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Questions Presented

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Question II: Did the trial court err in failing to direct a verdict on the charge of lynching second degree when the state failed to prove either defendant committed an act of violence upon the body of Ryan Lochbaum as alleged in the indictment and required by the statute?

Question III: Did the trial court err in failing to direct a verdict of not guilty on the charge of lynching second degree because the state failed to prove a premeditated purpose or intent to commit an act of violence upon another person?

Question IV: Did the trial court err in failing to direct on the charge of conspiracy on the ground that the State failed to prove any facts that would reasonably support an agreement between Frank Larmand and Leo Lemire to inflict an act of violence upon the person of Ryan Lochbaum or present or point a firearm at the person of Ryan Lochbaum?

Question V: Did the trial court err in failing to direct a verdict on the charge of presenting and pointing a firearm when the State has failed to prove a conspiracy and there was no other evidence sufficient to convict Frank Larmand for presenting and pointing a firearm?

Question VI: Did the trial court err in charging the jury that they may infer that all persons present as members of a mob when an act of violence is committed are guilty as principals?

Statement of the Case

Procedural Statement

Frank Larmand was arrested on May 1, 2009.¹ The grand jury for York County indicted him on July 16, 2009 for the charges of lynching second degree, conspiracy, and presenting and pointing a firearm. He was tried before the Honorable William H. Seals, Jr. and a jury on October 20-24, 2009. He, along with his co-defendant, was convicted on all charges. He was sentenced to ten years in prison on the lynching charge. He was given concurrent five year sentences on the charge of conspiracy and presenting and pointing a firearm.

A notice of intent to appeal was filed on _____.

Factual Statement

Kerriann Larmand, the wife of the Defendant Frank Larmand, owned and operated a business in the Charlotte area known as Pop-A-Lock. The business was a basic locksmith business. As part of a franchise operation the business would also respond to calls to open car doors and other emergency calls. Rec. on App. at 324. Mrs. Lamard had reason to believe that someone in the company was stealing calls when a cash customer called for services such as a request to unlock an automobile. As a result she, with the assistance of her husband, set up a fake call for service in an attempt to determine who was stealing the calls from her company. Rec. on App. at 326, ll 12-25 to 327, ll 1-23.

As part of the mystery call, Frank Larmard was to go to the Knights Stadium outside of Charlotte. There he would wait and see who came in response to the mystery call.

¹ He was originally arrested for lynching second degree, conspiracy, and assault and battery with intent to kill.

Prior to leaving Kanapolis, NC, where he lived, he picked up his brother-in-law, Leo Lemire. Mr. Lemire was needed to receive the call as his voice would not be recognized by any employee or former employee of Pop-A-Lock who may be involved. Rec. on App. at 371, ll 20-372, ll 1-12. Mr. Larmand went to Knights Stadium and his wife placed the called requesting assistance in unlocking an automobile. The call was placed at 10:14 pm. Rec. on App. at 329, ll 10-22. Mike Taylor, who at the time was employed by Pop-A-Lock, received the call at 10:18 pm. Rec. on App. at 23-25. Mr. Taylor call Ryan Lochbaum, a former employee who was terminated in October of 2008, at about 10:43. Rec. on App. at 176, ll 6-8. Mr. Lochbaum testified that Mr. Taylor was simply asking him for directions to Knight Stadium. He had previously told officers involved in the case that Mr. Larmand and Mr. Lemire were trying to lure him out to Knight Stadium that evening. Rec. on App. at 174, ll 5-11. As he had been terminate several months before, Mr. Lochbaum had no legitimate reason to be repsonding to a call for Pop-A-Lock. Mr. Lochbaum had also been denied unemployment benefits because of his misconduct while employed by Pop-A-Lock. Rec. on App. at ____.

After no one from Pop-A-Lock or anyone trying to steal the service call came to Knights Stadium, Mr. Larmand decided to go by the residence of Mr. Lochbaum. He went for the purpose of seeing if any employees of Pop-A-Lock were there and to determine if a red car with a Pop-A-Lock sign was at the residence. Rec. on App. at 377, ll 1- 12. Mrs. Larmand had received reports of a red car with a Pop-A-Lock sign was seen in the Charlotte area. Rec. on App. at 341, ll 17-25. When Mr. Larmand drove by Mr. Lochbaum's residence, he noticed several people gathered around a van but did not see a red car. He parked his truck past the house and instructed Mr. Lemire to remain in the truck. Rec. on App. at 378, ll 12-16. He then walked to

the residence of Mr. Lochbaum. He stood in the street near the van for a short period of time until someone acknowledged his presence. He stated that he wished to speak to Mr. Lochbaum. A person notified Mr. Lochbaum that someone was there to see him. Rec. on App. at 380, ll 12-20. Mr. Lochbaum then asked the others present to leave as he wanted to talk to Mr. Larmand in private. Rec. on App. at 72, ll 10-14. At least three other people were present when Mr. Lochbaum asked to speak to Mr. Larmand in private. Rec. on App. at 68, ll 21-25 to 69, ll 1-4.

After Mr. Lochbaum and Mr. Lamrad had spoken for a brief time, Mr. Lemire, who had left the truck after Mr. Larmand left, came at Mr. Lochbaum with a pistol. Rec. on App. at 150, ll 14-22. Mr. Lochbaum turned to confront Mr. Lemire and grabbed the pistol. In the struggle they both fell to the ground. At that point the neighbors who were with Mr. Lauchbaum earlier came and helped subdue Mr. Lemire. When the two fell to the ground, Mr. Lochbaum testified that Mr. Larmand tried to pull him off of Mr. Lemire. Rec. on App. at 151, ll 18-24. Mr. Lauchbaum was successful in obtaining the pistol from Mr. Lemire. At that point the struggle ended and Mr. Larmand and Mr. Limire left the area. 154, ll 4-14. Mr. Lauchbaum received only a very minor scratch to his hand. Rec. on App. at 159, ll 16-22.

After leaving the scene Mr. Larmand was stopped by William Watson of the York County Sheriff's Department. Mr. Lemire was arrested that night for presenting and pointing a firearm. Mr. Larmand was briefly questioned and released. Rec. on App. at 59, ll 1-16. Mr. Larmand was arrested the next day when he came to arrange bail for Mr. Lemire.

Argument

Question I

Did the trial court err in submitting his written charge to the jury when the jury had not requested it and after they had been deliberating for over three hours and forty minutes?

While South Carolina has no rule that permits a trial judge to send written instructions to a jury, the South Carolina Supreme Court has held that such a decision, while discouraged, is left to the sound discretion of the trial judge. As the Court said “While the written submission of the jury instructions could aid a jury in properly applying the law to the facts before it, this practice should be carefully exercised by the Bench.” *State v. Turner*, 373 S.C. 121, 129, 644 S.E.2d 693, 697-698 (2007). In *State v. Covert*, 382 S.C. 205, 675 S.E.2d 740 (2009) the Supreme Court reversed the decision of the trial judge to send just a statute to the jury. In that case the Court said “We caution the bench again, as we did in *Turner*, that this practice should be used sparingly, and only where it will aid the jury and where it will not prejudice the defendant.” *Id.* at 210, 675 S.E.2d at 743.

In the present case the trial judge did not fully examine the facts concerning the submission of written instructions as urged by the South Carolina Supreme Court. First the jury did not ask for the entire charge. The note from the jury requested “Can we have a copy printout of the statute of the three charges.” Rec. on App. at 584, ll 7-8. The trial court then proceeded to give the jury one copy of the entire charge. He did not give each juror a copy of the charge. As defense counsel argued “And there being one copy of the charge, I would hesitate a juror or a group of jurors being able to try and use the written charge to cite and to overcome what the jury

has heard in their minds.” Rec. on App. at 585, ll 6-8. Defense counsel further argued that as the charge was about twenty-two pages long and only one copy, a juror may have a tendency to pick and choose certain portions to the exclusion of other parts.” Rec. On App. at 585, ll 22-25 to 586, ll 1-4. This tendency was amplified when the charge was given only to the jury foreman while the rest of the jury was in the jury room. (Court report’s written notes). The foreman then re-entered the jury room as the “keeper of the law” with no instructions to the remaining jurors as to their right to fully read the instructions nor an admonishment not to take portions of the charge out of context.

In *Turner*, where sending the written charge to the jury was approved with the admonition that it should be used sparingly, the charge went to the jury at the beginning of the deliberations. The opinion in *Turner* is not clear if one copy or twelve copies of the charge went to the jury room. But the likelihood of prejudice from a charge given at the beginning of deliberations is not the same as one when the jury is struggling to reach a verdict. And the prejudice is enhanced when only one copy is sent and the jury is not cautioned to read the entire charge and not cautioned against taking a portion out of context. In addition, as noted above, the jury never asked for the entire charge. They were only interested in the statute. This fact increases the probability that the jury concentrated on only a portion of the written charge and not the entire charge. The prejudice to the defendant is readily apparent as the record reflects that the jury sent out a note that said “Reached verdict on three charges, deadlocked on the remaining.”²

² This note is very confusing at the very least. As the conspiracy and lynching charges would require the jury to find that both defendants were involved, the jury should have reached a verdict as to the lynching and conspiracy charges against both defendants. They could not have found one defendant guilty of lynching or conspiracy without finding the other defendant guilty. The only charge they could have reached a verdict on that would not require a conviction of the

Obviously the jury had not carefully read the jury instructions or had taken some of the instructions out of context.

The trial judge did not use caution in deciding to send the entire charge to the jury as they jury had not requested the entire charge. He further did not exercise caution when he sent only one copy of the charge to the jury. And finally he did not exercise caution when he failed to instruct the jury not to take a portion of the charge out of context and to consider the entire charge. As no caution was exercised, the submission of the written charge was reversible error.

Question II

Did the trial court err in failing to direct a verdict on the charge of lynching second degree when the state failed to prove either defendant committed an act of violence upon the body of Ryan Lochbaum as alleged in the indictment and required by the statute?

The indictment against Frank Larmand alleged that he along with Leo David Lemire did “inflict an act of violence upon the body of another resulting in physical injury to the victim, to wit: he did along with Leo David Lemire attack and assault Ryan Lochbaum, all in violation of Section 16-03-220.” (Indictment against Frank Larmand.) Neither defendant inflicted an act of violence upon the body of Ryan Lochbaum as alleged in the indictment. The sole injury to Mr. Lochbaum was some scratches to his hand that occurred while he was struggling with Mr. Lemire. Rec. on App. at 159, ll 16-19. Mr. Lochbaum described the efforts of Mr. Larmand as “trying to pull me off Leo.” Rec. on App. at 151, l 24. Mr. Lochbaum

other co-defendant was to have found Mr. Lemire guilty of pointing and presenting a firearm. The confusion by the jury had existed for some time as earlier they had asked “If we think one is guilty of a charge, do we have to automatically vote that the other party is also guilty of the charge?” Rec. on App. at 574, ll 15-17.

admitted Mr. Larmand never struck him. Rec. on App. at 188, ll 5-13. Neither the injury or the actions of Mr. Larmand would, under any reasonable interpretation, constitute an act of violence upon the body of Mr. Lochbaum.

Under *Jackson v. Virginia*, 443 U.S. 307 (1979), the state is not permitted simply to produce some evidence by which the conviction could be sustained. It must do more. The civil rule that if there is a scintilla of evidence the case must be submitted to the jury, is, after *Jackson*, not applicable to a criminal case. In *Jackson*, the United States Supreme Court specifically held that a modicum of evidence was not sufficient to convict in a criminal case. While cases frequently say that a court does not weigh evidence, to determine the difference between a modicum of evidence and sufficient evidence to convict in a criminal case, a court must, to some extent, weigh the evidence. In *Jackson* the United States Supreme Court said “Any evidence that is relevant - - that has a tendency to make the existence of an element of a crime more probable than it would be without the evidence . . . could be deemed a ‘modicum.’” But it could not seriously be argued that such a ‘modicum’ of evidence could by itself rationally support a conviction beyond a reasonable doubt.” *Id.* at 320. Thus, for an appellate court to decide whether there is more than a modicum of evidence, as required by *Jackson*, does require the court, at least to some degree, to weigh the evidence. What an appellate court may not do is to determine the credibility of the witnesses. That function is strictly for the jury. In the present case on the question of an act of violence upon the body of Ryan Lochbaum, there is at the very least only a modicum of evidence to sustain the conviction.

South Carolina Code § 16-3-210 defines lynching in the second degree as “any act of violence inflicted by a mob upon the body of another person and *from which death does*

not result.” (emphasis added) The only difference between lynching first degree and second degree is that a death results from the act of violence in lynching first degree. The legislature thus by implication meant for the act of violence to be serious. The fact that the minimum punishment is three years and a maximum of twenty further supports this position.

To be guilty of lynching second degree an attempt to inflict an act of violence would not be sufficient. The statute requires that the act of violence actually be inflicted upon the person. Nor is it sufficient to commit a simple assault and battery upon another person. To interpret the statute in such a manner that a simple assault and battery is an act of violence sufficient to invoke the lynching statute would permit the state to elevate a misdemeanor that carries a maximum sentence of 30 days, and make it a twenty year felony with a three year minimum. The basis for this increase in punishment would be simply because more than one person was involved and not because the injury was more severe or the beating more heinous. Such is not a reasonable interpretation of the statute. While theoretically possible, death generally does not result from a simple assault and battery and therefore would not be an act of violence “from which death does not result.”³

The statute also requires that the act of violence be inflicted upon the person. An act of violence directed at a person is not sufficient. A threat of an act of violence is not sufficient. The act of violence must make contact with the body of the person. The legislature

³ The trial judge instructed the jury at one point that if the jury found an act of violence *against* the victim, then they could convict. Rec. on App. at 567, ll 12-16. The word “against” has a different meaning from “upon.” While no objection to the use of “against” was made, the jury very easily in reading the written instruction have latched on to that word in arriving at a verdict. Even without an objection, a finding of guilt based on a finding of “against” as opposed to “upon” would not be proper.

did not say “to use an act of violence toward another person” or “in relationship to another person” or “in regard to another person.” They used the word “upon” which requires that some contact exist between the act and the person acted upon. An act of violence upon the body of Ryan Lochbaum was simply not proven in this case.

Question III

Did the trial court err in failing to direct a verdict of not guilty on the charge of lynching second degree because the state failed to prove a premeditated purpose or intent to commit an act of violence upon another person?

The State is required to prove more than the fact that two or more people inflicted an act of violence upon the body of a third party. They must prove that prior to the act the individuals involved in the act planned and premeditated the attack upon the body of the person. This Court has recognized that the premeditation may be proven by circumstantial evidence. *State v. Smith*, 352 S.C. 133, 572 S.E.2d 473 (Ct. App. 2002). Proof of this element of the offense must not, however, be left to speculation, conjecture or surmise.

In *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) the South Carolina Supreme Court said “The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. ‘Suspicion’ implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.” *Id.* at 594, 606 S.E.2d at 478. This Court in *State v. James*, 362 S.C. 557, 608 S.E.2d 455 (Ct. App. 2004) said “If there is any direct evidence or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury.” *Id.* at 561, 608 S.E.2d at 457 (emphasis added). No direct evidence of

premeditation was presented by the State. The question here, therefore is was there substantial circumstantial evidence reasonably tending to prove the guilt of Frank Larmand?

In this case the government produced no evidence of any planning or premeditation prior to the altercation. The evidence at trial showed that when Mr. Lochbaum confronted Mr. Lemire, who had the gun, Mr. Larmand did not immediately start attacking Mr. Lochbaum by striking him and attempting to inflict any act of violence upon Mr. Lochbaum. Instead he simply attempted to pull Mr. Lochbaum off his brother-in-law without inflicting any act of violence upon Mr. Lochbaum. Rec. on App. at 151, ll 18-24. No actions by Mr. Larmand and Mr. Lemire indicated any plan to jointly inflict an act of violence upon Mr. Lochbaum. Even if the act of Mr. Lemire in presenting or pointing a firearm at Mr. Lochbaum is considered an act of violence, the record is devoid of any direct or circumstantial evidence that Mr. Larmand planned, encouraged, or aided Mr. Lemire in such an act. Under the law that applies to this case, two people simply arriving at the same area is not sufficient to show planning and sustain the conviction.

In *State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009) the South Carolina Supreme Court held that merely showing up at the scene of a crime under suspicious circumstance is not sufficient to prove the defendants knew the crime of trafficking marijuana was occurring. In *Hernandez* three individuals came to the location of a tractor trailer that contained 900 pounds of marijuana. The three individuals arrived at the scene in a Ryder rental truck following a Thunderbird that had been at the previous location of the tractor trailer. The occupants of the Thunderbird had unloaded some furniture from the tractor-trailer. The three vehicles then left together and went down a dirt road until they became stuck. At that point the

under cover agent who was driving the tractor trailer called off the operation and arrested the driver and two passengers of the Ryder truck. The occupants of the Thunderbird escaped.

In reversing the conviction the Court said “The State claims that it is ‘nonsensical’ to find that the Thunderbird occupants did not know [Defendants] prior to this transaction. However the State failed to present any evidence such as acts, declarations or specific conduct to support this inference, and thus, we find that conclusion that [Defendants] knew the Thunderbird and therefore had knowledge of the drugs in the trailer is mere speculation.” *Id.* at 624, 677 S.E.2d at 606.⁴ The same is true in this case. All the State established is that the two defendants were at the scene together. The State produced no testimony “such as acts, declarations, or specific conduct” to support the fact that any alleged act of violence upon Mr. Lochbaum was premeditated. The State produced no statements by either party that encouraged or egged on any alleged attack upon Mr. Lochbaum. The conclusion that there was a prior plan is mere speculation and not sufficient to sustain a conviction.

Question IV

Did the trial court err in failing to direct on the charge of conspiracy on the ground that the State failed to prove any facts that would reasonably support an agreement between Frank Larmand and Leo Lemire to inflict an act of violence upon the person of Ryan Lochbaum or present or point a firearm at the person of Ryan Lochbaum?

The South Carolina Supreme Court has said concerning a conspiracy, “The gravaman of the offense of conspiracy is the agreement or combination. Thus, we focus here on

⁴ Even if the occupants of the Ryder truck had known the driver of the Thunderbird, that still would not prove they knew of the marijuana.

the sufficiency of the evidence of an *agreement* between the alleged conspirators, and not, as the State would have us do, on the alleged common *object*” *State v. Gunn*, 313 S.C. 124, 134, 437 S.E.2d 75, 80 (1993)(emphasis in original). A conspiracy is not proven simply because individuals may be together or engage in a common activity. “What is required is a *shared*, single criminal objective, not just similar or parallel objectives between similarly situated people.” *Id.* Thus, the mere fact that Mr. Larmand and Mr. Lemire were at the same place at the same time is not sufficient to establish the agreement required to prove a conspiracy.

In the present case all the state has established is that Mr. Larmand and Mr. Lemire arrive at the same place together. The State has not establish that they both agreed or even engaged in the same conduct as it related to Mr. Lochbaum. The conspiracy alleged by the State is to commit either the act of lynching or the act of presenting or pointing a firearm. Therefore, as noted above, the State must prove either a conspiracy to commit an act of violence upon the body of Ryan Lochbaum or a conspiracy to present or point a firearm at Mr. Lochbaum. The evidence in this case shows that Mr. Lochbaum attacked Mr. Lemire when Mr. Lemire came at him with a pistol. Mr. Larmand did nothing to promote, assist or aid Mr. Lemire in the act of presenting and pointing a firearm. All the testimony as to Mr. Larmand’s action shows that he, according to Mr. Lochbaum, attempted to pull Mr. Lochbaum off Mr. Lemire. Rec. on App. at 151, ll 18-24. While a conspiracy may be proven by circumstantial evidence, such evidence may not be based upon speculation, conjecture or surmise. *State v. Stewart*, 278 S.C. 296, 295 S.E.2d 627 (1982)(Ness, concurring)⁵ Nor may the conspiracy be established “by piling inference upon

⁵ While the fact seems self evidence that a criminal conviction may not rest upon speculation, conjecture and surmise, the concurring opinion by Hon. Julius B. Ness is the only reported criminal case in South Carolina that uses the phrase.

inference.” *Gunn*, 313 S.C. at 134, 437 S.E.2d at 81. *State v. Mouzon*, 321 S.C. 27, 467 S.E.2d 122 (Ct. App. 1996), *aff’d*, 326 S.C. 199, 485 S.E.2d 918 (1997).

The United States Supreme Court has said “Without knowledge, the intent cannot exist. Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what . . . was called a dragnet to draw in all substantive crimes.” *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943). In the present case the State has piled inference upon inference. The state has charged a conspiracy to commit the crimes of lynching second degree or presenting or pointing a firearm. The lynching second degree was to be committed by the use of the firearm. To prove this, the State asked the jury to infer the following facts: 1. Mr. Larmand and Mr. Lemire both agreed to come to the residence of Mr. Lochbaum. 2. Mr. Larmand knew Mr. Lemire had a firearm. 3. Mr. Larmand agreed with Mr. Lemire to use the firearm to commit the lynching second degree. 4. They both agreed to go to the residence of Mr. Lochbaum for the expressed intent to inflict an act of violence upon Mr. Lochbaum. No direct facts exist to prove any of those facts. Thus, to prove the case the State is required to pile inference upon inference to reach the conclusion that Mr. Larmand and Mr. Lemire committed the conspiracy. Such a practice is not permitted in South Carolina. *State v. Hammitt*, 341 S.C. 638, 535 S.E.2d 459 (2000); *State v. Vasquez*, 341 S.C. 648, 535 S.E.2d 465 (Ct. App. 2000); *State v. Mouzon*, 321 S.C. 27, 467 S.E.2d 122 (Ct. App. 1995); *State v. Gunn*, 313 S.C. 124, 437 S.E.2d 75 (1993) (all cases holding that conspiracy is not to be proven by piling and inference upon an inference)

Question V

Did the trial court err in failing to direct a verdict on the charge of presenting and pointing a firearm when the State has failed to prove a conspiracy and there was no other evidence sufficient to convict Frank Larmand for presenting and pointing a firearm?

As discussed above the evidence was not sufficient to convict Frank Larmand of the crime of conspiracy. As the sole basis for making Frank Larmand guilty of presenting or pointing a firearm was a conspiracy, this conviction should also be reversed. The record is devoid of any other evidence that would be sufficient to convict Mr. Larmand of this crime. No testimony supports a finding that Mr. Larmand was present aiding and abetting Mr. Lemire in the crime of presenting and pointing a firearm. Absent a conspiracy, the jury simply had no basis for convicting Mr. Larmand for this crime. He did not encourage the crime, promote the crime or assist in the crime of presenting or pointing a firearm.

Question VI

Did the trial court err in charging the jury that they may infer that all persons present as members of a mob when an act of violence is committed are guilty as principles?

The South Carolina Supreme Court brought into question the use of inferences in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). There the Court said “A jury charge is no place for purposeful ambiguity.” *Id.* at 611, 685 S.E.2d at 809. Mr. Larmand contends that the giving of the charge in this case was purposeful, but perhaps not intentional, ambiguity. A close analysis of the statute and charge actually shows that the charge is in some respects redundant to the other definitions giving by the trial judge. For example, the trial court charged

the jury, in keeping with the statutory definition that “A mob is defined as an assemblage of two or more persons for the premeditated purpose and with the premeditated intent of committing an act of violence upon another person.” Simply put, if a person plans on inflicting an act of violence upon a person and are present they are guilty of the crime of lynching.

To tell a jury they may infer that the person is guilty as a principle simply adds nothing to the statutory definition of “mob.” It does, however, have the potential of confusing the jury. In essence the charge to the jury says this: “A mob is an assemblage of two or more persons for the premeditated purpose and the premeditated intent of inflicting an act of violence and if you find that two or more people have assembled with the premeditated purpose and premeditated intent of inflicting bodily harm you may infer they are guilty as principle.” If the jury has found there is in fact a mob, then of necessity they have found the people gathered for the purpose of inflicting an act of violence upon a person. Under those facts the people assembled would be guilty as principles as defined by the court in another charge. Previously the court had told the jury “A person who joins another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the act done in carrying out the further plan and purpose.” Rec. on App. at 654, ll 22-24 to 565, ll 1-2. The trial court further instructed the jury on the “hand of one is the hand of all.” Rec. on App. at 566, ll 3-6.

A jury could reasonably be expected to believe that a charge is not repeated. A juror in this case could have very easily believed that the judge in essence told them that they may infer all persons present are members of a mob. If so, this is an improper conclusion as there is no factual basis for concluding that simply because a person is present they are members

of the mob and therefore guilty as a principle. As the judge did not clarify his charge that the jury first had to find the defendants were part of a mob before they could use the inference, the likelihood of jury confusion is increased. Furthermore, the trial court at an additional point charged the jury that mere presence is not sufficient to convict. Rec. on App. at 565, ll 11-18; 566, ll 7-11. Thus, the charge taken as a whole tends to give with one hand and take with the other. Such a charge is confusing. To reach a proper result a jury needs a charge that clarifies and does not confuse.

Article V, § 21 of the Constitution of the State of South Carolina provides “Judges shall not charge juries in respect to matter of fact, but shall declare the law.” This article is not only a limit upon the powers of the judiciary but a limit on the power of the legislature. The legislature may not pass a law that requires judges to charge a jury on the facts of a case. The statute in question is a charge on the facts.⁶

In *Yarborough v. Southern Ry*, 78 S.C. 103, 58 S.E. 936 (1907) the South Carolina Supreme Court discussed the issue of the trial judge giving a charge to a jury which permits them to infer a certain fact. The Court held “The circuit judge laid down in the charge the proposition that the jury might properly infer the consent of the railroad company to the placing of property on its platform from the facts that an agent has notice of its being placed there

⁶ The inference charge in a driving under the influence case, if properly given, is not a charge on the facts. If the trial judge charges “The legislature has determined that you may infer the average person is under the influence of alcohol at a level of .08. That finding does not mean you may infer that this particular defendant is under the influence at .08.” the charge is not one on the facts of the case but simply what the legislature has found based upon science to be true. Obviously even this charge would be unconstitutional if the inference level were .02 as it would not be based upon science. But the error would be a due process violation and not a violation of the prohibition against charging on the facts.

and makes no objection. In view of the issues made on the trial, we think this was a charge on the facts.” *Id.* at ___, 58 S.E. at 937.

In a driving under the influence case the legislature could not pass a law that tells a jury that they may infer a defendant guilty if there is testimony that the defendant smelled of alcohol, had slurred speech, and was unsteady on their feet. Such a charge would be a charge on the facts prohibited by our state constitution. Whether the inference under the statute is logical or not does not change the fact that the charge is a charge on the facts.

In *State v. Hartley*, 307 S.C. 239, 414 S.E.2d 182 (1992) the defendant requested that a charge to the jury simply stating that the absence of motive “is to be duly considered by you in weighing the question of guilt regarding him.” *Id.* at 240, 414 S.E.2d at 183. This Court held that such a charge was improper as it was a charge on the facts in violation of the state constitution. As this Court held “Thus, the trial judge was requested, in effect, to charge that particular evidence (*i.e.* evidence of lack of motive) is entitled to receive weight or consideration. The requested charge is clearly a charge on the fact that the jury was to determine.” *Id.* at 241, 414 S.E.2d at 184. The inference charge in this case is legally no different. The judge in essence told the jury that particular evidence is entitled to receive weight or consideration. In fact, he told the jury that a certain fact is entitled to special weight or consideration.

In *State v. Bagwell*, 201 S.C. 387, 23 S.E.2d 244 (1942)⁷ the defendant had requested a simple charge that the testimony of a co-defendant was to be “received by the jury with caution and should be scrutinized by the jury with great caution.” *Id.* at ___, 23 S.E.2d at

⁷ T. FELDOR DORN, GUNS OF MEETING STREET (The University of South Carolina Press 2006) chronicles this murder and trial in great detail.

249. In holding the trial court did not commit error, the South Carolina Supreme Court said “A judge cannot express in his charge, or intimate any opinion as to the *weight or sufficiency* of testimony of accomplice without violating the prohibition of the Constitution as to charging upon the facts.” *Id.* (emphasis added). When a judge instructs a jury that they may infer guilt from the proof of certain facts that judge is both expressing and intimating an opinion as to the weight and sufficiency of the evidence. He was making a comment on the facts.

CONCLUSION

For the foregoing reason, this Court should reverse the conviction of Frank Larmand and direct that a judgment of not guilty be entered in this matter. In the alternative this matter should be remand the matter for a new trial.

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