

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Horry County Court of General Sessions
The Honorable Steven H. John, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2018-000824

State of South Carolina.....Respondent,

v.

Nicholas McIver,.....Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT WHEN THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE THAT APPELLANT COMMITTED THE MURDER ACTING ALONE OR SUFFICIENT EVIDENCE HE AND CO-DEFENDANT FREEMAN JOINED TOGETHER TO COMMIT THE MURDER UNDER THE HAND OF ONE IS THE HAND OF ALL ACCOMPLICE LIABILITY DOCTRINE?
- II. WHETHER THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT EVIDENCE OF EVENTS TAKING PLACE AFTER THE COMMISSION OF THE OFFENSES CHARGED, SUCH AS EVIDENCE OF FLIGHT OR EVIDENCE OF ATTEMPTS TO COVER UP THE OFFENSES CHARGED ARE STANDING ALONE INSUFFICIENT CIRCUMSTANTIAL EVIDENCE TO FIND APPELLANT GUILTY.
- III. DID THE TRIAL COURT ERR IN PROHIBITING APPELLANT FROM CROSS-EXAMINING A DETECTIVE ABOUT THE QUESTIONS HE ASKED CODEFENDANT FREEMAN IF THE PROFFER DEMONSTRATED THE CROSS-EXAMINATION WOULD NOT HAVE ELICITED CODEFENDANT FREEMAN'S STATEMENT, THEREBY IMPLICATING *BRUTON v. UNITED STATES*, AND IF IT WOULD NOT HAVE OTHERWISE OPENED THE DOOR TO PREJUDICIAL OR IMPROPER TESTIMONY?
- IV. WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE IDENTIFICATION, PHOTO LINEUP, OR RELATED TESTIMONY IF THE IDENTIFICATION PROCEDURE AND LINEUP FEATURING APPELLANT'S PHOTO WERE UNDULY SUGGESTIVE, AND IF THE CHILD EYEWITNESS'S IDENTIFICATION IS OTHERWISE SO UNRELIABLE THAT THERE WAS A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION, IN VIOLATION OF DUE PROCESS.
- V. WHETHER APPELLANT'S CONVICTIONS ARE FUNDAMENTALLY UNFAIR OR WERE OBTAINED IN VIOLATION OF DUE PROCESS BY THE STATE'S PRESENTATION OF CONFLICTING PROSECUTORIAL THEORIES REGARDING THE IDENTITY OF THE SHOOTER OR THE MANNER IN WHICH THE SHOOTING OCCURRED.

STATEMENT OF THE CASE

Appellant Nicholas McIver and codefendant Terrell Freeman were indicted for the kidnapping and murder of Amanda Fisher; possession of a weapon during the commission of a violent crime; and grand larceny, value over \$2,000 but less than \$10,000. (Indictments, 2016-GS-26-05556 – 05558). Assistant Solicitor George H. Debusk, Jr. and Assistant Solicitor Seth A. Oskin prosecuted the case. G. Scott Bellamy, Esquire represented Appellant. Appellant and Freeman were tried in a joint trial by jury before the Honorable Steven H. John on April 25th through April 27th, 2018 in Horry County. A directed verdict was granted in favor of both Appellant and Freeman on the kidnapping charge. (Trial Transcript pp. 541-47). The jury found Freeman guilty of grand larceny, but acquitted him of murder and possession of a weapon during the commission of a violent crime. (Tr. p. 650-51). Freeman was sentenced to five (5) years imprisonment for grand larceny. (Tr. p. 664). The jury found Appellant guilty of murder, the weapon charge, and grand larceny. (Tr. p. 650) Appellant was sentenced to forty-five (45) years imprisonment for murder and five (5) years imprisonment each for grand larceny and the weapon charge, concurrent to the sentence for murder. (Sentencing Sheets, 2016-GS-26-05556 – 05558; Tr. p. 661). Appellant timely filed a notice of appeal on May 1, 2018.

STATEMENT OF FACTS

On July 8, 2016, Amanda Fisher and her cousin, Tabettha Oxendine, went on a family vacation near Holden Beach, North Carolina. (Tr. p. 488, ln. 4-6; p. 167, ln. 15). Fisher lived nearby at her grandparents' house in Shallotte, North Carolina. (Tr. 487, ln. 25; p. 167, ln. 1-3). Later that evening, Fisher and Oxendine decided to drive to Myrtle Beach in Fisher's white Chevrolet Malibu sedan to celebrate Oxendine's birthday. (Tr. p. 488, ln. 17-18).

On the morning of that same day, Freeman and Appellant checked into the Lancer Hotel in Myrtle Beach for two nights. (Tr. p. 122, ln. 15; pp. 196 – 199, ln. 4; p. 409, ln. 24). The two knew one another from living and working in Charlotte, North Carolina. (Tr. p. 306, ln. 14-15; p. 391, ln. 5-6).

At approximately 1:00 a.m. on July 9th, 2016, Fisher and Oxendine checked into a room at the Holiday Sands North hotel ("HSN"). (Tr. p. 202, ln. 23-25). Their room featured a balcony that faced Ocean Boulevard. (Tr. p. 206, ln. 23-25; p. 207, ln. 1-2). While on the balcony, Fisher and Oxendine called down to Appellant and Freeman on the street below and they began chatting. (Tr. p. 490, ln. 2-3, 23-24). The pairs of friends, whom had not met one another before, ultimately exchanged phone numbers. (Tr. p. 491, ln. 7; p. 492, ln. 1-4).

At 2:41am, the women met the men on the nearby beach. (Tr. p. 412, ln. 22-23; p. 491, ln. 10-12, 15). After strolling on the beach, the pairs of friends returned to the room at HSN, where they "just hung out in the room and got to know each other," and Oxendine took pictures of the group. (Tr. p. 491, ln. 13-14, 20; p. 506, ln. 21-22). Throughout the early morning hours of July 9th, Fisher, Oxendine, Freeman, and Appellant drank heavily and engaged in drug activity. (Tr. p. 511, ln. 15-21). At 6:17am, Oxendine and Appellant walked to the Lancer Motel. (Tr. p. 512, ln. 6-12; p. 417, ln. 25; p. 418, ln. 1-2, 9-10). Just minutes later, Freeman joined Oxendine and

Appellant at the Lancer Motel. (Tr. p. 513, ln. 8-9; p. 418, ln. 12-19). Fisher stayed behind at HSN. (Tr. p. 495, ln. 2-7; p. 419, ln. 21-23). Oxendine and Freeman had engaged in consensual sexual activity at both HSN and the Lancer Motel. (Tr. p. 493, ln. 12-14; p. 494, ln. 11-18; p. 503, ln. 11-13). Unbeknownst to Oxendine and Freeman, Appellant was alleged to have filmed them. (Tr. p. 493, ln. 15-16).

The next morning, Appellant asked Fisher if he and Freeman could ride to North Carolina with she and Oxendine. (Tr. p. 497, ln. 16-19) The plan then changed to the men and Fisher dropping off Oxendine and the three returning to Myrtle Beach. (Tr. p. 498, ln. 16-17). Oxendine planned to go back to Myrtle Beach that night after spending the day at her aunt's house. (Tr. p. 519, ln. 20-21). Oxendine later testified that at no time did she hear Freeman or Appellant make any threats towards Fisher or any indication that either would do Fisher any harm. (Tr. p. 507, ln. 21-25, p. 50, ln. 2-24). Likewise, no security calls or complaints had been made at either the Lancer Motel or HSN. (Tr. p. 456, ln. 3-10)

On the ride, Fisher drove with Appellant in the front passenger seat, while Freeman and Oxendine sat in the back. (Tr. p. 500, ln. 15-22, p. 517, ln. 12-15). When asked about the mood in the car, Oxendine testified, "They all seemed fine," with no tension between the four. (Tr. p. 499, ln. 23 – p. 500, ln.1). Oxendine sat in Freeman's lap and slept during the drive. (Tr. p. 496, ln. 18-22). She stated she did not think Freeman had a gun on his person; but she noted that she could not feel his back pockets. (Tr. p. 496, ln. 23-25; p. 506, ln. 1-14). An hour into the drive, Fisher called her mother to say she was going to get some clothes from her house before heading back to Myrtle Beach. (Tr. p. 180, ln. 8-9). According to trial testimony, Fisher gave her family no reason to be concerned during the telephone call. (Tr. p. 174, ln. 19-22). Fisher's stepfather stated the home

showed no signs of distress after she picked up clothes with Appellant and Freeman after dropping Oxendine off. (Tr. p. 182, ln. 3-5, p. 183, ln. 4-18).

At approximately 11:15 a.m.,³ Kenneth Thompson heard a popping sound while getting out of his car in the parking lot of the K&W Cafeteria on Highway 17 in North Myrtle Beach, (Tr. p. 87, ln. 1-2, 8; p. 88, ln. 19 – p. 89, ln. 4; p. 425, ln. 24-25). He looked toward Highway 17 and saw nothing unusual; but as he turned toward the K&W Cafeteria, he saw a man pulling a woman out of a white car by her arm while another man in the car appeared to be pushing her. (Tr. p. 89, ln. 9-11). He then ran toward K&W; he saw that the white car was gone when he turned around. (Tr. p. 89, ln. 19-20). Thompson promptly reported the incident. (Tr. P. 90, ln. 23-25). Thompson had not seen the car pull in, but testified he saw it parked in a normal position and did not hear any squealing tires as it left. (Tr. p. 98, ln. 25; p. 99, ln. 1-4, 15-23). Thompson later testified he was not “taking a mental picture of the scene” and did not pay attention to details as he ran in the other direction. (Tr. p. 92, ln. 4-6, 24; p. 93, ln. 4; p. 102, ln. 8-10). When shown a photo of Fisher’s car, he testified that Fisher’s car “looked just like the car.” (Tr. p. 90, ln. 14). However, he could not provide a specific description of the individual outside the car and could only identify him as a black male with short or pulled back hair and a medium complexion. (Tr. p. 92, ln. 3-4, 8; p. 102, ln. 21-22). Thompson could not describe anything about the man’s clothes because he was not “pay[ing] attention to what he was wearing...I was not focused on him; I was focused on the young lady that was being pulled out of the car.” (Tr. p. 92, ln. 4-6). Thompson was unable to provide any description for the other person because he could only see that there was another person inside

³ The specific time and location of events are provided throughout this section for review of the record and the issues raised herein in conjunction with the driving routes taken and the cell phone records should Respondent designate the records to be included in the Record on Appeal.

the car. (Tr. p. 92, ln. 10-12; p. 102, 4-5). Thompson did not identify Freeman or Appellant from a photo lineup or make an identification at trial.

Freeman and Appellant arrived back at the Lancer Motel in Fisher's vehicle at around noon and collected their belongings. (Tr. p. 429, ln. 6-11). One of the men threw a luggage bag over the balcony and into the back of the truck. (Tr. p. 431, ln. 1-2). Between 12:10 p.m. and 12:30 p.m., Appellant called Freeman five times from the truck while Freeman was in the hotel, with each call lasting less than a minute. (Tr. p. 431, 13-16; p. 432, ln. 8-22). Freeman returned his calls at 12:38 p.m. with a nearly six-minute call. (Tr. p. 432, ln. 25). They made three more short calls to one another between 12:44 p.m. and 1:16pm. (Tr. p. 433, ln. 4-9).

At approximately 1:45 p.m., Appellant bought matches, \$7.00 worth of gas, and a pack of cigarettes using Fisher's credit card at a gas station in Bennetsville, as well as \$49.40 worth of gas and cigarettes later at a gas station in Marshville at 3:00 p.m. (Tr. p. 217, ln. 10-21; pp. 227-228; p. 434, ln. 21-24; p. 438, ln. 20 – p. 439, ln. 3; p. 441, ln. 23-24). While at the store at the second gas station, Appellant made several calls to his girlfriend, Tyquajua. (Tr. p. 449, ln. 1-2; p. 296, ln. 11-16). Cashiers from both gas stations testified they saw no blood on the white t-shirt Appellant had been wearing that entire day. (St. Ex. 26-27, 29, 59-60; Video; Tr. p. 220, ln. 2; p. 230, ln. 6-10; pp. 433-434.).

Because the K&W parking lot did not have surveillance cameras capturing where the white car was said to have parked, law enforcement was unable "to find any evidence that actually showed what occurred during this incident." (Tr. pp. 106-107; p. 109; p. 119; p. 123, ln. 7-15). Sergeant Rose located a bullet fragment between Fisher's legs; but did not collect it as evidence, nor did she or any member of law enforcement take measurements in relation to the found bullet fragment and where the car was parked. (Tr. p. 136, 15-24). Law enforcement collected Fisher's

clothing but did not submit it for blood spatter analysis or any other forensic testing. (Tr. p. 450, ln. 8-13). Sergeant Rose also stated that prior to the shooting, no calls were made to report someone in distress or any other disturbances, such as erratic driving, involving a white Malibu. (Tr. p. 141, ln. 2-6).

After speaking with other detectives at the scene, Detective Lyman drove to Shallotte to speak with Fisher's family. (Tr. p. 389, ln. 12-15). Oxendine informed Detective Lyman about the time she and Fisher spent with Freeman and Appellant and provided their phone numbers and the photographs from her phone. (Tr. p. 390, ln. 21-23). The family provided the make, model and color of Fisher's Malibu. (Tr. p. 392, ln. 1-3). He entered the information in the National Crime Information Center (NCIC) as a stolen vehicle, and subsequently learned that the vehicle had been located in Charlotte that afternoon on fire. (Tr. p. 391, ln. 6-8; p. 392, ln. 3-20). Detective Helms stated the scene of the burned vehicle was less than a mile away from the residence of Appellant's girlfriend, Tyquajua. (Tr. p. 296, ln. 11-16; p. 297, ln. 23-25). The vehicle was towed to Charlotte Metro Police Department's (CMPD) evidence lot. (Tr. p. 293, ln. 20-21). CMPD Arson team would have initially processed the vehicle, and it did generate a report on the vehicle, but the State did not present that report at trial. (Tr. p. 300, ln. 9-11, p. 452, ln. 7-11) Detective Helms later returned to the evidence lot with Detective Lyman to take photographs of the burned vehicle on July 13; Detective Helms stated that he was "looking for evidence in general, not specific evidence of arson." (Tr. p. 302, ln. 10-14). Four months after the incident in November 2016, Detective Lyman returned to Charlotte to process the vehicle, which had been wrapped in plastic. (Tr. p. 394, ln. 14-23). Detective Lyman said the car was "completely burned up" and he found no bullets, casings, or blood, but recovered Fisher's purse and a melted key fob. (Tr. p. 394; p. 476, ln. 10-

16; p. 479, ln. 12). Detective Lyman stated other than “sifting through the ashes” and melted glass, no forensic analysis or testing was performed on the vehicle. (Tr. p. 452, ln. 3-8).

Detective Lyman stated that the CMPD Crime Scene Unit did process the truck driven by Appellant and Freeman that weekend, and the relevant items and evidence were sent to SLED labs in Columbia. (Tr. p. 449, ln. 12-21). CMPD also analyzed the truck and completed a crime scene analysis report. (Tr. p. 451, ln. 1-7). The State did not present any evidence regarding either the SLED analysis of the truck or CMPD’s forensic reports at trial. North Myrtle Beach Police Department (NMBPD), which did not have a separate crime scene investigative unit, did not perform any forensic analysis on Fisher’s Malibu or the truck. (Tr. p. 359, ln. 16 – p. 360, ln. 3-7).

NMBPD had obtained Appellant’s cellphone when he voluntarily surrendered it upon he and Freeman turning themselves in to CMPD on July 13, 2016 after learning they were suspected in Fisher’s death. (Tr. p. 370, ln. 5-7; p. 458, ln. 1-17; p. 343, ln. 20-23; p. 354 – p. 355). Detective Will Lynch analyzed Fisher and Appellant’s cellphones using Cellebrite. (Tr. p. 342, ln. 7-9). Cellebrite “pulls information off of the cell phone itself and then puts it into a format that [one] could read as opposed to having to go through the cell phone and having to open up every single contact and incoming calls, outgoing calls, SMS pictures and things like that.” (Tr. p. 337, ln. 5-6, 12-13; p. 339, ln. 12-25). Cellebrite also generates a timeline that organizes the user’s cell phone activities in chronological order as well as analyzes the frequency of contact made with other cellphones. (Tr. p. 340, ln. 8-12, 23-25). Cellebrite’s analysis also includes the time, date, and duration of the phone calls made, but cannot generate or recover the content of the calls. (Tr. p. 340, ln. 4-9; p. 372, ln. 5-7). The analysis of Appellant’s phone demonstrated he and Freeman contacted one another 261 times *overall* via text messages and phone calls. (Tr. p. 345, ln. 1; p. 367, ln. 13-17). However, Cellebrite does not distinguish phone conversations from voicemails in

its call frequency analysis, and most of the calls made from Appellant's phone to Freeman went unanswered, including the calls made the day of the shooting. (Tr. p. 358, ln. 6-8; p. 374, ln. 20-22). Freeman was ranked, for lack of a better term, as Appellant's ninth most frequent contact out of twenty-seven (27) contacts. (Tr. p. 345, ln. 12-13). No effort was made to investigate or contact any of the numerous individuals Appellant spoke with on July 9th or in the following days. (Tr. p. 358, ln. 9-19; p. 465, ln. 5-9). Freeman's phone number was deleted from Appellant's phone on an unknown date. (Tr. p. 346, ln. 20-21; p. 363, ln. 2-4). The analysis of Fisher's phone demonstrated she had communicated with Freeman's phone. (Tr. p. 350, ln. 21-23). Both phones contained pictures and videos from July 9, 2016. (Tr. p. 350, ln. 24-25). Law enforcement did not seek a search warrant in order to seize Freeman's phone and analyze its data in depth. (Tr. p. 471, ln. 8-11). Thus, the only record law enforcement could possibly obtain was a log of the calls made from Freeman's phone, which provides no content. (Tr. p. 361, ln. 6-7; p. 362, ln. 5-7; p. 365, ln. 13-15). Law enforcement did not attempt to investigate or contact any of the contacts on Freeman's cell phone. (Tr. p. 362, ln. 8-13).

Pathologist Dr. Edward Proctor performed an autopsy on July 10, 2016 and concluded Fisher's cause of death was a fatal gunshot wound to the head. (Tr. p. 237, ln. 16-22; p. 238, ln. 3; p. 242, ln. 10, 20-21). Dr. Proctor neither found any other injuries or signs of assault, nor did he find injuries consistent with being pushed from a car. (Tr. p. 240, ln. 17-20; p. 246, ln. 11-19). Dr. Proctor also determined Fisher had a blood alcohol level of .068, and her blood screen was positive for Valium and cocaine metabolite, indicating she used cocaine shortly before her death. (Tr. p. 242, ln. 3-10). The bullet entered above Fisher's right ear and exited the left side of the head above the ear and was slightly anterior. (Tr. p. 238, ln. 4-6). Dr. Proctor found that a contact wound indicated the muzzle of the gun was right up against Fisher's head at the time. (Tr. p. 239, ln. 13-

19). Dr. Proctor could not determine which direction the single shot was made in relation to the person that fired it according to the possible seating arrangements in the car. (Tr. p. 245, ln. 4-8).

Detective Lyman is not a ballistics expert, and he did not request SLED's assistance in determining the origin of the gunshot or the velocity of the bullet. (Tr. p. 453, ln. 2-11; p. 480, ln. 5-8; p. 481, ln. 7-19). He did not know whether Freeman or Appellant was right-or left-handed. (Tr. p. 461, ln. 2-5). Detective Lyman admitted that "[t]here was one shot and there's two people" and "[a]t the end of the day, [he] did not know who pulled the trigger in that car." (Tr. p. 465, ln. – p. 466). He also conceded that nothing in the texts or data extracted from Appellant's phone indicated a plan or preparation to go to Myrtle Beach to kill Fisher, and no text, photo, or other data contained an admission of guilt. (Tr. p. 357, ln. 16-19, p. 358, 1-5). Detective Lynch stated no witness indicated that Appellant shot Fisher. (Tr. p. 359, ln. 1-2).

The trial court charged the jury on the law of mere presence, the law of principal as well as on accomplice liability under "hand of one is the hand of all." (Tr. pp. 630-642). The jury requested to review the hand of one instruction written out, and that instruction, as well as the mere presence and circumstantial evidence instructions were provided to the jury. (Ct.'s Ex. 5-7).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT BECAUSE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE THAT APPELLANT COMMITTED THE MURDER ACTING ALONE OR SUFFICIENT EVIDENCE HE AND CO-DEFENDANT FREEMAN JOINED TOGETHER TO COMMIT THE MURDER UNDER THE HAND OF ONE IS THE HAND OF ALL ACCOMPLICE LIABILITY DOCTRINE.

Relevant Facts

After the State rested, Appellant moved for a directed verdict of not guilty. In arguing that the State had failed to prove that he acted as the principal or as an accomplice under the “hand of one is the hand of all”⁴ doctrine of accomplice liability, Appellant explained:

There is no direct evidence or substantial circumstantial evidence, Your Honor, to suggest that this is anything else other than a random act by one of these parties and that the State has failed to bring into this court evidence to establish who did what, and we would simply be asking this jury to speculate and/or guess as to what happened, and that's why we have this point in trial where the court can intervene and direct a verdict.

(Tr. p. 533, ln. 18-25; see also Tr. p. 531-532; p. 534, ln. 4; p. 537, ln. 16-25). The trial court directed a verdict of not guilty on the kidnapping charge as to both Freeman and Appellant, but denied the motion for all other charges. (Tr. p. 538, ln. 2 – 540). Appellant later renewed his motion for directed verdict or for a new trial in the alternative. (Tr. pp. 655-656). The trial court denied both motions. (Tr. p. 655-656).

Standard of Review

“In reviewing the denial of a motion for a directed verdict, the Court must view the evidence in a light most favorable to the State,” and review is limited to considering the existence or nonexistence of evidence, not its weight. *State v. Harry*, 420 S.C. 290, 298, 803 S.E.2d 272, 276

⁴ Hereinafter “hand of one”.

(2017). This Court will find the case was properly submitted to the jury if the State presented direct or substantial circumstantial evidence tending to prove the guilt of the accused in regard to every element of the offense. *State v. Cain*, 419 S.C. 24, 33, 795 S.E.2d 846, 851 (2017).

The trial court's authority to grant direct a verdict in the defendant's favor embodies the constitutional demand that the State must prove every element of the charged offense beyond a reasonable doubt. *See* Rule 19, SCRCrimP.; U.S. Const. Amend. XIV; S.C. Const. Art. I, §3. *See also Cain*, 419 S.C. at 33, 795 S.E.2d at 851. In cases where the State has exclusively relied on circumstantial evidence, if the "evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because suspicion implies a belief of guilt based on facts or circumstances which do not amount to proof." *Harry*, 420 S.C. at 298, 803 S.E.2d at 276. "Suspicion, however strong, does not suffice to sustain a conviction." *State v. Hyder*, 242 S.C. 372, 379, 131 S.E.2d 96, 100 (1963). "The State may not obtain a conviction when its proof as to any one element requires the jury to speculate or guess whether the defendant engaged in the conduct the legislature sought to criminalize." *Cain*, 419 S.C. at 30, 795 S.E.2d at 849. If the jury would need to speculate or guess as to whether the defendant committed an element of the offense charged, the State has essentially presented no evidence of the offense charged. *Id* at 30-32, 846 S.E.2d at 849-51. Thus a motion for a directed verdict must be granted "where evidence [] is such as to permit the jury to merely conjecture or to speculate." *Id*.

A. The State failed to present sufficient evidence that Appellant shot and killed the victim Fisher acting alone.

The State's theory throughout trial primarily centered upon Appellant and Freeman committing the charges together as one another's accomplices to some degree, and the trial court did not specifically instruct the jury that it could find Appellant committed the crimes charged

acting alone. The relatively minimal role Appellant served as the lone shooter in the State's presentation of the case magnifies the lack of evidence sufficient to prove Appellant's guilt.

The State simply failed to present any evidence that Appellant committed the act of shooting and killing Fisher himself. The inculpatory evidence pertained primarily, if not exclusively to events before and after Fisher was shot. This evidence demonstrated Freeman and Appellant spent time with Oxendine and Fisher the day of her death and the previous night, but there was no evidence as to what transpired between dropping off Oxendine at her aunt's home in Shallotte and the time of the shooting in North Myrtle Beach. There were no calls about any disturbances while the three drove back to Myrtle Beach. The State did not present any evidence of what occurred inside the car when Fisher was shot; law enforcement was unable to "to find any evidence that actually showed what occurred during this incident" because the KW's parking lot did not have surveillance cameras in that area. Most significantly, the State failed to present sufficient evidence demonstrating Appellant shot Fisher or evidence that placed a gun in Appellant's hand. Despite the State's admittedly unsubstantiated and speculative closing argument that Appellant was the shooter according to where he could have been sitting in the car and how Fisher's head could have been positioned at the moment she was shot (Tr. p. 575, ln. 14-25), the identity of the shooter could not be determined according to the medical examiner's testimony. Dr. Proctor could not determine from which direction the shot was fired inside the car in relation to the person who shot Fisher. (Tr. p. 245, ln. 4-8). In addition to Dr. Proctor's testimony, Detective Lyman and Detective Lynch also testified they did not know whether Freeman or Appellant pulled the trigger. The jury was thus left to speculate or guess as to whether Appellant killed Fisher himself. *See Id.* (reversing the trial court's denial of the defendant's motion for directed verdict on the manufacturing methamphetamine charge because the jury could only speculate or guess

whether the defendant was guilty from the State's evidence that merely proved the amount of methamphetamine the defendant could possibly or theoretically have produced); *State v. Palmer*, 413 S.C. 410, 419-21, 776 S.E.2d 558, 562-63 (2015).

There was also no evidence that Appellant even had a gun. Law enforcement never recovered one. Oxendine's testimony that she did not feel a gun on Freeman's person while sitting on his lap on the ride to Shallotte—hence, she was not even sure that Freeman had one—does not automatically constitute as evidence that Appellant must have had the gun that was later used to kill Fisher. This testimony is not evidence, but rather the absence of evidence, and at best invites the jury to speculate or guess as to whether Appellant might have had the gun later used to kill Fisher. This evidence is therefore equally insufficient to support guilt as the principal. *See State v. Martin*, 340 S.C. 597, 602-03, 533 S.E.2d 572, 574-75 (2000) (holding evidence that merely presents the possibility or is consistent with the defendant and codefendant's presence at the victim's home at the time of the murder was insufficient to submit the case to the jury). The State presented no facts to support any of its theories as to where the gun originated, even though Freeman had the opportunity to retrieve a gun from the truck or hotel room prior to the four leaving for Shallotte and there could have already been a gun in Fisher's car. Further, the State's reliance on the video of Appellant removing an admittedly unidentifiable object as evidence that Appellant had a gun and was the shooter is far from conclusive evidence. The fact that the State could not identify the object with any certainty in its closing argument as a gun and described it merely as "whatever it was he put in there" calls upon the jury to speculate that the item was a gun. The State did not provide the jury with any still photographs of the item or any evidence proving Freeman, Appellant, or Fisher owned, possessed, or even had access to a gun at that time. Moreover,

Detective Helms further testified that he did not know if any items, *i.e.*, possibly a gun, had been taken from the truck. (Tr. p. 301, ln. 1-3).

There were vast other inadequacies in the evidence presented by the State. The State presented no motive, eyewitnesses to the shooting, or videos from the scene. No evidence proving the shot was fired from the passenger seat or from the backseat was produced. There was no evidence or testimony regarding the blood spatters on the victim's clothes to determine the trajectory of the bullet. There was no evidence as to where the bullet struck the inside of the vehicle. There was no testimony or evidence regarding whether the shooter was right or left-handed, or whether the Appellant or Freeman were right or left-handed. There was no inculpatory forensic evidence gathered or analyzed from the truck or Fisher's car.

Thus, the State presented no evidence to distinguish Appellant as the lone gunman from Freeman at the time of the shooting. As in *Martin and Cain*, the jury was required to speculate about a essential element of murder in this case: who pulled the trigger. Because the jury was required to speculate regarding the shooter's identity, the State effectively presented no evidence that Appellant actually shot Fisher without Freeman acting as his accomplice. Therefore, the trial court erred in denying Appellant's motion for directed verdict.

B. The State failed to present sufficient evidence Appellant and co-defendant Freeman joined together to commit murder, engaged in an overt act in furtherance of shooting the victim, or aided, abetted, or assisted the other in the shooting in order to submit the case to the jury under the accomplice liability doctrine of the hand of one.

Under the hand of one, the State must prove the defendant was "present at the scene of the crime and intentionally, or through a common design, aided, abetted, or assisted in the commission of that crime through some overt act" to prove the defendant guilty under hand of one accomplice liability. *State v. Washington*, 424 S.C. 374, 417, 818 S.E.2d 459, 482 (Ct. App. 2018), *rehearing*

denied Sept. 20, 2018. Cf. e.g., *State v. Thompson*, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007) (“Mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt.”). Pursuant to this doctrine, a person that joins with another to “accomplish an illegal purpose is criminally liable for everything done by his confederate incidental to the execution of the common design or purpose.” *Id.* See also *State v. Fields*, 314 S.C. 144, 146, n. 1, 442 S.E.2d 181, 182, n. 1 (1994) (“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.”). Circumstantial evidence of the parties’ conduct, rather than evidence of a formal or expressed agreement, is sufficient to demonstrate an agreement to achievement an illegal purpose, which thereby establishes presence by pre-arrangement. *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010). Further, South Carolina courts have required evidence demonstrating the “**alleged accomplice must have acted with the intention of encouraging and abetting the commission of the homicide,**” or, at least that the commission of the murder by the principal must have been a reasonably foreseeable consequence of the defendant's actions. *State v. Mattison*, 388 S.C. 469, 484, 697 S.E.2d 578, 586 (2010) (bolded text in original); *but see State v. Reid*, 408 S.C. 461, 473, 758 S.E.2d. 904, 910 (2014) (holding the State must present evidence that the defendant *knew* of the principal’s criminal conduct).

First, because there was insufficient evidence Appellant killed Fisher as the principal, the events following the shooting cannot constitute as substantial circumstantial evidence of Appellant’s guilt because there was insufficient evidence Freeman shot Fisher, and thus there was insufficient evidence of Appellant’s guilt under the “hand of one is the hand of all” accomplice liability doctrine. *Martin*, 340 S.C. 597, 533 S.E.2d 572 (holding the trial court erred in denying

the motion for directed verdict when the State failed to present evidence that the defendant killed the victim and had no proof he and his co-defendant had worked together to bring about the victim's death; despite their inculpatory statements about killing someone that night and the circumstantial evidence regarding their movements the night of the crime).

Further, in order to withstand Appellant's motion for directed verdict, the State was required to produce evidence that Appellant and Freeman's presence at the scene was the result of a previously arranged plan to undertake an illegal act. *See Harry*, 420 S.C. at 298, 803 S.E.2d at 276. However, the State failed to present any evidence that Freeman and Appellant joined together to accomplish an illegal purpose or present any evidence of an overt act prior to or during the shooting that would indicate a prior agreement plan to kill Fisher. Likewise, there is no indication that Freeman shooting and killing Fisher would have been foreseeable to Appellant or vice versa. According to Oxendine's testimony, the four had enjoyed their time together with no signs of trouble, violence, or other cause for concern, and at no time did she hear Freeman or Appellant make any threats towards Fisher or indicate a joint intent or plan to do her any harm. As Detective Lynch testified, no texts, calls, or other data extracted from Appellant's phone indicated a plan or agreement with Freeman to go to Myrtle Beach to kill Fisher, and Freeman's phone was not forensically analyzed. The numerous calls Appellant made to Freeman, which were made after they *separated* and drove *separate* cars, means little to prove they had been working together to kill Fisher or working together to cover up a crime because their calls went unanswered for a few hours or so. Moreover, despite testimony that two men removed Fisher from the car, the witness could not identify either Freeman or Appellant as either of the men. This evidence nonetheless fails to prove the men worked together in some manner before or simultaneous to the shooting and only theoretically proves two unidentified men removed Fisher from the car together.

The State did present evidence Appellant and Freeman drove Fisher's car to the Lancer Motel after the shooting, and that a young girl did identify Appellant as the man she saw burning Fisher's car the following day. *State v. Lewis* is instructive. In *Lewis*, the Court of Appeals held that because "the State did not present any evidence of an overt act or the requisite state of mind for aiding and abetting" homicide by child abuse at the joint trial, evidence of the defendant's flight and suicide after the child's death did not suffice to withstand the defendant's motion for directed verdict. 403 S.C. 345, 356-57, 743 S.E.2d 124, 129-30 (Ct. App. 2013). Pursuant to the rationale in *Lewis*, the evidence as to the events after the shooting are insufficient to withstand Appellant's motion for directed verdict for the charges. The State failed to prove an overt act, particularly when considering that the trial court had directed a not guilty verdict for the kidnapping charge for Appellant and Freeman. As per the testimony previously discussed, there was no evidence as to the requisite state of mind. It is not as though the State proved Appellant and Freeman agreed to take possession of the vehicle as part of a plan or agreement to kill Fisher. Additionally, neither defendant was charged or tried for accessory after the fact, and the evidence actually presented and the reasonable inferences therefrom do not inform who actually pulled the trigger. Again, there also no evidence of what occurred during the shooting or evidence that placed the gun in either defendant's hand, let alone Appellant's.

Moreover, as previously discussed in the preceding sub-issue, it is paramount that the State failed to present direct evidence that either man shot Fisher, let alone evidence showing which of the two men actually shot her and which man aided, abetted, or assisted the other. Indeed, Detective Lyman conceded that "[t]here was one shot and there's two people" and "[a]t the end of the day, we did not know who pulled the trigger in that car." (Tr. p. 465, ln. – p. 466, ln. 1-6). *See Lewis*, 403 S.C. at 356, 743 S.E.2d at 130 (holding the trial court erred in refusing to direct the verdict on

aiding and abetting homicide by child abuse charge in a joint trial where the evidence showed only he or his codefendant could have committed the crime but evidence failed to show which of two did); *State v. Johnson*, 291 S.C. 127, 352 S.E.2d 480 (1987) (finding the evidence insufficient for the trial court to have denied the motion for directed verdict where it could not be proven the defendant killed the victim because it was inconclusive whether the defendant's tennis shoes caused the marks on the victim). There was no evidence that either even had a gun. The State's evidence regarding the events before and after the shooting simply fails to suffice to prove that Freeman and Appellant previously agreed to commit any crime together, the natural consequences of which was murder. As Appellant had argued, from the State's evidence, the jury would have had to impermissibly *assume* that either man had a gun, as well as have to assume or guess that either man actually shot Fisher while the other aided and abetted the homicide. *Cain*, 419 S.C. at 30, 795 S.E.2d at 849; *see also Martin*, 340 S.C. 597, 602-03, 533 S.E.2d 572, 574-75.. As in *Cain*, where the State had merely presented a theoretical amount, the State in this case had merely presented a "theoretical gun" and a "theoretical shooter." In *Cain*, the expert witness could not testify conclusively on the quantity element of trafficking in *Cain*. Likewise, in this case, the State's expert, Dr. Proctor, Detective Lyman, and Detective Lynch, could not determine that the shooter was Appellant nor could they testify from where the shot originated.

It is significant that the jury did not find the evidence sufficient to find Appellant or Freeman guilty under hand of one for murder and possession of a weapon during a violent a crime. This is made patent by the jury finding Appellant guilty on all charges, but finding Freeman guilty of only grand larceny in taking Fisher's car, which Appellant drove after the shooting.

The trial judge's ruling acknowledged that there was no evidence proving the identity of the shooter, and did not and could not refer to any evidence the State presented that proved any of the necessary elements of Appellant's guilty under the hand of one. The trial judge was confident the State presented evidence that established Appellant and Freeman were at the scene (Tr. p. 546, ln.10-25; p. 567, ln. 1-12). However, this is the only element the trial judge's ruling supports.

Lastly, in light of the fact three people could have pulled the trigger: Fisher in committing suicide, Freeman, or Appellant, the State's evidence raised nothing more than a mere suspicion as to the shooter's identification, and thus raised only a mere suspicion Appellant shot and killed Fisher acting alone or with Freeman as his accomplice. The evidence presented required the jury to speculate or guess as to whom pulled the trigger, which equivocates to no evidence at all.

II. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT EVIDENCE OF EVENTS TAKING PLACE AFTER THE COMMISSION OF THE OFFENSES CHARGED, SUCH AS EVIDENCE OF FLIGHT OR EVIDENCE OF ATTEMPTS TO COVER UP THE OFFENSES CHARGED ARE STANDING ALONE INSUFFICIENT CIRCUMSTANTIAL EVIDENCE TO FIND APPELLANT GUILTY.

Relevant Facts

During the charge conference, Appellant joined Freeman's request to charge the jury that the evidence of flight or a cover up alone is insufficient circumstantial evidence to find Appellant guilty of the crimes charged. (Tr. p. 565, ln. 10-25). The trial judge denied the request because he was not going to charge the jury on flight, adding that such a jury instruction would constitute as a comment on the evidence. (Tr. p. 566, ln. 1-10).

Standard of Review

"The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007).

Argument

The law to be charged to the jury is determined by the evidence presented at trial. *State v. Sams*, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014). *See also* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); *State v. Stukes*, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) ("Jury instructions should be designed to enlighten the jury and aid it in arriving at a correct verdict."). As a general rule, a trial judge should refrain from all comment that tends to indicate to the jury its opinion on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused. *State v. Jackson*, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989).

The trial judge committed reversible error by refusing to give the requested charge. The trial judge's reasoning that he would not give the requested charge because he was not charging the jury that it could find evidence flight as evidence of guilty knowledge or intent was flawed because there is no such reciprocal element required for the trial judge to give the requested charge. While the charge on flight has been held improper and has been prohibited, *see State v. Grant*, 275 S.C. 404, 272 S.E.2d 169 (1980), there is by no means authority for the trial judge's finding he could not then instruct the jury that evidence of flight or "cover up" evidence following the commission of the charged offense was in and of itself insufficient evidence of guilt.

The requested charge is also a sound principle of law. In *State v. Lewis*, this Court rejected the State's argument that defendant's flight and suicide attempt constituted sufficient evidence to withstand a directed verdict, particularly in light of the State's failure to present any evidence of an overt act or the requisite state of mind for aiding and abetting the crime charged. 403 S.C. at 357, 743 S.E.2d at 130. (citing *State v. Odems*, 395 S.C. 582, 590, 720 S.E.2d 48, 52 (2011) (declining to hold "that flight alone is substantial circumstantial evidence of a defendant's guilt")). In *State v. Odems*, the South Carolina Supreme Court held that the State's evidence was insufficient to withstand the defendant's directed verdict motion. 395 S.C. 582, 586-87, 720 S.E.2d 48, 50-1 (2011). The evidence in *Odems* was also circumstantial and related to flight and a cover up: "(1) the fact that less than ninety minutes after the burglary, police located Petitioner in the getaway car with the burglars and the stolen goods; (2) Petitioner fled from law enforcement; and (3) Petitioner asked an uninvolved person to lie for him." *Id.* at 588, 720 S.E.2d at 51. As in *Lewis* and *Odems*, in which the charges in both cases were also presented under the hand of one, the State here failed to prove Appellant committed the crime and that he did so with the requisite mental state for accomplice liability. *See supra* Issue I. Moreover, similar to the circumstantial evidence

held insufficient in *Odems*, the evidence incriminating Appellant was his and Freeman's actions after the shooting: the driving away from K&W following the shooting and Appellant driving and burning Fisher's car.

Moreover, the requested instruction was supported by the evidence produced at trial. There was no evidence as to whom shot Fisher and no evidence of a plan between Freeman or Appellant or Appellant's knowledge Freeman was going to kill her. There was only circumstantial evidence after the fact. Further, the requested instruction does not constitute as a trial judge's improper comment on the evidence in the same way the firmly established instruction on mere presence is not a comment on the evidence.

The refusal to give such a charge was not harmless error in light of the insufficient or even complete lack of evidence that Appellant shot and killed Fisher acting alone or with Freeman as one another's accomplice. *See supra* Issue I. The evidence as to the events following the shooting was the strongest evidence of Appellant's guilt and heavily relied upon by the State during closing arguments. (Tr. pp. 581, ln. 3 – p. 582, ln. 25; p. 584, ln. 9-25; p. 585, ln. 24-25). *See generally State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999) (holding it was "impossible" to conclude the error was harmless partly because the State stressed the improperly admitted evidence in its closing argument).

Therefore, the trial judge's refusal to give this requested charge constituted reversible error, depriving Appellant of a fair trial and warranting a new trial.

III. THE TRIAL COURT ERRED IN PROHIBITING APPELLANT FROM CROSS-EXAMINING A DETECTIVE ABOUT THE QUESTIONS HE ASKED CODEFENDANT FREEMAN BECAUSE AS DEMONSTRATED BY THE PROFFER, THE CROSS-EXAMINATION WOULD NOT HAVE IMPROPERLY ELICITED CODEFENDANT FREEMAN'S STATEMENT, THEREBY IMPLICATING *BRUTON v. UNITED STATES*, AND WOULD NOT HAVE OTHERWISE OPENED THE DOOR TO PREJUDICIAL OR IMPROPER TESTIMONY.

Relevant Facts

Appellant sought to question Detective Lyman at trial about his statements and questions to Freeman during the course of his interview with Freeman. (Tr. p. 377, ln. 6-23). Outside of the presence of the jury, Appellant proffered the following questions that he sought to ask Detective Lyman: 1) "Did you ever make a statement that we had this case wrapped up within 24 hours?"; and 2) "Did you make a statement that we know this wasn't premeditated, it just happened?" (Tr. p. 383, ln. 15-23). Detective Lyman stated he there a "good chance" he asked Freeman those specific questions, explaining: "If I made those statements, they would've been made early on... basically building rapport with ... Mr. Freeman at the time" so that Freeman would be more forthcoming. (Tr. p. 378, ln. 7-12; p. 384, ln. 10-14). Freeman objected to the line of questioning. (Tr. p. 378, ln. 18-25). The trial court ultimately did not allow Appellant to ask Detective Lyman the questions proffered, reasoning such questioning would violate *Bruton*, prejudice Freeman, otherwise open the door to improper matters, and serve "no other purpose but to inflame the jury against [] Freeman." (Tr. p. 379, ln. 10-16; p. 384, ln. 20-25).

Standard of Review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support

or are controlled by an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). Further, under harmless error analysis, an error is considered harmless where it reasonably could not have affected the trial's outcome. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1986).

Argument

The scenario and constitutional concerns contemplated by *Bruton* and its successors were not present here. The Sixth Amendment's Confrontation Clause, extended to the states by the Fourteenth Amendment, guarantees the accused the right to confront witnesses against him, which includes the right to cross-examine those witnesses. *E.g.*, *State v. McDonald*, 412 S.C. 133, 139, 771 S.E.2d 840, 843 (2015). Further, the admission of an out-of-court statement violates the Confrontation Clause unless: 1) the witness is unavailable and 2) the accused had a prior opportunity to cross-examine the witness. *E.g.*, *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004). When the witness is a co-defendant that does not testify at a joint trial, and where the co-defendant's statement is a confession that inculcates another co-defendant, the out-of-court statement is inadmissible even with a cautionary jury instruction. *Bruton v. United States*, 391 U.S. 123, 126-137 (1968). *Bruton* applies only when the co-defendant's statement, on its face, implicates the defendant. *McDonald*, 412 S.C. at 139, 771 S.E.2d at 843. (citing *Richardson v. Marsh*, 481 U.S. 200, 207-208 (1987)).

The trial court erred in refusing to allow Appellant to question Detective Lyman regarding the investigation in this manner because it would not have implicated *Bruton* or opened the door to otherwise improper evidence. A *Bruton* violation occurs when

[T]wo defendants, A and B, are tried jointly, and defendant A makes a confession that inculcates defendant B. If defendant A does not testify, then A's statement against B is

inadmissible because B will be unable to exercise his right under the Confrontation Clause to cross-examine A.

State v. King, 367 S.C. 131, 140, 623 S.E.2d 865, 869 (Ct. App. 2005) (holding the admission of the co-defendant's confession did not violate *Bruton* because it did not inculcate the defendant). Appellant was clear he was merely trying to ask Detective Lyman about the investigation and law enforcement's conclusions early on in the investigation, rather than seek to elicit or admit Freeman's statement. The cross-examination would not have raised concerns of prejudice to Freeman pursuant to *Bruton* because Appellant was not prompting Detective Lyman to testify to Freeman's responses or answers during the interview.

As for the trial court's concern about the statement opening the door to other improper matters *State v. Page*, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008) is instructive here. In *Page*, the defendant questioned the detective in the case regarding her investigation and the steps leading to the charges against the Page, the defendant, and his co-defendants. *Id.* at 480-81, 663 S.E.2d at 358-59. The trial court granted the State's subsequent motion to admit the co-defendant's statement into evidence against the defendant on the grounds the defendant had opened the door to allow in the complete unredacted confession. *Id.* at 481, 663 S.E.2d at 359. The defendant's questioning of the detective was merely to demonstrate that the State had little evidence to link him to the crime. *Id.* at 482-83, 663 S.E.2d at 359-60. The South Carolina Court of Appeals held it was error, but harmless error, to admit the unredacted statement because although a party may open the door to otherwise inadmissible evidence, any damage to the detective's credibility did not require admission of the statement to rehabilitate the detective's investigative techniques. *Id.* at 483, 378 S.E.2d at 360.

As in *Page*, Appellant's counsel was zealously defending his client and attempting to create reasonable doubt in the jury's minds by demonstrating law enforcement and the State made a rush

to judgment in charging Appellant, as well as underscore the possibility that what may have happened in the car was not premeditated or was even an accident. Also just as in *Page*, the proffered questions would not have required the admission of Freeman's statement into evidence to rehabilitate Detective Lyman's credibility. Any other prejudicial effect or concern regarding the questions' inherent implication of Freeman is nonconsequential because the jury knew Freeman and Appellant had obviously been arrested in this case at a certain point, and Detective Lyman explained the statements were for rapport building, not that Freeman had made any statement.

The error in prohibiting Appellant from conducting such cross-examination was not harmless. In light of Detective Lyman's testimony that Freeman's cellphone data was not analyzed, and his failure to interview any of the persons Appellant contacted close to the time of the shooting and the burning of the car, the questions about the investigation and law enforcement's conclusions regarding the timeline would have helped establish that law enforcement rushed to judgment in charging Appellant. In the same vein, in light of the lack of evidence as to the identity of the shooter and law enforcement's forensic failures, prohibiting Appellant from eliciting Detective Lyman's questions that raised the possibility the shooting may not have been premeditated or was even an accident, and thus not murder, was not harmless. Indeed, the State presented no direct or circumstantial evidence of what happened in the car precisely at the moment Fisher was shot.

Therefore, the trial court committed reversible error because such questioning would not have impermissibly opened the door to allow Freeman's otherwise inadmissible statement into evidence and would not have prejudiced Freeman.

IV. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE IDENTIFICATION, PHOTO LINEUP, AND RELATED TESTIMONY BECAUSE THE IDENTIFICATION PROCEDURE AND LINEUP FEATURING APPELLANT'S PHOTO WERE UNDULY SUGGESTIVE, AND THE CHILD EYEWITNESS'S IDENTIFICATION IS OTHERWISE SO UNRELIABLE THAT THERE WAS A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION, IN VIOLATION OF DUE PROCESS.

Relevant Facts

In the three days after a burned vehicle was reported to CMPD, the connection between the vehicle and Fisher's death was established, and the CMPD and NMBPD came together to investigate the witnesses that encountered and reported the burned vehicle. (Tr. p. 317, ln. 11-22). A photographic lineup was created to include Appellant's photograph and the photographs of five other individuals. (Tr. p. 310, ln. 8-23; St. Ex. 44). Detective Levett had generated the lineup through a computer database using Appellant's mugshot taken a few years earlier when he had a previous encounter with Charlotte law enforcement. (Tr. p. 256). He testified that the procedure used was to ensure objectivity, and had reviewed the lineup before showing the witness to ensure they were "consistent" in characteristics; but could not explain the physical criteria the computer used to generate the lineup and admitted he had no control over which filler pictures were chosen. (Tr. pp. 262-263; p. 311, ln. 1-2). Photos 1, 2, 5, and 6 were photos of men described as having a medium or dark complexion, and photos 3 and 4 depicted men described as having a light complexion. (Tr. p. 259, ln. 1-15; St. Ex. 44). Appellant was described as being one of the two men with a light complexion, and Appellant was the only man out of six men with a mustache but without a beard. (Tr. pp. 259-260).

On July 12, 2016, three days after the burning car was reported, Detective Klass of CMPD presented the lineup to two witnesses, S.H. and Walter Digsby. (Tr. p. 265, ln. 12 –p. 266, ln. 1). Detective Klass told the witnesses: "I was going to show them a photo lineup and that they did not

have to feel pressured to pick out a person. If the person wasn't there it was fine to say that there wasn't anybody present." (Tr. p. 266, ln. 11-14). He presented each of the six photos to the witnesses one at a time, displaying the photos to the witnesses by putting them down on a piece of paper. (Tr. p. 267, ln. 4-6, 21-22; p. 268, ln. 1-2). The first eyewitness to see the vehicle, Walter Digsby, was unable to select anybody from the lineup, and he had written "no" beside Appellant's photo. (Tr. pp. 271- 272, ln. 7-9). Digsby was unavailable to testify because he passed away before trial. (Tr. p. 266, ln. 4-8; p. 317, ln. 18-21). The second witness, S.H., a seven-year-old at the time and nine years old at the time of trial, lived on the same street where the vehicle was found. (Tr. p. 327, ln. 17; p. 328, ln. 22). S.H. testified that while she was playing outside "one summer day", she saw a white car catch on fire. (Tr. p. 328, ln. 22, p. 330, ln. 14). S.H. stated she saw a white car right before it caught on fire, and she saw a light-skinned person with dreadlocks standing outside the car and a woman near the man in another car. (Tr. p. 275, ln. 9-20, p. 276, ln. 1; Tr. p. 280, ln. 17-19). She then saw the man and a woman leave together. (Tr. p. 329, ln. 23-24; p. 330, ln. 18-19). S.H.'s mother called the police after S.H. informed her mother what she had seen. (Tr. p. 330, ln. 23 – p. 331, ln. 2). When she first spoke with police, she told them the man was light-skinned, and then they came back to her with the pictures. (Tr. p. 280, ln. 1-3). When shown the lineup, S.H. quickly selected photograph Appellant's picture (picture #3) by pointing to his picture and stating, "That's him." (Tr. p. 321, ln. 11, 14; St. Ex. 45). She testified that she was 100 percent sure that the man in the photo shown to her by detectives was the man she had seen by the car. (Tr. p. 331, ln. 21 – p. 332, ln.1). S.H. described then men in pictures 1 through 4 as light-skinned, and photos 5 and 6 as depicting men that were dark-skinned. She agreed pictures 3 and 4 were close in complexion, but that the man in photo 4 had a darker complexion. (Tr. p. 279, ln. 1-24). Because S.H. was only seven years old at the time of the identification, Detective Klass stated he had to

take a little bit more time with her to explain the process and ensure she understood. (Tr. p. 270, ln. 3, 11-12). Although S.H. testified she knew the difference between right and wrong at trial, nearly two years after the original identification, Detective Klass did not determine her competence to know and tell truth versus to say something untrue, or lie, even if due to her uncertainty. (Tr. p. 272, ln. 18; p. 273, ln. 1-2; p. 274, ln. 13-25). The record contains no testimony of what S.H. told Detective Helms on July 9, 2016, regarding the car and what she saw the person by the car do; it only contains her testimony at the hearing two years later. No testimony was presented as to what the man later identified as Appellant was doing at the time witnesses saw the man near the burning car on July 9, 2016.

Appellant moved to exclude S.H.'s identification of him and related testimony on the grounds that the identification was unduly suggestive and unreliable. After holding a *Neil v. Biggers*⁵ hearing, the trial court concluded the identification procedure or lineup was not unduly suggestive, but even if either were, the trial court found the "identification by the witness, [S.H.], was so reliable that there is no substantial likelihood of misidentification." (Tr. p. 286, ln. 7-13). The trial court also noted that S.H. identified the first four photographs as featuring light-skinned African American men, and that she had the opportunity to view what occurred and who was there, and was 100 percent certain of her identification (Tr. p. 284, ln. 23-24; p. 285, ln. 21, 24-25; p. 286, ln. 1). The trial court characterized the span of three days between witnessing the burning of the car and identification as: "Hardly any length of time between the two at all that would affect a person's memory or recall." (Tr. 286, ln. 3-6). Accordingly, the witness's testimony and the photo lineup were admitted into evidence. (Tr. pp. 252-287; St.'s Ex. 44).

⁵ *Neil v. Biggers*, 409 U.S. 188 (1972).

Standard of Review

The decision to admit an eyewitness identification is within the trial court's discretion and will not be disturbed on appeal absent an abuse of such discretion, or “the commission of prejudicial legal error.” *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) “An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion that is without evidentiary support.” *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526-27 (2004). “However, an eyewitness identification which is unreliable because of suggestive procedures is constitutionally inadmissible as a matter of law.” *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. *Id.* at 289.

Argument

A criminal defendant is deprived of due process when an identification procedure is unnecessarily suggestive and conducive to irreparable mistaken identity, or in other words, created a very substantial likelihood of irreparable misidentification. *Id.* at 343 S.C. at 286, 540 S.E.2d at 447 (citing *Stovall v. Denno*, 388 U.S. 293 (1967); *Manson v. Braithwaite*, 432 U.S. 998 (1977)).

In *Neil v. Biggers*, the United States Supreme Court developed a two-prong test to determine whether an out-of-court identification passes constitutional muster. 409 U.S. 188, 196-97 (1972). First, a court must determine whether the identification process was unduly suggestive. *Id.* at 198. The court next must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.* “Reliability is the linchpin in determining the admissibility of identification testimony.” *Manson v. Braithwaite*, 432 U.S. 98, 98, (1977). The central question is whether under the totality of the

circumstances the identification was reliable even though the confrontation procedure was suggestive. *State v. McCord*, 349 S.C. 477, 562 S.E.2d 689 (Ct. App. 2002). The relevant factors to determine whether an unduly suggestive identification is otherwise reliable considers the following factors: (1) the witness's opportunity to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of any prior descriptions by the witness of the suspect; (4) the witness's level of certainty; and (5) the amount of time between the crime and confrontation. *State v. Heyward*, 422 S.C. 488, 494, 812 S.E.2d 432, 435 (Ct. App. 2018).

The trial court erred in admitting into evidence S.H.'s testimony and her identification at trial because the identification procedure was so impermissibly suggestive to create a substantial likelihood of irreparable misidentification.

The rationale in *State v. Turner*, despite its contrary conclusion, is instructive here. In *Turner*, the defendant objected to the photo lineup as unduly suggestive because it contained only two persons that could be identified as dark-skinned because of the use of a light background. 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007). The lineup and the identification procedure were upheld because:

[D]espite the variation in background colors, appellant does not stand out in comparison with the other individuals in the lineup. All six men have facial hair and all appear to be "built," as described by the victim. The gray background does not make appellant's complexion seem darker than the complexions of the four other individuals who have purple backgrounds.

Id. The case at bar is distinguishable from *Turner* to the extent Appellant is light skinned; however, four of the photos were described as showing medium to dark-skinned persons. Appellant clearly stands out in comparison with these four photos. Only Appellant had a mustache without a visible beard. Thus, through only these two characteristics, the other five males were readily excludable as the man S.H. may have seen and it is not as though these characteristics are

easily overlooked by an eyewitness such as a freckles or eye shape would be. Moreover, the computer-generated procedure for creating the photo lineup offered no opportunity for review as the officer charged with overseeing the lineup's objectivity and consistency between photos was in actuality unable to regulate the lack of uniformity of material characteristics, such as skin tone. Thus, the failure to create a photo lineup containing men with sufficient similar characteristics resulted in an unduly suggestive photo lineup because Appellant appeared in stark contrast with the other men.

Further, the trial court erred in concluding the photo lineup was otherwise sufficiently reliable that no substantial likelihood of misidentification existed from the unduly suggestive lineup. There was no testimony or other evidence of S.H.'s proximity to the man by the car nor any evidence as to how long she observed the person. *See Moore*, 343 S.C. at 289, n. 2, 540 S.E.2d at 449, n. 2 (holding the brief period of time the eyewitness viewed the suspect from a distance away (the extent of the distance was absent from the record) were factors weighing *against* reliability). S.H. merely described the man as light-skinned with dreads and no other identifying features. Her description was meager and less than the eye witness's description in *Moore* which the court described as: "tenuous, at best. [The eyewitness's] descriptions were based primarily on the suspects' clothing and race, and that one was taller than the other. She really did not get a look at either suspect's face." Also inescapable to the analysis is S.H.'s age, and its compounding impact on all of the *Neil v. Biggers* factors, including how acute her attention could have been at the time. *See Id.* Recall that three days had passed before officers spoke with the a seven-year-old child. Despite S.H.'s testimony she was one hundred percent certain that Appellant was the man she saw, the photo lineup was so unduly suggestive that only one or two photos matched her description, which gave her a fifty-fifty chance of selecting Appellant. While she did not mention

facial hair in her description—if she noticed facial hair on the suspect at all—only Appellant had a mustache without a full or visible beard. Thus, under the totality of the circumstances, the only factor established with any degree of reliability was S.H.’s level of certainty, which means little when the rest of the factors weigh against any finding of reliability. *See State v. Hardin*, 425 S.C. 1, 14, 819 S.E.2d 177, 184 (Ct. App. 2018). (“While the victims testified they were one hundred percent certain that Hardin was one of the assailants, and the length of time between the robbery and the identifications was only a little over three hours, we do not believe these two factors alone suffice to support a finding that the out-of-court identifications were proper and admissible.”).

Therefore, under the totality of the circumstances, the trial court erred in finding the photo lineup did not create a substantial likelihood of irreparable misidentification, and, thus, the identification was unreliable as a matter of law.

V. THE STATE'S IMPROPER PRESENTATION OF CONFLICTING PROSECUTORIAL THEORIES REGARDING THE IDENTITY OF THE SHOOTER AND THE MANNER IN WHICH THE SHOOTING OCCURRED RENDERED APPELLANT'S CONVICTIONS FUNDAMENTALLY UNFAIR AND VIOLATED DUE PROCESS.

Appellant raised the argument when moving for a directed verdict, arguing that the State did not present sufficient evidence for the jury to determine who shot Fisher and that the State was asking the jury to guess as to which defendant pulled the trigger. (Tr. p. 533, ln. 18-25). In presenting its case to the jury, the State impermissibly offered contradictory prosecutorial theories as to Appellant's guilt, in violation of due process and resulting in convictions that are fundamentally unfair.

Argument

The theory of contradictory or inconsistent prosecutorial theories is one of first impression in South Carolina. In the seminal case on this issue, *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000), the Eighth Circuit Court of Appeals reversed the defendant's thirteen year old conviction because the prosecution's use of inconsistent prosecutorial theories violated due process in a way that rendered his convictions fundamentally unfair. In *Groose*, a married couple was found stabbed to death in their bed with the murder weapon, a butcher knife, near the bodies. *Id.* at 1047. The defendant and four others were arrested for the crime. *Id.* One of the co-defendants, Lytle, made inconsistent statements regarding who stabbed the victims. *Id.* Lytle stated that he and a group of juveniles had arrived at the victims' home after they had already been stabbed by co-defendant Cunningham; but later stated he saw his co-defendant Bowman stabbing them while the other juveniles were burglarizing the home. *Id.* at 1047-1048. The State used the Bowman statement at the defendant's trial to convict him under the theory of accomplice liability. *Id.* The State then used the prior inconsistent statement regarding Cunningham to convict Cunningham in a separate

trial. *Id.* “In short, what the State claimed to be true in Smith’s case it rejected in Cunningham’s case, and vice versa.” *Id.* at 1050. The two prosecutions were factually inconsistent, and the defendant could not have been convicted under both theories. *Id.* at 1051. The Eighth Circuit held reversal was constitutionally required because the “manipulation of the evidence deprived him of due process and rendered his trial fundamentally unfair....The adversarial system is poorly served when a prosecutor, the state’s own instrument of justice, stacks the deck in his favor.” *Id.* In so deciding, the Eighth Circuit likened the State’s impermissible actions to a hypothetical, alternate scenario: “[S]uppose that Smith and Cunningham had been tried jointly. Would the prosecutor have been entitled to ask the jury to accept as true both of Lytle’s accounts of who murdered [the victims] in an attempt to secure convictions of both Smith and Cunningham?” *Id.* at 1051-52. The Eighth Circuit concluded the alternative situation, as well as what actually occurred at trial surpassed the range of discretion given to prosecutors in presenting their case to hold “the use of inherently factually contradictory theories violates the principles of due process.” *Id.* at 1052.

The principles in *Smith v. Groose* are applicable to the present case. Here, the case consisted of one bullet and two defendants, and the State sought to convict both Freeman and Appellant for the murder and related charges without any direct or substantial, circumstantial evidence as to whom actually shot the victim. The State effectively admitted that the identity of the shooter was unknown in its closing argument; the State simply asked the jury to accept that both of them were guilty because regardless of whom pulled the trigger both defendants were guilty under the hand of one accomplice liability. (Tr. p. 568, ln. 19-22; p. 569, ln. 8-12; p. 570, ln.1-19; p. 572-74; p. 576, ln. 1-2). The State presented tenuous and incomplete evidence at trial and during closing argument, suggested to the jury factually different, possible scenarios of what *could* have occurred in the car when Fisher was shot regarding seating positions and shooter, and

the different *unsubstantiated, possible* motives of both or either men, prefacing the speculative suggestions with “if” and “maybe”. (Tr. pp. 576-80; p. 584, ln. 25; p. 586). Moreover, assuming *arguendo* the evidence was sufficient to properly send the case to the jury, the jury could have believed that Appellant was the principal and Fisher was the accomplice or vice versa. Under the scant evidence presented, the jury could have believed Appellant pulled the trigger or Freeman pulled the trigger; however, both could not have been true. Yet under either scenario, the guilty verdict would have otherwise been supported by the same evidence. The State’s creation of factually different scenarios, coupled with the jury’s option as to each defendant’s role in deciding the verdict on each charge, offends due process and principles of fundamental fairness in the same way the Eighth Circuit found the State’s use of inconsistent statements to support factually different theories did. The State here was able to take advantage of the holes in its own case to present unsubstantiated theories of guilt to the jury, and thus stacked the deck and bolstered its chances to secure convictions as the prosecution did in *Smith v. Grosse*.

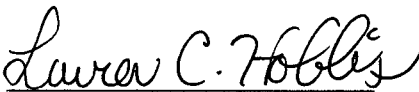
Therefore, Appellant was deprived of due process and his trial was fundamentally unfair because the jury was left to speculate or guess as to which defendant was guilty under the conflicting facts and theories the State presented.

CONCLUSION

For the foregoing reasons, Appellant respectfully urges this Honorable Court to vacate Appellant's conviction and sentence, and remand for the entry of a judgment of not guilty, or in the alternative, for a new trial.

Respectfully submitted,

WILLIAM G. YARBOROUGH III
LAUREN C. HOBBS

By: 
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Horry County Court of General Sessions
The Honorable Steven H. John, Circuit Court Judge

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DEC 27 2018

SC Court of Appeals

Appellate Case No. 2018-000824

State of South Carolina.....Respondent,

v.

Nicholas McIver,.....Appellant.

PROOF OF SERVICE

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CERTIFICATE OF SERVICE

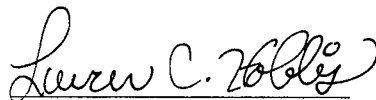
The undersigned hereby certifies that Appellant's opening brief, designation of matter, and motion to allow late filing were mailed by US mail for filing and service upon Respondent respectively, with sufficient postage attached and addressed as follows:

The Honorable Kitchings, Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Senior Assistant Attorney General Benjamin J. Aplin
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The undersigned further certifies that all parties required to be served under the South Carolina Appellate Rules have been served.

This 23 day of November, 2018



William G. Yarborough III, Attorney at Law, LLC

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November 23, 2018

The Honorable Jenry Kitchings
Clerk of Court, South Carolina Court of Appeals
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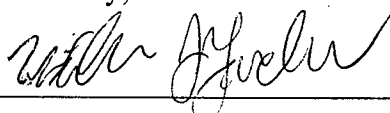
SC Court of Appeals

Re: The State of South Carolina v. James D. White
Appellate Case No. 2016-001302

Dear Ms. Kitchings,

I apologize for the delay in responding to your letter regarding my availability for oral argument in the above-captioned case. I have no current conflicts with the dates outlined in your letter and have blocked off these dates in my calendar to prevent any conflicts from arising. Thank you.

Sincerely,



William G. Yarborough III

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