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## **Argument**

### **Question I**

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

The State argues that Mr. Larmand cannot prove prejudice in the manner in which the trial judge gave the foreman of the jury the written jury instructions. First, when written instructions are given to a jury in an improper matter, this court should presume prejudice. The State should have the burden of proving the error was harmless beyond a reasonable doubt. The State cannot establish the improper sending of the written jury instructions to the jury was harmless.

Secondly, the State has argued that sending the instructions to the jury after they begin deliberations is less likely to cause any prejudice to the defendant than giving the instructions before the deliberations begin. The State cites virtually no authority to support this position. Only when the written instructions are given with proper instructions can the State adequately argue that sending the instructions was harmless.

Contrary to the argument of the State, sending the written instructions with no clarifying instruction that they are not to consider one part of the charge to the exclusion of other parts does not preclude the jury from considering only one portion of the written instructions. In fact, with the written instructions being only given to the foreman out of the presence of the other jurors, the probability of the jury using the instructions in an improper manner is increased. The other eleven jurors were not told they even had the right to look at the instructions much less that

they had the right to read the entire instructions. If the forewoman elected to read only a portion of the charge to them, the other jurors had no basis for determining that the forewoman was acting improperly.

The State has argued that the accepted federal practice of giving each individual juror a copy of the charge would cause them “to deliberate individually, thus hindering the jury’s ability to collectively reach a verdict.” Br. of Resp. at \_\_\_\_\_. First this has not been found to be true in the federal courts. Secondly, each juror is suppose to deliberate individually and arrive at their verdict. This is what the trial judge instructed the jury. Rec. on App. at 589, ll 6-10. A jury room does not have a majority rule. Any procedure that enables each individual juror to arrive at their individual decision as to guilt or innocence is not a hindrance to our system of jurisprudence.

Mr. Larmand has not argued that giving the entire charge is more prejudicial than giving a portion. Under the facts of this case they are both equally prejudicial to Mr. Larmand. When, as the State concedes, a jury is struggling with its understanding of the law, a trial judge should clearly and unequivocally instruct a jury how to use the written instructions they were given. The trial judge did not exercise caution in giving the instructions to the jury because the trial judge gave no guidance to the jury in how to use the written instructions he gave only to the foreman out of the presence of the other jurors.

## **Question II**

**Did the trial court err in failing to direct a verdict 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?**

### *Issue Preservation*

The State first contends that the issue of a directed verdict being granted on various grounds was not properly preserved. Unlike other appellate issues, the question of the question of the sufficiency of the evidence to convict whether a directed verdict is requested or not, is always preserved. Rule 19(a) of the South Carolina Rules of Criminal Procedure provides “On motion of the defendant or *on its own motion*, the court *shall* direct a verdict in the defendant’s favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment.” (Emphasis added) Thus, as the rule says “shall” the trial judge is under an obligation under the rule to direct a verdict on his own motion if the evidence is not sufficient to convict. No corresponding obligation on the part of the trial judge is present under Rule 50 of the South Carolina Rules of Civil Procedure.

The logic behind such a rule is simple. No greater denial of due process and Article I § 5 of the Constitution of the State of South Carolina and the Fifth and Fourteenth Amendments to the Constitution of the United States of America could occur than to have an innocent man in prison because his lawyer failed to ask for a directed verdict, failed to ask for a direct verdict on an proper ground or failed to clearly express his grounds for a directed verdict. When the state has failed in its proof, a citizen should not be incarcerated. Surely the State does not argue that a citizen should be incarcerated when the state has failed in its burden of proof and either his lawyer failed to ask for a directed verdict or asked for a directed verdict on the wrong grounds.

The amendment to the indictment has no effect upon the issue raised by the Mr.

Larmand. Mr. Larmand does not dispute that the statute does not require a serious injury, but it does require that an act of violence be inflicted upon a person and not merely threatened or attempted. The legislature used the word “upon” which can only be interpreted to mean actual contact with the body of another. While arguably the state could have charge Mr. Larmand with attempted lynching, they did not do so.

And while the state argues that any degree of violence will satisfy the statute, the State does not dispute the fact that no act of violence was inflicted upon the person of Ryan Lauchbaum, which is required by the statute. While the statute, as urged by the State, does focus on the act of violence, it also focuses on the act of violence being inflicted upon the upon the person.

The State does in fact argue that a simple assault and battery committed by two or more people would result in a minimum sentence of three year and up to twenty. If the legislature had so intended they would have used the phrase “any assault and battery” rather than “any act of violence.” Most people would not think of a simple assault and battery as being an act of violence. As the statute must be interpreted strictly against the state, this Court should give a meaning to “act of violence” to exclude a simple assault and battery. “[W]hen a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.” *State v. Blackmon* 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). Strictly construing the words “violence” and “upon” this Court should conclude it means substantially more than a mere assault and battery and reverse the conviction of Mr. Larmand.

### **Question III**

**Did the trial court err in failing to direct a verdict 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 charges against Mr. Larmand are based entirely upon circumstantial evidence. There is no direct proof of any agreement between Mr. Larmand and Mr. Lemire to commit the crimes for which they were charged. As the State correctly argues “By definition then, the premeditated purpose and intent underlying a charge of lynching cannot be spontaneous.” Br. of Resp. at 25, quoting *State v. Smith*, 352 S.C. 133, \_\_\_, 572 S.E.2d 473, 475 (Ct. App. 2002). Thus the state is required to prove that prior to the arrival of Mr. Lemire at the scene, there was an agreement between Mr. Larmand and Mr. Lemire to commit an act of violence upon the person of Ryan Louchbaum.

Every fact in this case is consistent with an innocent explanation. What was the act of violence the two allegedly conspired to inflict upon the person of Ryan Louchbaum? Were they going to shoot him? Were they going to merely threaten him which is not an act of violence upon a person and therefore not lynching? Were they going to beat him up or just push him around? The jury is simply left to speculate as to what the intent was, if any. The facts simply do not support an intent to harm Mr. Louchbaum.

Both Mr. Larmand and Mr. Lemire knew that other people were present as they saw them when they drove by Mr. Louchbaum’s residence. Mr. Larmand did not request to meet with Mr. Louchbaum alone. This request was made by Mr. Louchbaum. When Mr. Larmand and Mr. Louchbaum met privately at Mr. Louchbaum’s request, Mr. Larmand did not direct him away from Mr. Louchbaum’s house to the open field area next to his house. Instead they went to the area closer to his neighbor, Jessie Harris. Rec. on App. at 80, ll 1-9; 110, ll 1-3; 150, ll 7-9.

Mr. Larmand never hit, pushed or shoved Mr. Lochaum before Mr. Lochbaum grabbed Mr. Lemire. Rec. on App. at 189, ll 12-17. The melee that followed was described as a “chain reaction.” Rec. on App. at 94, ll 5-6.

The State further argues that the circumstantial evidence in this case proves a conspiracy because Mr. Lemire approached Mr. Louchbaum saying “this is what you get when you f\*\*k with my family.” Brief of Resp. at 30. This statement only indicates a personal statement of Mr. Lemire. It does not indicate a joint venture of any type. Had Mr. Lemire said “this is what you get when you f\*\*k with *our* family” then the sentence would have indicated a joint venture by Mr. Lemire and at least one other person. By using the word “my” Mr. Lemire is indicating his personal opinion and actions and not an opinion and action Mr. Larmand shared with him.

The State argues that because Mr. Larmand parked one-half mile away he planned on attacking Mr. Lochbaum. First, according to the scale of the Google Earth map used as an exhibit, the distance is slightly over 1,110 feet. The car was parked in the vicinity of several house from which people could observe and describe the car. After the alleged attack they would both have to go over 1,000 feet to the automobile. The logic of placing a get away car so far from the scene of the alleged planned attack simply does not support the inference that the attack was planned by both Mr. Larmand and Mr. Lemire.

The State further argues that the fact that Mr. Larmand fled the scene is also evidence of their guilt. In *State v. Grant*, 275 S.C.404, 272 S.E.2d 169 (1980) the South Carolina Supreme Court said “evidence of flight tend to only marginally probative as to the ultimate issue of guilt or innocence.” *Id.* at 408, 272 S.E.2d at 171. Under the facts of this case evidence of

flight is even less than marginal. After the fight the firearm Mr. Lemire possessed was in the hands of Mr. Louchbaum. Both Mr. Larmand and Mr. Lemire had been in a altercation with several individuals. They were out numbered. Mr. Jessie Harris testified that someone, he thought Mr. Lochbaum, told Mr. Larmand and Mr. Lemire to leave. Rec. on App. at 123, ll 18-25. They quickly left the scene. When the officer turned on his blue light, Mr. Larmand stopped his automobile and did not try to evade the police. Rec. on App. At 57, ll24-25 to 58, ll 1-3. Apparently Mr. Larmand was not even given a ticket for speeding. Rec. on App. at 59, ll 1-13.

Mr. Lemire testified that he was told to remain in the car. Rec. on App. at 463, ll 15-20. He did not leave the truck until after he heard a loud argument. Rec. on App. at 466, ll 13-16. He testified that his leaving the truck was not part of any plan or scheme.

This Court has held, when a case is based only upon circumstantial evidence, the evidence must be substantial. *State v. James*, 362 S.C. 557, 561, 608 S.E.2d 455, 457 (Ct. App. 2004). *See, also, Jackson v. Virginia*, 443 U.S. 307 (1979). The reason for such a rule is simple. A purely circumstantial evidence case is the only case ever tried in our criminal justice system in which every witness can tell the truth and an innocent man be convicted. While cross-examination may be effective in some cases to prove that a witness is not being truthful, cross-examination is seldom able to discredit the witness in a purely circumstantial evidence case because the witness is being truthful. Under the facts of this case there is simply no substantial evidence that Mr. Larmand planned any attack on Mr. Louchbaum. The facts are simply not sufficient to convict Mr. Larmand of the crimes for which he was convicted.

#### **Question IV**

**Did the trial court err in failing to direct a verdict 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?**

For the reasons stated in Argument III above, the trial court should have directed a verdict on the conspiracy charge. As a practical matter, if a person is guilty of lynching the person also has to be guilty of conspiracy as the crime of lynching requires a prior agreement. While conspiracy may be proven by circumstantial evidence the evidence still must be substantial and be more than speculation.

The State argues that each individual factor may not be sufficient to convict but added together they do provide substantial evidence against Mr. Larmand. Brief of Resp. at 30-31. In essence, the State argues that the whole is greater than the individual parts. Such an argument is not sufficient to establish substantial circumstantial evidence to sustain the conviction. The facts proved by the state in this case are all equally point to the innocence of Mr. Larmand. The state produced no substantial evidence of any agreement between Mr. Larmand and Mr. Lemire to injure or hurt Mr. 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?**

The argument that the state failed to prove any agreement which is a necessary element to prove Mr. Larmand committed the crime of lynching or conspiracy, likewise applies

to the argument as to a directed verdict on the charge of presenting and pointing a firearm. The argument for Mr. Larmand on this issue would be the same argument made by Mr. Larmand in Argument III and IV stated above.

### **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?**

#### *Issue Preservation*

The State first argues that the issue of whether the inference charge given in this case is a charge on the facts in violation of Article V, § 21 of the Constitution of the State of South Carolina. At the trial when the objection to the inference charge was being discussed counsel for Mr. Lemire objected to the charge on the ground that it is unconstitutional. Rec. on App. at 517, ll 5-18; Rec. on App. at 322, ll 8-12. The trial court summarily denied the motion without asking for any further clarification. Unless this Court were to assume the trial judge did not know the Constitution of the State of South Carolina, the issue is preserved. The state asks too much when they required that an objection made at a trial be with the same clarity and specification as that on appeal. Trial counsel simply does not have the luxury of the time that appellate counsel has to articulate the issues on appeal. What the State has argued for is a perfect record on appeal and not a fair record. Just as a defendant is not entitled to a perfect trial but a fair trial, an appellate court is not entitled to a perfect record but a fair record. *State v. Page*, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008). At a Post Conviction Relief hearing the State would not argue that trial counsel need be perfect in their objections. The same rule should apply on

appeal.

### *Discussion of Issue*

The trial judge in this case gave confusing charges to the jury. The jury was instructed “please understand that if a crime is committed by two or more people who are acting together in committing a crime the act of one is the act of all,” (Rec. on App. at 564, ll 20-22) “mere presence at the scene of a crime is not sufficient to convict as the principal on the theory of aiding and abetting.” (Rec. on App. at 566, ll 9-11) and “it is permissible to infer that all persons present as members of a mob when an act of violence is committed have aided and abetted the crime and are actually guilty as principals.” (Rec. on App. at 567, ll 5-11). The difficulty in reconciling these three statements is readily apparent.

To tell a jury they may infer a person is “actually guilty” from mere presence is a charge on the facts. Whether the inference is created by judicial decision or enacted by the legislature, telling a jury to infer guilt from the state proving certain facts is a comment on the facts and violates the Constitution of the State of South Carolina.

The jury charge in this case is confusing at best. A jury should not be required to make the fine distinction between knowing that to be a member of a mob means that a person has previously agreed to participate in an act of violence upon a person and their presence would make them a principal, and then are told that their presence there as a member of the mob makes them guilty as a principal. Surely a jury is going to assume that the inference means something. Add to the mix that they are also told that mere presence is not sufficient to convict and no reasonable juror would be able to understand what the charge means.

Evidence of confusion on the part of the jury is evidenced by the fact that after

about four and one-half hours of deliberations, and after the foreman had received the written instructions to carry into the jury room, they announced they had reached a verdict on three charges but not on the remaining charges. Under no analysis of the facts could the jury have reached a guilty verdict on three of the charges and then not to be able to reach a verdict on the other three as two of the three charges against Mr. Lemire required the participation of Mr. Larmand. All the charges against Mr. Larmand required the conviction of Mr. Lemire. The only charge the jury could have reached a verdict on that did not require the conviction of the co-defendant would have been presenting and pointing a firearm by Leo Lemire.

The State's discussion of the inference issue on page 34 of the brief simply confuses the issue more. What element is the inference used to help prove? The two sections cannot be read separately. Lynching is committed by a combination of a pre-existing intent to commit an act of violence and being present when the act is committed regardless of whether the person actually personally inflicts an act of violence. As that is the definition of lynching independent of the "inference" in § 16-3-240, the charge on an inference simply adds nothing to the definition and can only serve to confuse the jury.

## **CONCLUSION**

For the foregoing reasons and for the reasons set forth in the opening brief of appellant, the conviction of Francis Larmand should be reversed and this matter remanded with directions to enter a verdict of not guilty or order a new trial because of the erroneous judge charge on inference and the improper giving of the jury instruction to the foreman to be carried into the jury room with out adequate instruction.

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