim's] DNA.

392 S.C. at 142, 708 S.E.2d 774, 778. In finding that a directed verdict was appropriate, the Court noted there was no evidence linking Bostick to the crime scene or to the items found in the burn pile, nor was the weapon used to beat the victim ever introduced. *Id.* at 141, 708 S.E.2d at 778. Finally, though the State had theorized that the victim, who was treasurer for her church, was killed for the money she had at her home, the Court pointed out that "no evidence was introduced concerning Bostick's knowledge that [the victim] may have had money in the

briefcase or if indeed any money was in the briefcase on that particular Sunday." *Id.* at 142, 708 S.E.2d at 778.

Appellant apparently suggests the evidence in *Bostick* far exceeds the evidence presented by the State in this case. Respondent disagrees. Here, there was evidence of Appellant and Brown arming themselves preparing for a fight at the Afterdeck and then seeking it out by mugging and provoking contact with various unarmed victims who unexpectedly faced violent assaults by the combined efforts of Brown and Griffith.[3]

Respondent submits that the evidence presented in the instant case is akin to the evidence presented by the State in *Frazier*, where the South Carolina Supreme Court upheld the denial of a directed verdict motion. 386 S.C. at 531–32, 689 S.E.2d at 613. In that case, the Court ruled that the State had presented substantial circumstantial evidence of guilt by presenting evidence of the following: an affair between the victim's wife and the defendant, defendant's knowledge of victim's whereabouts, defendant's confrontation with the victim shortly before the murder, defendant's actions taken in preparation for the murder, and eyewitness testimony placing defendant near the murder scene at the time of the murder. *Frazier*, 386 S.C. at 531–32, 689 S.E.2d 610, 613.

Respondent submits that the State presented substantial circumstantial evidence in the instant case of the same caliber as the evidence presented in *Frazier*, and Respondent asks the

[3] In *State v. Lynch*, 412 S.C. 156, 161, 164–65, 771 S.E.2d 346, 349–51 (Ct.App.2015), Lynch was convicted of the murder of his girlfriend and her granddaughter after they disappeared and he drove his girlfriend's car across the country and tried to cross the border into Canada. The victims' bodies were never found but the granddaughter's blood mixed with blood belonging to a man was discovered in the victims' apartment. Id. at 161, 168, 771 S.E.2d at 349, 352–53. The State presented evidence at trial Lynch was the last person seen with the victims at the place where the State alleged the murders occurred. Id. at 173, 771 S.E.2d at 355 (citing *State v. Williams*, 303 S.C. 274, 276, 400 S.E.2d 131, 132–33 (1991) (finding "substantial evidence" to prove the defendant's guilt when the victim was employed by the defendant, was last seen alive with the defendant, and the victim's decomposed body was found)); see also *State v. Lane*, 410 S.C. 505, 765 S.E.2d 557 (2014) (per curiam) (finding the State presented substantial circumstantial evidence the defendant was guilty of burglary when a piece of paper with the defendant's name was later found at the crime scene and a car with the same unusual paint as the defendant's was seen in the victim's driveway when the crime occurred).

Court to find, just as the Court did in *Frazier*, that "[t]his evidence, when viewed collectively, presented a jury question. . ." as to Appellant's guilt. *Id.* at 532, 689 S.E.2d at 613. Respondent submits that the State presented substantial circumstantial evidence of Appellant's guilt at trial and that the State further excluded other reasonable hypotheses through its presentation of the evidence. Thus, the trial court did not err in denying Appellant's motion for directed verdict as to murder and assault and battery, and this Court should affirm the trial court's ruling.

Conspiracy

In the second argument, the Appellant complains the there was insufficient evidence of a criminal conspiracy. "To establish the existence of a conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties." *State v. Kelsey,* 331 S.C. 50, 63, 502 S.E.2d 63, 70 (1998). Because the crime of conspiracy is the agreement itself, the State need not show any overt acts in furtherance of the common scheme or plan. *State v. Wilson,* 315 S.C. 289, 292, 294, 433 S.E.2d 864, 867, 868 (1993). Nonetheless, substantive crimes committed in furtherance of the conspiracy may constitute circumstantial evidence from which a jury could infer the existence of the conspiracy, its object, and scope. *Id.* See *State v. Crawford,* 362 S.C. 627, 637, 608 S.E.2d 886, 891 (Ct.App.2005) ("A formal or express agreement need not be established."); *id.* ("A tacit, mutual understanding, resulting in the willful and intentional adoption of a common design by two or more persons is sufficient, provided the common purpose is to do an unlawful act either as a means or an end." (internal quotation marks omitted); *State v. Cope*, 405 S.C. 317, 347-50, 748 S.E.2d 194, 210-11 (2013) cert. denied, 135 S. Ct. 400, 190 L. Ed. 2d 289 (U.S.S.C. 2014).

Plainly there is sufficient evidence that that Griffith and Brown were acting in concert with an intent to do violence. As stated above, Griffith and Brown were together when Griffith purchased the knife shortly before he carried into the Afterdeck. Griffith and Brown were together when they confronted Klevis Horanlli and Seth Rogers and offered to help them if they had any more fights and Brown told them "they were the two realist mother f-----s we were going to meet and they were ready to kill a mother f----r." R. 438-39, 454,Tr.p. 518-519; p. 534, ll. 21-25. Rogers opined that Brown and Griffith were "looking for trouble." R. 456, Tr.p. 536, l. 12. There is a plethora of evidence that Brown and Griffith were traveling together around the Afterdeck that night doing "mean mugging" and staring at Palmer and his friends on multiple occasions. Further, when Brown and Griffith threatened Palmer from behind stating "You're about to get f--ked up," they were standing close together and Palmer testified he could not tell which one said it. R. 168-69, Tr.p. 226-227. R. 205, Tr.p. 263 ("two feet away"). Further, when Palmer was provoked to attempt the first punch before Appellant acted, Brown immediately came upon Palmer in support of Griffith.

The record is clear that neither Griffith nor Brown were acting independent of each other throughout the night. There were acting in tandem throughout the evening making threats and attempting to intimidate. This was sufficient evidence to support the conviction for conspiracy. The court properly denied the directed verdict motion.

III. The trial court did not err in refusing to give the *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013), instruction on circumstantial evidence, to include specifically "reasonable hypothesis" language removed in *Logan* and even had the court erred, the error was harmless, particularly in light of the overall instructions. (ISSUE III)

Introduction

The trial court's jury instruction on circumstantial evidence, though not a verbatim recitation of the *Logan* instruction, conveyed the same substance as the *Logan* instruction. If this Court finds that the trial court erred in giving its own circumstantial evidence instruction, such error was harmless. Finally, even assuming there was error, there was no prejudice in this case where the State relied in large part on direct evidence to prove the elements of murder and assault.

"An appellate court will not reverse the trial [court]'s decision regarding a jury charge absent an abuse of discretion." State v. Commander, 396 S.C. 254, 270, 721 S.E.2d 413, 421–22 (2011) (internal quotation marks omitted). "To warrant reversal, a trial [court]'s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Id. at 270, 721 S.E.2d at 422 (internal quotation marks omitted). "A jury charge which is substantially correct and covers the law does not require reversal." State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011).

How the Issue Was Raised at Trial

After denying the directed verdict, by agreement of counsel, Judge Cottingham gave his instruction, through his law clerk, prior to the closing arguments. R. 623, Tr.p. 782, ll. 2-6. The law clerk read the charges due to an illness. R. 623-647, Tr.p. 782-806.

During the instruction, the court stated the following concerning evidence:

As jurors, it is your duty to determine the effect, value, weight and truth of the evidence presented during this trial. There are two types of evidence which are generally presented during a trial, direct evidence and circumstantial evidence.

Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes the main fact to be proved.

Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. **The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.** You should weigh all of the evidence in this case. After weighing all the evidence, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, you must find the Defendant not guilty.

R. 629, Tr.p. 788, ll. 6-23. (emphasis added in Initial Brief of Appellant).[4]

After the charge, defense counsel requested that the trial court charge *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444, which was a recent decision at the time of Appellant's trial. (R. 647, Tr. p. 806, ll. 10-19.

MR. HEWITT: Your Honor, we would request that you additionally charge the circumstantial evidence, the charge that's recognized in State v. Logan, it excludes –

THE COURT: I've already charged circumstantial evidence.

MR. HEWITT: It has — **it excludes all other possibilities except a reasonable hypothesis of guilt**. I will - being very candid with Your Honor, the Supreme Court has

[4] In State v. Grippon, our supreme court found the trial court did not err when it refused to charge the phrase "to the exclusion of every other reasonable hypothesis" in its circumstantial evidence jury charge. 327 S.C. 79, 82, 489 S.E.2d 462, 463 (1997), abrogated by State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004). The supreme court held that in a criminal case relying in whole or in part on circumstantial evidence, once a proper reasonable doubt instruction is given, the jury should be instructed as follows:

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

Id. at 83–84, 489 S.E.2d at 464. The Grippon instruction is similar to the instant instruction.

held that it's a discretionary call by you, it's subsumed within the reasonable doubt charge but it's not error for you to charge it if you want to.

THE COURT: No, I respectfully decline to do that. I've charged the reasonable doubt on at least five different occasions in my charge and I have given you the circumstantial evidence that has been previously approved by the Courts. So other than that, I assume that the charge is okay?

MR. HEWITT: **That's correct**. Your Honor.

R. 647, Tr.p. 806, ll. 10-24.

ANALYSIS

Recently in State v. Lynch, 412 S.C. 156, 771 S.E.2d 346 (Ct. App. May 6, 2015), the Court of Appeals rejected a strikingly similar argument. Like, Appellant here, the Court found that the denial of a circumstantial evidence charge based upon "reasonable hypothesis" language was not reversible error. Even in this case, the Appellant's counsel was of the opinion that including the "reasonable hypothesis" language was discretionary and that he had no other concerns about the instruction. R. 647, Tr.p. 806. He has failed to show reversible error.

In *State v. Logan,* the Supreme Court held trial courts should provide the following language as a circumstantial evidence charge, in addition to a proper reasonable doubt instruction, when requested by the defendant:

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

405 S.C. at 99, 747 S.E.2d at 452. The court further noted, "This holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon* and *Cherry*. However, trial courts may not exclusively rely on that charge over a defendant's objection." *Id.* at 100, 747 S.E.2d at 452–53. Nevertheless, the *Logan* court ultimately concluded any error in the trial court's jury instructions was harmless beyond a reasonable doubt because the trial court "clearly instructed the jury regarding the reasonable doubt burden of proof" and its jury instruction, "as a whole, properly conveyed the applicable law." *Id.* at 94 n. 8, 747 S.E.2d at 449 n. 8 (citations omitted).

Though the trial court did not charge the exact language from *Logan*, it apparently charged the instruction approved in State v. Grippon, which had the same concepts expressed in the *Logan* instruction are found in the trial court's jury instructions in this case. In this appeal, Appellant takes issue for the first time with the trial court's failure to include the particular language from *Logan* that "'to the extent the State relies on circumstantial evidence, *all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt.*'" Initial Br. of Appellant, p. 28 (emphasis in original) (quoting *Logan*, 405 S.C. at 99, 747 S.E.2d at 452). However, as part of its reasonable doubt instruction, the trial court informed the jury that the defendant was presumed innocent:

> A person charged with committing a criminal offense in South Carolina is never required to prove himself innocent. I charge you that it is an important rule of the law that the Defendant, in a criminal trial, no matter what the seriousness of the charge may be, will always be presumed to be innocent of the crime for which the indictment was issued unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.

> This presumption of innocence does not end when you begin your deliberations, but it accompanies the Defendant throughout the trial until you reach a verdict of guilt based on evidence satisfying you of that guilt beyond a reasonable doubt. The presumption of innocence is like a robe of righteousness placed about the shoulders of the Defendant which remains with the Defendant until it has been stripped from the Defendant by evidence satisfying you of the Defendant's guilt beyond a reasonable doubt. The presumption of innocence is not mere legal theory. It is not just a legal phrase. It is a substantial right to which every Defendant is entitled unless you the Jury are satisfied from the evidence of the Defendant's guilty beyond a reasonable doubt.
>
> The State has the burden of proving the Defendant guilty beyond a reasonable doubt. Some of you may have served in jurors in civil cases where you were told that it is only necessary to prove that a fact is more likely true than not true, such as by the greater weight or preponderance of the evidence. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant's guilty. There are very few things in this world that we know with absolute certainty and in criminal cases, the law does not require proof that overcomes every possible doubt. If based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged you must find the Defendant guilty. If on the other hand, you think there is a real possibility, that the Defendant is not guilty, you must give the Defendant the benefit of the doubt and find him not guilty.

R. 627-29, Tr.p. 786-788. See also R. 632, Tr.p. 791, ll. 9-12 ("the defendant is not required to prove his innocence. The burden of proof remains on the State to prove guilt beyond a reasonable doubt."). See Tr. R. 634, 793, ll. 4-7 (reasonable doubt").

Respondent submits that the substance of the charge given by the trial court in Appellant's case includes the same substance of the *Logan* charge, just in different words. *See State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) ("'The substance of the law is what must be charged to the jury, not any particular verbiage.'" (quoting *State v. Adkins*, 353 S.C. 312, 318–19, 577 S.E.2d 460, 464 (Ct. App. 2003))).

The trial court did not commit reversible error in refusing to issue Lynch's requested "reasonable hypothesis" jury charge. *See State v. Jenkins,* 408 S.C. 560, 572, 759 S.E.2d 759,

765 (Ct.App.2014)(Defendant was not entitled to proposed jury instruction regarding circumstantial evidence in murder trial, which stated that the jury could not convict him unless all of the circumstances pointed conclusively to his guilt "to the exclusion of every other reasonable hypothesis"; Supreme Court had excluded the "reasonable hypothesis" language from the circumstantial evidence instruction); State v. Drayton, 411 S.C. 533, 769 S.E.2d 254 (Ct. App. 2015), reh'g denied (Mar. 19, 2015), cert. granted in part, judgment vacated in part, No. 2015-000814, 2015 WL 9315573 (S.C. Dec. 23, 2015) (any error in trial court's circumstantial evidence jury instruction was harmless, in murder trial, even though instruction omitted "reasonable hypothesis" language; trial court's instructions properly conveyed applicable law as to state's burden of proof and reasonable doubt, circumstantial evidence instruction immediately followed reasonable doubt instruction, and instructions as whole conveyed applicable law); State v. Lynch, 412 S.C. 156, 771 S.E.2d 346 (Ct. App. 2015), reh'g denied (May 6, 2015) (denial of murder and larceny defendant's requested circumstantial evidence charge, based on "reasonable hypothesis" language found in Edwards, and stating, inter alia, that "[c]ircumstantial evidence has to be complete," was not reversible error, since state Supreme Court held in Logan that Edwards language was unnecessary).

The trial court's jury instructions in the instant case struck the right balance of "requiring the State to prove its case beyond a reasonable doubt" and simultaneously "guiding the jury's consideration of circumstantial evidence" without shifting the burden to Appellant. *See Logan*, 405 S.C. at 98, 747 S.E.2d at 452. Even if this Court finds that the trial court's circumstantial evidence instruction was erroneous, Respondent submits that Appellant was not prejudiced by the instruction. *See Daves v. Cleary*, 355 S.C. 216, 224, 584 S.E.2d 423, 427 (2003) ("A circuit court's refusal to give a properly requested charge is reversible error only where the requesting

party can demonstrate prejudice from the refusal." (citing *Cohens v. Atkins*, 333 S.C. 345, 349, 509 S.E.2d 286, 289 (1998))).

IV. The trial judge did not abuse his discretion in allowing the limited reply testimony of Kayla Houck about a statement the Appellant made after he got out of jail that described stabbing the decedent and him falling back and that he got rid of the weapon solely in response to the three witnesses in the Appellant's case that Blake Brown has stated that he had done stabbed all three victims. This was correctly determined by the trial judge to not be a violation of the earlier sequestration order since it was not related to "eyewitness" factual evidence concerning the incident, that it could not have been anticipated by the State until the undisclosed defense testimony and was limited to a post-arrest statement by the Appellant. (ISSUE FOUR)

The trial judge allowed the reply testimony of Kayla Houck that the Appellant had told her days after he was initially released from jail that he had stabbed the deceased and described the victim falling after the wound. The trial court recognized that there had been a sequestration order, but that this did not violate the order because the State could not have anticipated that there defense witnesses would have contended that Blake Brown had indicated that he, rather than the Appellant, had stabbed the victim. R. 606, Tr.p. 765, ll. 1-12. Respondent submits that there was no abuse of discretion in the admission.

STANDARD OF REVIEW

In criminal cases, the appellate court only reviews errors of law and is bound by the trial court's factual findings unless the findings are clearly erroneous. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The decision whether to waive a sequestration order for witnesses present during the trial rests in the sound discretion of the trial judge." *State v. Huckabee*, 388 S.C. 232, 240-41, 694 S.E.2d 781, 785 (Ct. App. 2010); *State v. Saltz*, 346 S.C. 114, 126, 551 S.E.2d 240, 247 (2001).

However, "[a] party is not entitled to the sequestration of witnesses as a matter of right." *State v. Fulton*, 333 S.C. 359, 375, 509 S.E.2d 819, 827 (Ct.App.1998). "Rather, the decision to sequester witnesses is left to the sound discretion of the trial judge." Id. "This discretion extends

to the State's right to recall a witness in reply who was present in the courtroom during a portion of the trial." Id. "Whether a witness should be exempted from a sequestration order is within the trial court's discretion." *State v. Tisdale*, 338 S.C. 607, 616, 527 S.E.2d 389, 394 (Ct.App.2000) (declining to grant a mistrial based on violation of a sequestration order by the State's witness); see also *Fulton*, 333 S.C. at 375, 509 S.E.2d at 827 (finding no abuse of discretion by the trial judge in allowing reply testimony from two previously sequestered witnesses who had remained in the courtroom following their initial testimony).

"The admission of reply testimony is within the sound discretion of the trial judge, and there is no abuse of discretion if the testimony is arguably contradictory of and in reply to earlier testimony." *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986); see also *State v. Huckabee*, 388 S.C. 232, 243, 694 S.E.2d 781, 786 (Ct.App.2010) (finding no abuse of discretion by the trial judge in allowing reply testimony when it was limited in scope to contradict a previous contention raised by the defendant and not admitted to complete the State's case-in-chief). Stated another way, the admission of reply testimony is within the sound discretion of the trial court and will only result in reversal if the admission of such testimony is found to be prejudicial. *State v. Farrow*, 332 S.C. 190, 194, 504 S.E.2d 131, 133 (Ct.App.1998) ; *State v. Huckabee*, 388 S.C. 232, 240-41, 694 S.E.2d 781, 785 (Ct. App. 2010); *State v. Singleton*, 395 S.C. 6, 15-16, 716 S.E.2d 332, 336-37 (Ct. App. 2011).

HOW THE ISSUE WAS PRESENTED AT TRIAL

At the outset of the trial, defense counsel Hyman made a motion to sequester the lay witnesses. Particularly, defense counsel stated:

> MR. HYMAN: Judge, one more motion and I don't know if you want to handle this prior to jury selection or after, but I would make a motion that all non-experts be sequestered. Any witnesses that, this deals with **witnesses who are talking, doing recollection of what occurred that night . . .**

R. 3, Tr.p. 20, ll. 5-10. Judge Cottingham stated that he had no problem with sequestering witnesses and stated that he could apply it with experts also. R. 3, Tr.p. 20, ll. 11-16. Upon the state's request, the court allowed: "Ginger Pop" and Nicole Bryan, the gang expert, to stay. R. 3, Tr.p. 20, ll. 21-25. He also allowed the victims to remain in the courtroom, over objection of the defense. R. 4, Tr.p. 21, ll. 2-19. Defense counsel Hyman restated his concerns and its limitation to eyewitnesses:

> Judge, part of my motion to sequester, I also would like if someone does testify that they be remanded to the courtroom or else out of the courthouse. **Again this is talking about eye-witness testimony.** There have been many, many, many statements, many of which don't correlate to the others. . . .
>
> . . . Judge, I'm asking that after somebody testifies, if they have an eye witness, that that eye-witness not be allowed and the same thing with mine -
>
> THE COURT: I got you.
>
> MR. HYMAN: that they not be allowed to go right back into the same room. -
>
> THE COURT: Well, you want them to leave — to leave them in the courtroom?
>
> MR. HYMAN: They can stay in the courtroom; that's fine.
>
> THE COURT: Oh, I'm not gonna let them go back in with the -
>
> MR. HYMAN: That's what I'm asking. .
>
> THE COURT: Oh, no, I'm not gonna do that. They'll be told not to — not to discuss their testimony with any other witnesses, too.
>
> MR. HYMAN: Well, and Judge, that — it's one thing to tell them, but it's quite another thing to keep them from doing it.
>
> THE COURT: Well, they're not going —there's no reason to send them back in there. That's not gonna happen.

R. 4-5, Tr.p. 21, l. 20 - p. 22, l. 22.

During the State's voir dire of the jury, among the lists of potential state witnesses, the solicitor included Kayla (Kala) Houck as a potential witness. R. 12, Tr.p. 45, l. 8. Similarly, among the defense witness, the defense stated that Kayla Houck was also a potential defense

witness. R. 13, Tr.p. 46, l. 14. However, Kayla Houck was not called in the state's case in chief or the defense case.

Sequestration was discussed during the trial. In particular, the court at the end of day one on January 6 requested that the State tell the people who had already testified as well as the victims to not talk to any upcoming witnesses. The State declared that they were keeping the witnesses in separate parts. R. 136, Tr.p. 194.

At the outset of court on January 7, 2014, defense counsel Hewitt stated that he had seen some new faces in court and requested that any "fact witnesses" were not supposed to be in the courtroom and that no one was allowed to circulate testimony to other fact witnesses. R. 138, Tr.p. 196, ll. 10-15. The State responded that the only people that were there who was under subpoena was Joe Beeson who was to testify first. She further stated that the other people in the back were not under subpoena and it was her understanding that they were only there for support. R. 138, Tr.p. 196, ll. 18-25. The defense then declared that the only witnesses he had present on his witness list were the client's mother and father,[5] but they're not fact witnesses. Judge Cottingham permitted them to remain. **R. 139; Tr.p. 197, l. 1-10.**

At the outset of court on January 9, 2014, Judge Cottingham again inquired as to who was present in court. R. 514A, Tr.p. 660. The defense confirmed again that the court had been cleared of the appropriate folks, including that the family had left. R. 514A, Tr.p. 660, l. 8-16. The State declared that the only people left were the two victim's in the case, as well as the deceased mother. R. 514A, Tr.p. 660, ll. 17-21.[6]

[5] As stated above, Kayla Houck was also on the defense witness list. R. 12-13, Tr.p. 45-46. Presumptively, she was not present in court at that time.

[6] The trial court also advised witness Michael Parker to not discuss his testimony with any potential witnesses. R. 208, Tr.p. 266. Parker, upon release, was admonished not to discuss his testimony with other witnesses. R. 281A, Tr.p. 339.

It is unclear from the record what, if any, part of the trial, Kyla Houck was present in light of these declarations by both the state and the defense.

Pertinent Defense Evidence

During the defense case in chief, they sought to present a theory that Appellant was not an aggressor in the death and assaults. Kacie Henry testified that Blakely Brown told her he stabbed three people at this incident that occurred at Afterdeck. R. 543, Tr.p. 699. She further stated that Brown told her he stabbed the young man that died. R. 544, Tr.p. 700, ll. 17-19. Henry stated that Brown never told her Appellant did the stabbing. R. 544, Tr.p. 700, ll. 19-20. She said Brown freely admitted to her that he stabbed the boy that died as well as the other two young men. She stated Brown told her that more than once. He would talk about it, 5, 6, 7 times, it could've been more. R. 544-45, Tr.p. 700-701. On cross-examination, she stated that she had dated Brown after he got out of jail for a couple of months. R. 546, Tr.p. 702. She admitted that the Appellant's mother, Sherrie Griffith, had sent her messages on FACEBOOK in September 2012, although she denied ever speaking with the Appellant or his mother. R. 553, Tr.p. 709. She stated that she did not know how Griffith or her mother became aware of the discussions with Brown which she never gave to a police officer. R. 553, Tr.p. 709.

The defense also called Christopher Whiteside. Whiteside testified that he is very close friends with the Appellant. R. 572, Tr.p. 728, l. 25. He stated that he had met Appellant's co-defendant Blakely Brown once at a party at the Hampton Inn at Traveler's Rest in the summer of 2010. R. 573, Tr.p. 729. He stated that Brown admitted to stabbing three people and that one of them had died. R. 574, Tr.p. 730. On cross-examination, Whiteside confirmed that he had not told the police the Brown had said he stabbed someone. R. 581, Tr.p. 737. He claimed he had not talked to anyone about this. R. 582, Tr.p. 738. He confirmed that when he saw Brown at the

Hampton Inn that he was hanging out with the Appellant. R. 584, Tr.p. 740. He stated that he was there with the mother of Blake's child and Darren. He stated that the first time he met Brown he told him that he had stabbed someone with Appellant present and he used the word "poked." R. 585, Tr.p. 741. He admitted being friends with Griffith on his FACEBOOK page. R. 586, Tr.p. 742. He claimed this was the first time he had talked about it since 2010. He claimed that he did not talk with law enforcement because he figured that they already had the information. R. 587, Tr.p. 743.

Theron Malley also testified about a statement Blakely Brown had made to him. He stated that he was also at a hotel party at the Travelers Rest Hampton Inn during the summer of 2010. R. 590, Tr.p. 746. He stated that Appellant was a friend of his. He stated he went to the party with Chris and overheard Brown state that he had stabbed three people and that one had died. R. 590, Tr.p. 746. On cross-examination, Malley clarified that Brown was peaking to someone else and that he had overheard it. R. 591-92, Tr.p. 747-748. He stated that he met Griffith for the first time at a gym a year ago and denied that he was at the party at the Hampton Inn. R. 592, Tr.p. 748. He claimed that he also did not know that Appellant had murder charges pending against him when he met Griffith. He stated that he did not go to the police department at any time or tell anyone about it. He stated he was told to come to court because he was at a party, other that Whiteside. R. 595-96, Tr.p. 751-752.

State's Intent to Call Reply Witness

At the outset of rebuttal, the State announced its intent to call Houck. The defense noted its objection to the witness. R. 603-05, Tr.p. 762-764.

> THE COURT: Well, let me hear, let me hear, let's make a complete record please. What is this witness, apparently they have some [objection] to, name the witness and tell me the basis for the reply testimony?

MS. LIVESAY: Your Honor, the name of our witness is Kayla Houck or Houck. We'll be calling her to reply to the Defense's case as to third-party guilt.

THE COURT: And what position did she have, was she an investigator or what in this case?

MS. LIVESAY: She is a lay witness that talked with Blake Griffith about this incident.

THE COURT: Why was she a lay witness talking to the Defendant, Blake Griffith?

MS. LIVESAY: I'm sorry. Your Honor?

THE COURT: Why was she a lay witness, why was she talking to him?

MS. LIVESAY: She, she was a witness that he talked to just days after he got out of jail.

THE COURT: I gotcha.

MS. LIVESAY: And I'll be narrowing the testimony just as to that conversation.

THE COURT: And what proposed testimony does she elicit, please?

MS. LIVESAY: She will be saying that Blake Griffith told her that he stabbed the deceased boy.

THE COURT: This, I assume, is in reply to the three witnesses who testified for the Defense alleging that Brown made that assertion that he had done it; is that correct?

MS. LIVESAY: Yes, sir. Your Honor.

THE COURT: Now what's your objection to this, please?

MR. HEWITT: Our objection. Your Honor, is that is in clear violation of your sequestration order. That's it.

THE COURT: How do you want to address the sequestration order?

MS. LIVESAY: **Your Honor, she will not be testifying from our standpoint from, for any factual purposes at all. My understanding was we sequestered the witnesses to make sure their stories don't match up, which is why we allowed Mr. Griffith's parents to stay in the courtroom because they were not fact witnesses. We are not using her as a fact witness. We are using her solely to reply to the Defense's case regarding the statements that Blake Griffith made.**

THE COURT: Yes, sir?

MR. HEWITT: Your Honor, I think the, that we obviously have a disagreement about what your sequestration order covered. The record whenever it's developed will settle that, but I am firm in my position that it violates the - - -

THE COURT: No, sir, I respectfully disagree with you. There's no way that the Defense or the State can anticipate every piece of evidence that's coming in and there was no way that they could have anticipated that three witnesses were going to state emphatically that the Codefendant Brown admitted that he did the killing. It's clear to me that given the nature of that testimony, that the State is entitled to rebut it by showing that this Defendant, if that's the testimony, admitted that he did it and it's contrary to those three witnesses, and they're entitled to do it and it does not violate my sequestration because she is not testifying as to the facts in the case unless you get into it through cross-examination and I'm gonna give you wide examination privileges on that issue.

R. 604-06, Tr.p. 763, l. 2 - 765, l. 12.

Kayla Houck's Reply Testimony

Kayla Houck then testified on reply narrowly - not as to the incident itself - but to the conversation she had with the Appellant two days after he got out of jail about the incident after Appellant's parents bonded him out. R. 608, Tr.p. 767. She confirmed that she had known the Appellant for ten years and went to school with him and had been at the Afterdeck the night of the incident with Appellant, Mariana Mays and Blake Brown. R. 608, Tr.p. 767. She stated she had a conversation with Appellant two days after he was bonded out when she went to pick him up at his house to go to the shopping center. She stated that she thought the Appellant was "very shocked acting" and she rolled down her car window. She stated the following:

> . . . And I said, hey, Blake, and he said I can't - I can't believe this happened. I'm sorry that I got you guys into this and he said but that I saw the life come out of that guy's eyes and he

Q: He did what?

A: He did a motion of falling back and also we had a different discussion about the weapon and he said, quote, that shit is long gone.

Q: Now, Kayla, when was the first time you told somebody about that statement?

A: About two years after.

Q: Okay. And if you don't mind, tell the Jury why you did not tell anybody immediately?

A: I was really good friends with his family and honestly I was on the fence whether I wanted to mess that relationship up with them or get involved in something that I necessarily didn't want to be involved in and do the right thing and I chose to do the right thing.

R. 609, Tr.p. 768, ll. 2-21.

She stated that she and the Appellant were good friends at the time, but because she had decided to tell about the conversation, they are no longer friends. R. 610, Tr.p. 769.[7] She stated that they had been romantically, but not sexually involved after he got out of jail. R. 610, Tr.p. 769. She stated that she had since married in 2013. R. 610-11, Tr.p. 769-770.

On cross-examination, the defense expanded the inquiry beyond was presented on direct. Houck denied meeting with defense counsel Hyman or discussing the case with him over the telephone. R. 611, Tr.p. 770. She did recall denying to him in a telephone call that she had been shoplifting and that it was all they had talked about. R. 612, Tr.p. 771. She recalled speaking with investigator Carmen Mureddu and confirmed in the October 25, 2010 statement she did not make any allegation against Appellant although she now claimed Appellant told him in September 2009. R. 613, Tr.p. 772. She stated that she spoke with Mureddu over the telephone.

Q: Okay. And in Ms. Mureddu 's report, she states — and I'm asking you if this is something that you said. Kayla said that she has talked to Griffith since the incident. She said that he told her that the guys in the bar ran up on them and they had a problem with Brown. Griffith told her that he saw Brown stab one guy in the head and then he saw Brown pin another down and stab him in his side ribcage area. Griffith said that he was hit and kicked during the fight. Is that what you told Carmen Mureddu?

A: Yes, because he told me that happened.

Q: Okay. Now, you're saying that he told you that happened?

A: Yes.

[7] In his brief, the Appellant asserts that her none responsive testimony that "and I don't want to be friends with a murderer" R. 610, Tr.p. 769, l. 15, exceeded scope of legitimate reply. Initial Brief of Appellant, p. 35-36. However, he made no objection to the comment at trial. No objection to the evidence or motion to strike was made at trial. Nevertheless, her relationship testimony was generally responsive to her evolving past and present relationship with Appellant. He raised no complaint at trial about the breadth of the reply testimony, only whether it violated the sequestration order.

Q: But you're also trying to say that he also said that he stabbed this guy?

A: He did tell me that.

Q: Okay. So, you're saying he told you both things?

A: Yes. ,

Q: But on 10/25/2010 when you met with the Solicitor's investigator, you told that investigator that Griffith told you that he saw Brown pin a guy down, stab him in his ribcage area and stab a guy in the head?

A: He did tell me that.

R. 619-20, Tr .p. 778–779.

Post-verdict Motion and Denial

After the verdict, Appellant made a motion asserting the trial judge erred in allowing the reply witness because it violated the state's sequestration order and was not responsive to evidence that the defense presented that Blakely Brown stabbed the deceased. The defense stated that the court should have limited any testimony to whether anyone made statements that were inconsistent with Blakely Brown's statement. R. 698-99, Tr.p. 862-863.

The State asserted that rebuttal is in fact in the discretion of the trial court and it was a proper rebuttal having Ms. Houck testify that the Appellant had admitted to her that he had done the killing because there was evidence presented in the defense's case that the codefendant had been the stabber. R. 701, Tr.p. 865, ll. 10-20. "In fact, the statement of the Codefendant was introduced into the record on the Defense's case in chief." The State urged that it was entitled to rebut the same with the statement of the Appellant to Houck. Id.

Judge Cottingham implicitly denied the motion. R. 701-02, Tr.p. 865 – 866.

ANALYSIS

Respondent respectfully submits that the trial judge did not abuse his discretion in allowing reply witness Houck testified about a statement Appellant made to her describing his

stabbing of the deceased in rebuttal to the previously undisclosed statements of three witnesses that Blakely Brown had admitted to them that he had stabbed all three victims. Certain salient factors are clear. First, the reply testimony was not eyewitness testimony concerning the actual stabbings inside the Afterdeck that evening. The testimony was not similar to the testimony of her friend Marianna Mays about the actual events of the evening. Simply put, Kayla Houck's testimony concerning an independent statement Appellant made to her days after his release from jail could not have been affected or impacted by testimony received during the trial. Simply put, she could not have "shaped her testimony to that given by other witnesses at trial." See State v. Huckabee, supra.

Here, the three defense witnesses who testified about the separate statements allegedly made by Brown were all on the defense witness list with Kayla Houck. R. 13, Tr.p. 46, ll. 11-23. None of the witnesses had Kayla Houck present during their alleged conversations. Further, the Appellant has presented no other witness at trial who similarly described the conversation with Houck by Appellant. Further, defense witnesses Henry, Whiteside, and Malley each admitted within their testimony that they had never spoken with law enforcement nor anyone else about the substance of their potential testimony and alleged statement by Brown. Plainly, if present, this could not have shaped Houck's testimony. Remarkably, they appeared in court as a defense witness when they had an apparent cloak of silence with others, particularly the prosecution about any discussion they may have had with Blakely Brown, and completely denied ever telling the Appellant. Absent such prior disclosure by the witnesses to the prosecution or a state agent, it is clear that the prosecution could not have anticipated the substance of their testimony as it related to Blakely Brown.

Further, it appears the State was asserting that the sequestration order may not have applied to Houck because, like the Appellant's family, she was not intended to testify as a "fact witness" as to being an eyewitness to the actual event at the Afterdeck, but rather in rebuttal as a mere witness to a much later inculpatory comment Appellant after his release from jail. The State asserted this in response to the motion to not allow her to testify.

> **Your Honor, she will not be testifying from our standpoint from, for any factual purposes at all. My understanding was we sequestered the witnesses to make sure their stories don't match up, which is why we allowed Mr. Griffith's parents to stay in the courtroom because they were not fact witnesses. We are not using her as a fact witness. We are using her solely to reply to the Defense's case regarding the statements that Blake Griffith made.**

R. 605, Tr.p. 764, ll. 11-18. The State's reading of the limitation of the sequestration request to "eyewitnesses" was supported by the earlier comments of the defense. Defense counsel Hyman's concerns for sequestration were to cover "Any witnesses, this deals with witnesses who are talking doing recollection of what occurred that night" (R. 3, Tr.p. 20, ll. 5-10) and "again, this is talking about eye-witness testimony." R. 4-5, Tr.p. 21-22. Defense counsel Hewitt noted that there must be disagreement with the breadth of the sequestration order, but did not acknowledge why Kayla Houck, who was also on the defense witness list may have been allowed by them at some point to remain in the courtroom.

Clearly, the trial judge was reasonable in his assessment that the state could not have anticipated that the particularly witnesses would have testified about separate statements that co-defendant Brown had allegedly made to them. The admission of the reply testimony was in direct response to matters raised by the defense in its case that Brown rather than Appellant did the stabbing of all three victims.

Houck's limited testimony was proper reply testimony. Without question, it was "arguably contradictory of and in reply to earlier testimony." *State v. Todd,* 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986); *see also State v. Huckabee,* 388 S.C. 232, 243, 694 S.E.2d 781, 786 (Ct.App.2010) (finding no abuse of discretion by the trial judge in allowing reply testimony when it was limited in scope to contradict a previous contention raised by the defendant and not admitted to complete the State's case-in-chief).

Respondent acknowledge that Kayla Houck was present at the Afterdeck the night of the incident. R. 26, Tr.p. 81 (went to Myrtle Beach with Marianna Mays, Blake Griffith and Blake Brown); R. 37-48, 62, p. 92–103, 117 (the four of them at the Afterdeck that night). As stated previously, Mariana testified that while she and Kayla were waiting at the car, she sees Blake Brown run out the door and take off and then later sees the Appellant come up to them as if he was invincible like nothing happened, after she saw injured people coming from inside the club. R. 47-49, Tr.p. 102-104. He declared to Marianna that when she asked Appellant if he had something to do with it he stated "yes" and then took off running rather than getting into the car with an angry demeanor. R. 49-50, Tr.p. 104–105. Marianna confirmed that Blake Griffith had a knife on him that night at the Afterdeck clipped to his shorts. R. 54, Tr.p. 109. Mays also confirmed that Houck was together with Mays, Brown and the Appellant when they went into the Red Hot Shoppe when Appellant purchased a knife that evening. R. 36-37, Tr.p. 91-92.

However, the testimony presented during the case in chief was not similar to the event the State was presenting in reply. Rather, it was wholly independent of the state's earlier evidence and was not a recounting of the events of the assault or flight. Assuming Houck's presence throughout the trial, her testimony about an independent event not testified about in either the state's case or the defense's case could not have been shaped by any evidence presented.

Respondent submits the trial court acted within its discretion in admitting the reply testimony because it was not collateral. See *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986) (stating the "admission of reply testimony is within the sound discretion of the trial judge"). *Cf. State v. Williams*, 409 S.C. 455, 469, 761 S.E.2d 770, 778 (Ct.App.2014) (finding reply testimony inadmissible because it "was not directly relevant to the ultimate issue in the trial—[defendant]'s guilt or innocence"). There is no abuse of discretion in the admission of reply testimony because it "is arguably contradictory of and in reply to earlier testimony." State v. Todd, supra.

Further, the decision about "whether a witness should be exempted from a sequestration order is within the trial court's discretion." *State v. Tisdale*, 338 S.C. 607, 616, 527 S.E.2d 389, 394 (Ct.App.2000): *State v. Singleton*, 395 S.C. 6, 15-16, 716 S.E.2d 332, 337 (Ct. App. 2011). In *State v. Fulton,* 333 S.C. 359, 509 S.E.2d 819 (Ct.App.1998), wherein the appellant argued that the trial judge erred in allowing testimony from two of the State's witnesses called on reply when both had remained in the courtroom after their initial testimony and both had been subject to a sequestration order. *Fulton*, 333 S.C. at 375, 509 S.E.2d at 827. Citing the rule that the decision to sequester a witness is left to the sound discretion of the trial judge and that such discretion extends to the State's right to recall a witness in reply who was present in the courtroom during a portion of the trial, the court affirmed the trial court's ruling. Id. The court simply stated, "[a]fter a review of the record, we find no abuse of discretion by the trial judge in allowing the State to present the reply testimony." Id.

In *State v. Simmons*, 384 S.C. 145, 682 S.E.2d 19 (Ct.App.2009), the Court found no abuse of discretion by the trial court in allowing a witness subject to a sequestration order to testify after being in the courtroom during another witness's testimony. Simmons, 384 S.C. at

173–74, 682 S.E.2d at 34. In so holding, the court explained that there was no evidence presented to establish that the witness "knowingly and intentionally entered the courtroom in an effort to violate the order." Id. at 173, 682 S.E.2d at 34. Further, the witness was only present for a small portion of the other witness's testimony which did not pertain to his own testimony. Id. at 174, 682 S.E.2d at 34. Additionally, the witness testified that he entered the courtroom because he had been "sent for" as he was the next witness to testify. Id. Finally, the court found the witness's testimony reflected his notes from interrogating the defendant and the defendant did not attempt to show any inconsistencies between the witness's notes and his testimony as a result of being present during the other witness's testimony. Id.

In *State v. Huckabee*, 388 S.C. 232, 243, 694 S.E.2d 781, 786 (Ct. App. 2010), the Court upheld that the trial court did not abuse its discretion by allowing witness Tavenier to testify in reply. On reply, Tavenier was asked only three questions: (1) did she own a purse; (2) did she own a pocketbook; and (3) had she ever owned a purse, pocketbook, or a shoulder strap of any kind. The Court of Appeals found Tavenier's testimony was limited in scope to merely contradict the contention raised by Huckabee that Tavenier pulled a gun out of her purse. It was not admitted to complete the State's case-in-chief. Furthermore, an abuse of discretion does not occur solely because the reply testimony is contradictory to the previously presented testimony. State v. Todd, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986) ("The admission of reply testimony is within the sound discretion of the trial judge, and there is no abuse of discretion if the testimony is arguably contradictory of and in reply to earlier testimony."); *State v. South*, 285 S.C. 529, 535, 331 S.E.2d 775, 779 (1985) ("Any arguably contradictory testimony is proper on reply, and the trial judge properly exercised his discretion."); *State v. Stewart*, 283 S.C. 104, 106, 320

S.E.2d 447, 449 (1984) ("The admission of testimony which is arguably contradictory of and in reply to earlier testimony does not constitute an abuse of discretion.").

Like these cases, there was no evidence that the witness intentionally violated the court sequestration order. There is no evidence presented by any other witness that pertained to her own limited testimony on reply. Thus, based upon prior precedent in South Carolina allowing a sequestered witness to testify on reply where that witness was present in the courtroom during other testimony, and based upon the content of Kayla Houck's reply testimony, the trial court did not abuse its discretion in allowing Houck's reply testimony.

CONCLUSION

For the aforementioned reasons, the State respectfully asks this Court to affirm the judgment and conviction and sentences.

Respectfully Submitted,

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February 26, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Edward B. Cottingham, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

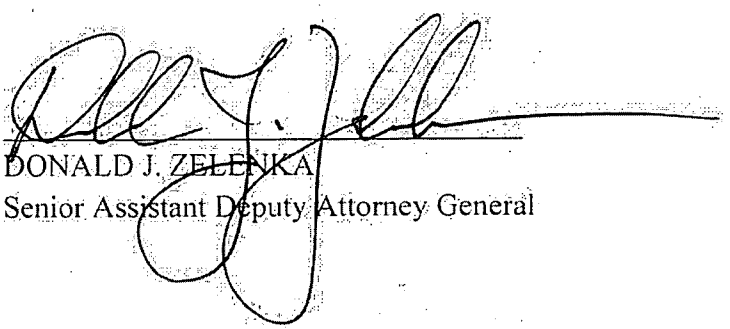
JOSHUA GRIFFITH,

Appellant

Appellate Case No. 2014-000066

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Amended 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."



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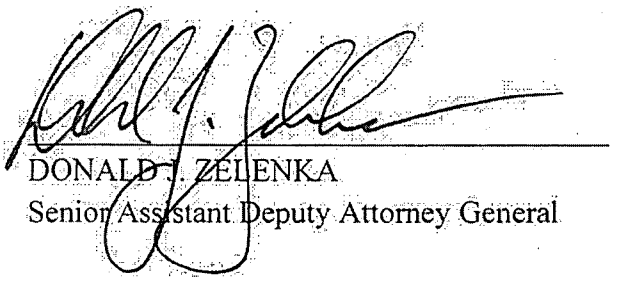
February 26, 2016

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Amended Final Brief of Respondent in the foregoing action by depositing copy in the InterAgency Mail to Robert M. Dudek, Chief Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 26th of February 2016.



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