

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM YORK COUNTY
In the Court of Common Pleas**

Honorable William H. Seals, Jr., Circuit Court Judge

**Case No. 2009-GS-46-02834
Case No. 2009-GS-46-02835**

The State Respondent

vs

Francis Larmand Appellant

FINAL BRIEF OF APPELLANT

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Questions Presented

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?

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 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 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 October 28, 2009.

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 280. 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 call for service in an attempt to determine who was stealing the calls from her company. Rec. on App. at 282, ll 12-25 to 283, 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 with intent to kill.

Prior to leaving Kanapolis, NC, where he lived, he met his brother-in-law, Leo Lemire. He requested Mr. Lemire to join him as another person was needed to receive the call as that person's voice would not be recognized by any employee or former employee of Pop-A-Lock who may be involved. Rec. on App. at 348, ll 20-349, 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 285, 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. 285 at 23-25. Mr. Taylor called Ryan Lochbaum, a former employee who was terminated in October of 2008, at about 10:43. Rec. on App. at 131, 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 129, ll 5-11. As he had been terminated several months before, Mr. Lochbaum had no legitimate reason to be responding 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. This upset Mr. Lochbaum. Rec. on App. at 122, ll 3-15..

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 354, ll 1- 12. Mrs. Larmand had received reports of a red car with a Pop-A-Lock sign being seen in the Charlotte area. Rec. on App. at 297, 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 355, 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 357, 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 27, 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 23, ll 21-25 to 69, ll 1-4.

After Mr. Lochbaum and Mr. Larmand 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 105, 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 106, 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. 109, ll 4-14. Mr. Lauchbaum received only a very minor scratch to his hand. Rec. on App. at 114, ll 16-22.

After leaving the scene Mr. Larmand was stopped by William Watson of the Rock Hill Police Department. Mr. Lemire was arrested that night for presenting and pointing a firearm. Mr. Larmand was briefly questioned and released. Rec. on App. at 14, 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 562, 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 563, 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 563, ll 22-25 to 564, 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 the 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 114, ll 16-19. Mr. Lochbaum described the efforts of Mr. Larmand as “trying to pull me off Leo.” Rec. on App. at 106, 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 552, ll 15-17.

admitted Mr. Larmand never struck him. Rec. on App. at 143, 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 545, 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 1506 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 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 or present or point a firearm at the person of Ryan Lochbaum?

The South Carolina Supreme Court has said concerning a conspiracy, “The

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.

gravaman of the offense of conspiracy is the agreement or combination. Thus, we focus here on 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 established 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 106, 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 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*,

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.

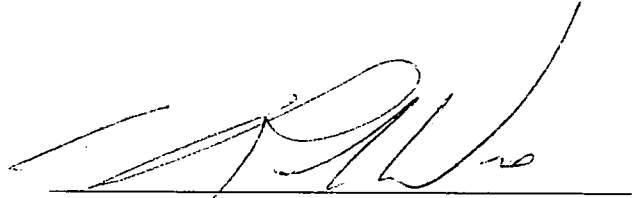
In *State v. Bagwell*, 201 S.C. 387, 23 S.E.2d 244 (1942)⁷ the defendant had requested a simple charge that the testimony of a co-defendant was to be “received by the jury with caution and should be scrutinized by the jury with great caution.” *Id.* at ____, 23 S.E.2d at 249. In holding the trial court 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.

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

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 the Court should remand this matter for a new trial.

April 4, 2010



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Appeal From York County
The Honorable William H. Seals, Jr., Circuit Court Judge

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ARGUMENT 17

 I. The circuit court exercised caution and did not abuse its discretion in sending the jury a written copy of the entire charge as given. (Appellant’s Issue I) 17

 II. The circuit court properly denied Appellant’s directed verdict motions on the charge of lynching in the second degree because there was ample evidence of Appellant’s guilt to submit the charge to the jury. (Appellant’s Issues II & III) 21

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STATEMENT OF ISSUES ON APPEAL

I.

The circuit court exercised caution and did not abuse its discretion in sending the jury a written copy of the entire charge as given. (Appellant's Issue I)

II.

The circuit court properly denied Appellant's directed verdict motions on the charge of lynching in the second degree because there was ample evidence of Appellant's guilt to submit the charge to the jury. (Appellant's Issues II & III)

III.

The circuit court properly denied Appellant's directed verdict motions on the charges of criminal conspiracy and pointing and presenting a firearm, because there was ample evidence of Appellant's guilt to submit the charges to the jury. (Appellant's Issues IV & V)

IV.

The circuit court's jury charge on the inference of guilt as a principal under S.C. Code §16-3-240 was a proper statement of the law. (Appellant's Issue VI)

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On July 16, 2009, the York County Grand Jury indicted Appellant Francis V. Larmand, Jr. ("Larmand"), and his brother-in-law Leo David Lemire ("Lemire"), on one count of lynching in the second degree, one count of conspiracy, and one count of pointing and presenting a firearm. The matter was called for a jury trial on October 20, 2009, before the Honorable William H. Seals, Jr., Circuit Court Judge.

Prior to trial, the State moved to amend each of the lynching indictments to strike language alleging physical injury resulted to the victim. The State explained this language was included as a result of a drafting error, physical injury is not an element of lynching, and such language should be removed to avoid confusion to the jury. Larmand and Lemire both consented to the proposed amendment. (Trial Transcript [TT], pp. 14-15; Record on Appeal [R.], pp. 6-7).

Officer William Watson ("Officer Watson") of the Rock Hill Police Department testified he was on duty the night of April 30, 2009, and around midnight he responded to a call about a fight involving a gun in a near-by subdivision, and a BOLO for a dark SUV fleeing the scene. As he approached the subdivision, he saw a dark Toyota 4Runner traveling away from the subdivision at approximately sixty miles per hour in a twenty-five mile per hour zone, and suspecting it could be the SUV in the BOLO, he pulled it over. When Officer Watson stopped the vehicle, Larmand was driving and Lemire was the passenger, and both were wearing dark shirts and dark pants. After talking to them, Officer Watson arrested Lemire for pointing and presenting a firearm, and allowed Larmand to leave at that time. (Trial Transcript [TT], pp. 53-66; R., pp. 8-21).

The victim, Ryan Lochbaum ("Lochbaum"), testified he knew Larmand prior to April 30, 2009, because he worked for Larmand's locksmith business, Pop-A-Lock, until October, 2008, but had only met Lemire once. He stated he never invited Larmand or Lemire to his home in Rock Hill, and to his knowledge neither individual had ever been there. (TT, pp. 141-143; R., pp. 96-98).

On April 30, 2009, Lochbaum had a birthday party for his son, and that night he and some of his neighbors continued to socialize in his driveway. Around midnight, a neighbor Mark Whittington ("Whittington") told him a man, subsequently identified as Larmand, was standing in front of his home and wanted to talk to him. Lochbaum testified he was shocked to see Larmand, and when he realized Larmand was upset, he asked his neighbors for some privacy and they walked away. (TT, pp. 141-147, pp. 96-102).

Lochbaum and Larmand began having a heated discussion. At some point, Larmand broke eye contact and looked off to the side. When Lochbaum looked in the same direction, he saw Lemire approaching him at a fast pace, carrying a handgun. He testified Lemire got within about fifteen feet of him, extended his arm, pointed the gun at him, stated "this is what you get when you f**k with my family," and pulled the hammer back on the gun. When Lemire got closer, Lochbaum grabbed the gun, and as they struggled on the ground for the gun, Larmand put Lochbaum in a choke hold from behind. (TT., pp. 146-151, 211; R., pp. 101-106, 166).

Lochbaum's neighbors ran back and tried to get Larmand off Lochbaum and the gun away from Lemire. During the struggle with Lemire, Lochbaum sustained injuries to his knuckles and hands from being dragged across the pavement. Lochbaum eventually got the

gun from Lemire, and took it inside his home because he “knew no one would believe this” unless he had it. After Larmand and Lemire left, he brought the gun back outside, emptied the bullets on the ground, and laid the gun next to the bullets. (TT, pp. 146-156; R., pp. 101-111).

Whittington testified he lived about five houses down from Lochbaum, and on the night of April 30, 2009, he, Ronald Lee Edward (“Edward”), and Michael Devin Fivecoat (“Fivecoat”) were standing in the driveway of Lochbaum’s home. Around midnight, he noticed a man he had never seen before standing in front of Lochbaum’s driveway. He stated the man, identified in court as Larmand, wore a black shirt and black pants, and appeared to be “kind of edgy.” After Lochbaum and Larmand started talking, Whittington, Edward, and Fivecoat walked down the street, but Whittington thought there might be trouble and observed Lochbaum and Larmand from a distance because “[i]t’s not normal for somebody to come up dressed in dark clothes in the middle of the night just to talk to somebody.” (TT, pp. 66-73; R., pp. 21-28).

As Lochbaum and Larmand continued to talk, Whittington saw a second man, later identified as Lemire, suddenly emerge from the darkness and run toward Lochbaum with his hand up. Whittington, Fivecoat, and Edward immediately ran back to help Lochbaum, and saw Lochbaum trying to disarm Lemire. Whittington testified Lemire was on the ground, Lochbaum was on top of Lemire, and Larmand had Lochbaum in a choke hold. Whittington grabbed Larmand around the waist, and pulled him off Lochbaum while the other men got the gun away from Lemire. Larmand and Lemire then ran down the street and Whittington called the police as he chased them. Larmand and Lemire sped away in their vehicle, which

was parked about a half a mile down the road from Lochbaum's house. (TT, pp. 73-106; R., pp. 28-61).

Jesse Harris ("Harris") testified he lived next door to Lochbaum in April, 2009. Around midnight on April 30, 2009, he looked out his window and saw Lochbaum arguing with a man he identified in court as Larmand. When he saw Larmand push Lochbaum, he told his wife to call the police and ran outside to help. By the time he got outside, the men were behind Lochbaum's van where he could not see them, but he heard a loud voice say, "this is what you get when you f**k with my family." When he got around the van, Harris realized a third person, identified as Lemire, was involved in the scuffle, and Larmand had Lochbaum in a choke hold. Harris initially attempted to put Larmand in a choke hold to get him off Lochbaum, but he let go when he realized a gun was involved. (TT., pp. 108-111; R., pp. 63-66).

Harris testified Lemire held the gun around the handle and the trigger, and Lochbaum was trying to push the gun away. Harris saw the hammer was back on the gun, so he stuck a finger in between the hammer and the gun to prevent it from going off, and used the other hand to try to pull the gun away. He testified the hammer closed on his finger at some point, leaving a bruise or blister on his finger. When he demanded Lemire let go of the gun, Lemire repeatedly yelled, "f-you, he's f'ing with my family, he's f'ing with my family." The other neighbors arrived on scene, and Harris told Whittington to get Larmand off of Lochbaum, who could not breathe because of Larmand's choke hold, was purple in the face, and appeared to be dying. He further testified Lemire did not let go of the gun until he kicked him twice in the groin. (TT, pp. 108-117; R., pp. 63-72).

Edward testified he accompanied Whittington to Lochbaum's house that night, and Lochbaum appeared shocked when Larmand, who appeared to be agitated, unexpectedly showed up. He walked away with Whittington and Fivecoat after Lochbaum and Larmand started talking, but they all ran back when Whittington yelled "there's more than one." He was the last one to get back, and he saw everyone scuffling in a "dog pile." Lemire was at the bottom below Lochbaum, and Larmand's arms were around Lochbaum's neck in a choke hold. He heard Fivecoat say "oh, my god, there's a gun," and heard another person using "cuss words" to say something to the effect of "don't be messing with my family." Eventually, Lochbaum emerged from the pile with the gun, and Lemire and Larmand ran down the street. (TT, pp. 218-231; R., pp. 174-187).

Fivecoat's testimony regarding the events of April 30, 2009, corroborated the testimony of Lochbaum, Whittington, Harris and Edward. He stated he did not know how Larmand arrived, and he did not see or hear a car go by. He walked away when Lochbaum asked for privacy, but continued to observe from a distance. When Whittington said someone else was there, he ran back to help and saw several people fighting in a dog pile, but he did not realize there was a gun involved until it was pointing at him. After Lemire was disarmed, Fivecoat followed Lemire and Larmand as they fled to their vehicle, and he yelled at them to stop because the police were coming. When they sped away in their vehicle, he described the vehicle to Whittington. (TT, pp. 249-263; R., pp. 205-219).

Detective Leslie Herring ("Detective Herring") of the Rock Hill Police Department testified he was assigned to investigate the incident on May 1, the morning after it occurred. As a result of his investigation, he issued additional warrants against Lemire, and issued

warrants against Larmand. Herring testified he has been to Larmand and Lemire's hometown of Kannapolis, North Carolina, and estimated it is at least an hour drive away from Rock Hill. (TT, pp. 273-281; R., pp. 229-237).

After the State rested, Larmand moved for a directed verdict on the charge of pointing and presenting a firearm. He argued the State only proved he was merely present when Lemire brandished the gun, and thus presented no evidence or testimony he agreed or conspired to have Lemire bring and brandish the gun. The State argued it presented sufficient circumstantial evidence of a common agreement or understanding between Larmand and Lemire to find each responsible for the other's actions under the hand of one is the hand of all doctrine. The circuit court denied Larmand's motion on the ground the acts and declarations of any conspirator in furtherance of the conspiracy are deemed to be the acts and declarations of every other conspirator. (TT, pp. 302-305; R., pp. 258-261).

Larmand then moved for a directed verdict on the charge of second degree lynching "based on chronology more than anything else." He argued the sequence of events established by the State's evidence showed Larmand was speaking with Lochbaum, Lemire appeared, Lochbaum jumped on Lemire, and Larmand merely reacted to Lochbaum's actions by jumping into the fray. He further argued the State failed to prove the required premeditation. The State argued it presented strong circumstantial evidence Larmand's and Lemire's actions that night were not spontaneous, but instead resulted from a premeditated plan and purpose to commit an act of violence against Lochbaum. The circuit court denied the motion, stating "[c]learly this is an issue for the jury to consider." (TT, pp. 305-310; R., pp. 261-266).

The circuit court then asked Lemire if he had any motions. Counsel responded “[n]othing from us at this time.” (TT, p. 310; R., p. 266).

Kerriann Larmand (“Kerriann”), Larmand’s wife, testified she and Larmand bought Pop-A-Lock in 1997, and she took it over completely in 2004. Pop-A-Lock employed Lochbaum for almost three years, and she fired him in October, 2008, because he was giving his personal cell phone number to customers. When Lochbaum subsequently applied for unemployment benefits, she objected and testified against him.

On April 30, 2009, she set up a “mystery shopper call,” a technique used to catch individuals who try to illegally intercept their customers before their authorized employee can respond to a call. She testified Larmand and Lemire waited at a place called Knight’s Stadium. Her records indicate Pop-A-Lock received a call requesting assistance at Knight’s Stadium at 10:14 p.m. that night, and one of her employees, Mike Taylor, accepted the job at 10:18 p.m., and then called Lochbaum at 10:40 p.m. Neither Mike Taylor nor Lochbaum showed up at Knight’s Stadium that night. (TT, pp. 323-337; R., pp. 279-293).

The April 30th mystery shopper call alleged someone locked their keys in their car after a baseball game and needed a key made. Larmand and Lemire were at Knight’s Stadium to see if anyone responded to the call, but no one did. Kerriann testified her business is located north of Charlotte in Kannapolis, but Knight’s Stadium is located closer to Rock Hill in South Carolina. (TT, pp. 337-343; R., pp. 293-299).

On cross-examination, Kerriann claimed the April 30 mystery call did not target Lochbaum, but also stated a couple of employees told her Lochbaum had access to Pop-A-Lock’s calls on his computer, and she stated she wanted to see if Lochbaum or anyone else

would show up at Knight's Stadium. She testified it was normal for Larmand to go out on mystery calls, but this was Lemire's first time, and Larmand planned to drive by Lochbaum's home to see if any Pop-A-Lock magnets or employees were there. She looked up Lochbaum's address on the Internet, and gave Larmand and Lemire directions there. (TT, pp. 344-360; R., pp. 300-316).

Larmand testified he ran his own business called Frank's Service Center in April 2009, but sometimes helped his wife with the Pop-A-Lock business, and it was not unusual for him to wear black clothing because he worked on cars. Around the time of this incident, there were concerns about non-employees intercepting Pop-A-Lock calls and taking their business before they could respond, and with non-employees using Pop-A-Lock magnets on their cars to take their business. (TT, pp. 363-370; R., pp. 340-347).

Larmand testified Lemire was not an employee of Pop-A-Lock, but Lemire participated in the April 30 mystery call because Pop-A-Lock employees would not recognize his voice or phone number. When no one responded to the mystery call that night at Knight's Stadium, Larmand was going to head home after getting gas, but then decided to drive to Lochbaum's home in Rock Hill to see if any Pop-A-Lock employees, or a vehicle with a Pop-A-Lock magnet on it, were there. He asked Lemire to go with him, but stated he did not know Lemire had a gun with him, and did not conspire with Lemire to point and present a firearm or lynch Lochbaum. (TT, pp. 371-378; R., pp. 348-355).

When he arrived at Lochbaum's house, Larmand saw three men standing outside Lochbaum's van in the driveway. He did not see any Pop-A-Lock employees or magnets on cars at Lochbaum's house, but drove past Lochbaum's house and parked up the street, out

of sight. He stated he told Lemire he wanted to talk to Lochbaum, and to stay in the truck.

He walked down the sidewalk and stood at the bottom of Lochbaum's driveway for two or three minutes before one of the men asked if he could help him. Larmand testified Lochbaum appeared shocked to see him, and asked "what the hell are you doing here?" and "how the hell did you find out where I live?" He told Lochbaum to leave his wife's business alone, and Lochbaum responded by asking why they were denying his unemployment and stating they were railroading him. Larmand testified he told Lochbaum he could "keep Mike Taylor, too," because he suspected Lochbaum was working with the current Pop-A-Lock employec. (TT, pp. 378-382; R., pp. 355-359).

Larmand testified he then turned his back on Lochbaum and was walking back to his vehicle when he heard Lemire say, "don't f**k with my family." He turned around, and saw Lemire and Lochbaum struggling for the gun, and the neighbors running back. He stated he jumped into the pile because there were two guys on Lemire, and he put one hand on the gun to make sure the barrel faced across the street, and one arm around Lochbaum to try and pull him off Lemire. At that point, one or two guys jumped on him. Lochbaum came out of the pile with the gun and stated, "[s]ome idiots know how to hold a gun, but I know how to use one." (TT, pp. 382-389; R., pp. 359-366).

Larmand testified he helped Lemire up, they walked back to their vehicle, and drove away, and they were pulled over by police about a minute later. Lemire was arrested during the traffic stop, but Larmand was allowed to leave. He was arrested the next day when he went to the courthouse to bail out Lemire. (TT, pp. 389-396; R., pp. 366-373).

On cross-examination, Larmand again admitted he did not see any Pop-A-Lock

magnets and could not identify any Pop-A-Lock employees at Lochbaum's house when he drove by. He decided he wanted to talk with Lochbaum anyway, and parked down the street because he did not want Lemire to get involved. He admitted he walked up and immediately accused Lochbaum of doing things in front of the group of people there, but stated he never heard or saw Lemire coming behind him. (TT, pp. 399-414; R., pp. 376-391).

Lemire testified Larmand asked him to help him with a "sting" at Knight's Stadium on April 30, 2009, after he just happened to see Larmand at an intersection, and he agreed to go along, use his phone to make the call, and be the call-back person. He had the gun on him when he saw Larmand at the intersection, and put it under the seat in Larmand's vehicle. He testified he never told Larmand he had the pistol, and Larmand never asked him to bring it along, they never talked about doing anything to Lochbaum, and Larmand never told him the sting was designed to get Lochbaum. He stated he was wearing a black shirt and black pants that night because that is what he usually wears. (TT, pp. 444-459; R., pp. 422-437).

When no one responded to the mystery call at Knight's Stadium, they left and Larmand stopped to get gas. Lemire then agreed to go with Larmand to Lochbaum's home to see if there were any Pop-A-Lock signs on any car at Lochbaum's house, or if any Pop-A-Lock employees were there.

When they arrived at Lochbaum's house, Larmand saw Lochbaum's van in the driveway, drove past the house, and parked the vehicle. Larmand told Lemire to wait in the vehicle while he went to talk to Lochbaum. Lemire testified he was waiting in the vehicle, when he heard a loud voice that was not Larmand's and some swearing. He then grabbed his gun and walked toward the house because he wanted to make sure Larmand was alright.

(TT, pp. 459-467; R., pp. 437-445).

As Lemire approached the house, he saw Larmand walking up the street toward the vehicle, with Lochbaum walking behind him. He then saw people running up behind Lochbaum and Larmand from the yard, so he walked up, told Lochbaum "don't F with my family," and held the gun up in the air. He claimed he never pointed the gun at Lochbaum, except maybe when he was raising it up in the air.

Lemire further testified one of the men stopped in front of him while another tried to sneak up behind him, and when he tried to look at the man coming up behind him, Lochbaum grabbed his arm and pushed him. He stated his back gave out, he hit the ground, and Lochbaum and two other men jumped on top of him. He admitted the gun was loaded, but stated he never attempted to fire it. (TT, pp. 467-471; R., pp. 445-449).

Lemire testified he let go of the gun, and Lochbaum grabbed it, said "any a**hole can carry a gun . . . but I know how to shoot one," pointed it at him and Larmand, and cocked it. He and Larmand ran back to the their vehicle and drove away, but they were quickly stopped by police, and he was arrested for pointing and presenting a gun. He learned about the additional charges against him the next day while he was in jail waiting for his bond hearing. (TT, pp. 472-475; R., pp. 450-453).

After the defense rested, Larmand renewed his previous motion for a directed verdict, which the circuit court again denied. Lemire did not move for a directed verdict. (TT, pp. 516-517; R., pp. 494-495).

During the jury charge conference, Larmond and Lemire objected to the language in the proposed lynching instruction permitting the jury 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 guilty as principals.¹ Relying on a recent appellate case striking down an instruction allowing the inference of malice from the use of a deadly weapon, they contended the jury should not be given any inferences regarding the elements of the crimes when self-defense or defense of others is asserted. He also contended the language unconstitutionally shifted the burden of proof from the State to the defense. Noting the language in the charge came directly from the lynching statute, the circuit court overruled the objection. (TT, pp. 320-322, 517; R., pp. 276-278, 495).

The circuit court charged the jury on the law applicable to this case, including the State's burden of proof, the jury's duty to find the facts and judge the weight of the evidence, and the principle of accomplice liability. As to the specific charges, the court again charged the jury the State had to prove each element beyond a reasonable doubt, and used the exact language from the second degree lynching statute to instruct the jury what the State had to prove in order to find Larmand and Lemire guilty, including the definition of a mob and the requirement of premeditation. After the jury was excused, Lemire again objected to the portion of the jury charge containing the inference language from the lynching statute, and the circuit court again overruled it. (TT, p. 558-574; R., pp. 536-552).

After deliberating approximately one hour, the jury asked: "[i]f we think one is guilty of a charge, do we have to automatically vote that the other party is also guilty of the charge?" The circuit court recharged the jury on the elements of second degree lynching,

¹Lemire's counsel expressly included Larmand when arguing the objection. (TT, p. 321; R., p. 277).

pointing and presenting a firearm, and criminal conspiracy. Lemire and Larmand renewed their objections to the inference language from the lynching statute, and the circuit court again overruled it. (TT, pp. 574-583; R., pp. 552-561).

Approximately two and a half hours later, the jury indicated it was not close to a verdict, and asked for a printout of the statutes on the three charges. The circuit court indicated it was going to give the jury foreperson a print out of the entire charge exactly as it was read to the jury. Lemire and Larmand objected to giving the jury only one copy, contending jurors may use the written copy “to cite and overcome what [they have] already heard in their minds,” and jurors may emphasize certain sections of the charge. The circuit court overruled their objection and gave the jury foreperson a copy of the entire charge. (TT, pp. 584-587; R., pp. 562-565).

Approximately an hour later, the jury indicated it had reached a verdict on three charges, but remained deadlocked on the remaining charge. Without objection, the circuit court gave them the standard Allen charge. (TT, pp. 588-590; R., pp. 566-568)

The jury convicted Larmand and Lemire on all charges. After the jury rendered its verdict, Larmand asked the court to set the verdict aside on the grounds previously raised regarding the inference language in the jury charge on lynching and providing the jury a written copy of the jury charges. The circuit court denied the motion, and moved to sentencing. (TT, pp. 591-592, 595; R., pp. 569-570, 573).

By way of mitigation, Larmand asserted he only had a prior paraphernalia charge, he was a hard working citizen, and was well known and liked in his community. Lemire asserted he had a medical condition that would make incarceration difficult for him, the

security clearance he had in connection with his business was ruined, and Lochbaum was himself a "victimizer." The circuit court then sentenced each of them to ten years incarceration on the second degree lynching conviction, with five year concurrent terms on the criminal conspiracy and firearm convictions. (TT, pp. 596-602; R., pp. 574-602).

The following day, Lemire moved for a new trial on the grounds raised during the trial. After the circuit court denied his motion, both Larmand and Lemire moved for bond pending appeal. In denying their motion, the circuit court found "the nature of the crime was a violent act," there was "obvious bad blood between the Defendants and the victim," and releasing Larmand and Lemire "would be a danger to the community," (TT, pp. 603-606; R., pp. 582-585). This appeal followed.

ARGUMENT

I. The circuit court exercised caution and did not abuse its discretion in sending the jury a written copy of the entire charge as given. (Appellant's Issue I)

Larmand contends the circuit court erred in submitting the charge to the jury in writing. In support of this contention, Larmand argues the charge was prejudicial because the jury only requested a copy of the statutes, only one copy of the charge was sent back with the foreperson, the jury was not instructed to consider the entire charge and not take a portion out of context, and the written charge was submitted after the jury was struggling to reach a verdict. To the contrary, the circuit court properly exercised its discretion in sending the jury a written copy of the entire charge, rather than portions of it.

Appellate courts will not reverse the trial court's decisions regarding jury instructions absent an abuse of discretion, and a show of prejudice. State v. Turner, 373 S.C. 121, 644 S.E.2d 693, 697 (2007); Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528, 539 (2000); *see also* State v. Douglas, 369 S.C. 424, 632 S.E.2d 845, 849 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result).

While there is no statute or rule on point, our Supreme Court has held "[a] trial court may, in its discretion, submit its instructions to the jury in writing." Turner, 644 S.E.2d at 697. In Turner, the trial judge charged the jury and informed them he would send back a written copy of his charge. *Id.* The defendant objected, and the trial court submitted the written charge without addressing the objection. *Id.*

On appeal, the Supreme Court upheld the trial court's submission of the entire written charge, and further found the appellant failed to show any prejudice resulting from the

alleged error. *Id.* While noting the submission of written instructions could help a jury properly apply the law to the facts, the Court cautioned that the practice is not appropriate for every case and should be exercised carefully. *Id.* at 697-98.

The Supreme Court Court revisited this issue in State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009), and held it was error to submit only a portion of a charge in writing. In Covert, the trial judge allowed the jury to have a copy of the relevant trafficking statute during deliberations. *Id.* at 741. The defendant objected, expressing concern the jury would emphasize the portion submitted over the charge as a whole. *See State v. Covert*, 368 S.C. 188, 628 S.E.2d 482 (Ct. App. 2006) (Anderson, J., concurring), *aff'd as modified*, 382 S.C. 205, 675 S.E.2d 740 (2009).

In affirming the conviction, the Supreme Court held the trial court erred in submitting only the statutes in writing, but found the error was harmless. Covert, 675 S.E.2d at 741-743. The Court reiterated its warning in Turner: “[T]his practice should be used sparingly, and only where it will aid the jury and where it will not prejudice the defendant. It is **never appropriate**, however, to give **only part** of the charge to the jury as was done in this case.” *Id.* at 743 (emphasis added).

Similar to the procedure upheld in Turner, the circuit court in this case properly submitted a written copy of the **entire** charge to the jury. Further, this case is clearly distinguishable from the procedure deemed inappropriate by the Court in Covert, because the circuit court expressly declined to give the jury a copy of the statutes only.

Even if it was error to give the jury a written copy of the entire jury charge, Larmand’s attempts to show prejudice are without merit and lack authority. Contrary to his

assertions, the submission of written instructions after the jury has requested them, as opposed to the beginning of deliberations, is actually *less* likely to result in prejudice. See 75A Am. Jur. 2d Trial § 978 (“It has been recognized that when a jury desires to be handed the written instructions, no good reason exists to deny such request because giving the instructions to them might avoid confusion in the jury room as to the contents of the instructions”). In fact, Turner expressly recognized written instructions could assist a jury in properly applying the law to the facts, but sought to prevent the systematic submission of written instructions at the beginning of deliberations in every case without prior consideration. Turner, 644 S.E.2d at 697-98.

Waiting for the jury to request written instructions allows the jurors to first deliberate from memory on the charges and evidence presented. The trial judge may then consult with counsel and assess the propriety of written charges, as the circuit court did in this case.

Larmand’s contention every member of the jury should receive an individual copy of the jury charge is equally misguided. Such a practice would tempt jurors to deliberate individually, thus hindering the jury’s ability to collectively reach a verdict. On the other hand, submitting one copy of the charge with the foreperson allows the jury to collectively discuss the law it must apply to the facts before it.

Finally, Larmand contends prejudice resulted from the circuit court’s failure to instruct the jury not to consider any portion of the charge out of context. Significantly, Larmand did not request such a charge. In any event, the circuit court properly precluded this very possibility by sending the jury a copy of the entire charge, rather than just the portions requested. It defies logic to argue, as Larmand does, that giving the jury the entire charge,

rather than just the specific portions of the charge it requested, somehow made it more likely the jury would focus on only a portion of the charge.

It was clear the jury was struggling with its understanding of the law as charged. After it requested copies of the applicable statutes, the circuit court properly decided, in accordance with applicable law, to give the jury a written copy of the entire jury charge rather than portions of it. The circuit court properly exercised caution and did not abuse its discretion in giving the entire charge to the jury in writing, and its decision on this issue should be affirmed.

II. The circuit court properly denied Appellant's directed verdict motions on the charge of lynching in the second degree because there was ample evidence of Appellant's guilt to submit the charge to the jury. (Appellant's Issues II & III)

Larmand contends the circuit court erred in denying his directed verdict motions because the State failed to prove he, along with co-defendant Lemire, committed an act of violence upon the victim. In support of this contention, Larmand asserts the State failed to prove the victim suffered physical injury as alleged in the indictment. Further, Larmand argues S.C. Code §16-3-220 (2003) requires a *serious* act of violence resulting in *serious* bodily injury, and contends the State failed to show such.

In addition, Larmand contends the State failed to prove he and Lemire assembled with the premeditated purpose and intent of committing an act of violence upon the body of Lochbaum. In support, Larmand argues the State's evidence as to premeditation is purely speculative and establishes only their mere presence at the scene of the crime.

A. Issue Preservation

As a threshold matter, Larmand never asserted at trial that the State failed to present sufficient evidence of an act of violence, and therefore, this issue is not preserved for appellate review. It is axiomatic an issue must have been raised and ruled on by the trial court to preserve the issue for review on appeal. *See e.g., State v. Price*, 368 S.C. 494, 629 S.E.2d 363 (2006) (issue must have been raised to and ruled on by trial judge to be preserved for appellate review); *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004) (argument procedurally barred when it was not made to the trial judge); *State v. Taylor*, 355 S.C. 392, 585 S.E.2d 303 (2003) (when particular argument was not presented to the trial court, it was

not preserved for appellate review); State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003) (party need not use exact name of legal doctrine to preserve an issue for appellate review, but it must be clear that the argument was presented on that ground).

The only ground Larmand asserted as a basis for his directed verdict motion was insufficient evidence of premeditation. After the State rested, Larmand moved for a directed verdict “based on chronology more than anything else,” and asserted no evidence showed Larmand and Lemire acted with premeditation, intent, or as part of any plan. After the defense rested, Larmand renewed his directed verdict motion on the same grounds. After the jury rendered its verdict, Larmand moved “for a new trial based on my earlier motions for a directed verdict.” (TT, pp. 305-310, 517, 595; R., pp. 261-266, 495, 573).

Further, Larmand is precluded from arguing the State failed to prove the victim suffered physical injury as alleged in the indictment because prior to trial Larmand consented to striking this language from the indictment. The State moved to amend the indictment to strike the language alleging physical injury resulted to the victim on the grounds this was a drafting error, physical injury is not an element of second degree lynching, and to avoid confusing the jury. Counsel for Larmand and Lemire both stated they had no objection, and the circuit court granted the motion. (TT, p. 15; R., p. 7). Having consented to the amendment, Larmand cannot now claim he was entitled to a directed verdict because the State failed to prove physical injury.

B. Statutory Construction

Even if issues regarding the level of violence and physical injury were preserved, however, Larmand is misguided in contending S.C. Code §16-3-220 (2003) requires a

“serious” act of violence resulting in “serious” bodily injury. In support of his contention, Larmand argues the legislature “by implication meant for the act of violence to be serious,” because the only difference between first and second degree lynching is whether death results. Larmand further asserts the legislature could not have intended the severity of the punishments provided under §16-3-220 to be based on whether “more than one person was involved and not because the injury was more severe or the beating more heinous.”

Contrary to Larmand’s assertions, the plain language of §16-3-220 is satisfied by **any** degree of violence, and physical injury to the victim is clearly **not** an element of the statute. Further, reading §16-3-220 in conjunction with its companion statutes reveals the legislature intended second degree lynching to be a serious crime based on whether more than one person committed the act of violence with premeditated intent.

Courts look to the plain meaning of a statute and the intent of the legislature when interpreting statutes. *See State v. Gaines*, 380 S.C. 23, 667 S.E.2d 728, 733 (2008); *see also Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 663 S.E.2d 484, 488 (2008) (“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature”). “All rules of statutory constructions are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used.” *Gaines*, 667 S.E.2d at 733 (*quoting State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007)). “The court should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute’s operation.” *Rollison*, 663 S.E.2d at 488. Further, statutes addressing the same subject matter must be construed together if possible. *See Joiner.ex rel. Rivas v. Rivas*, 342 S.C. 102, 536 S.E.2d 372, 375 (2000) (“It is well settled that statutes

dealing with the same subject matter are *in pari material* and must be construed together, if possible, to produce a single, harmonious result”).

Lynching in the second degree is defined as:

Any act of violence inflicted by a mob upon the body of another person and from which death does not result shall constitute the crime of lynching in the second degree and shall be a felony.

§16-3-220. The plain statutory language does not require physical injury, but focuses on the act of violence rather than the result. The statute clearly criminalizes all violent acts committed by a mob on the body of a person, regardless of the degree of violence associated with such acts.

The legislature’s use of the phrase “*any* act of violence” precludes interpretations limiting or qualifying the statute. If the legislature intended the statute apply narrowly to more serious forms of violence, or intended to require a more specific showing of physical injury, it could have easily included such limiting language in the statute. See State v. Prince, 335 S.C. 466, 517 S.E.2d 229, 234 (Ct. App. 1999) (declining to adopt narrow interpretation of “act of violence” for purposes of aggravated stalking statute where legislature could have easily inserted limiting language and declined to do so).

In addition, reading §16-3-220 in conjunction with S.C. Code §16-3-210(2003) (first degree lynching), clearly reveals the legislative intent that any analysis of the difference between first and second degree lynching begin **and end** with whether death resulted. If death results from lynching, §16-3-210 applies and the punishment is as severe as death, or five (5) to forty (40) years in prison. If death does not result, §16-3-220 applies and the act is punishable by three (3) to twenty (20) years in prison.

C. Sufficiency of the Evidence

When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of evidence, not its weight. Gaines, 667 S.E.2d at 732-33. In reviewing the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. *Id.* at 733. “If there is any direct evidence or circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury.” State v. Gentry, 363 S.C. 93, 610 S.E.2d 494, 500 (2005).

The intent of those assembled to mutually assist each other may be proven by “positive testimony” or by circumstantial inferences. State v. Barksdale, 311 S.C. 210, 428 S.E.2d 498, 500 (Ct. App. 1993). “The common intent to do violence to the person of another may be formed before or during the assemblage;” however, “to sustain a conviction for lynching the State must produce at least some evidence of premeditation.” *Id.*; State v. Smith, 352 S.C. 133, 572 S.E.2d 473, 475 (Ct. App. 2002). Premeditation is defined as “willful deliberation and planning” or “conscious consideration” preceding an act. Smith, 572 S.E.2d at 475. (*quoting* Black’s Law Dictionary 1199 (7th ed. 1999). “By definition then, the premeditated purpose and intent underlying a charge of lynching cannot be spontaneous.” *Id.*

Contrary to Larmand’s contentions, there is ample evidence in the record he and Lemire assembled together with the premeditated intent and purpose of committing an act of violence on Lochbaum, and subsequently committed such an act of violence. The record establishes that on April 30, 2009, Larmand and Lemire traveled together over an hour’s

distance from their home to Rock Hill, waited for approximately an hour at Knights Stadium, and then drove to Lochbaum's home. They drove a vehicle unfamiliar to Lochbaum, wore all black, and brought a loaded revolver. They arrived at Lochbaum's home around midnight, drove past the house and parked out of sight down the street. Larmand approached the house alone, and asked to speak with Lochbaum. After Lochbaum's neighbors walked off, Larmand initiated an argument. Lemire approached along the dark street, unnoticed by Lochbaum or his neighbors, then suddenly emerged from the darkness and ran toward Lochbaum with the loaded revolver. Lemire cocked the gun and pointed it at Lochbaum, stating "this is what you get when you f**k with my family."

Lochbaum defended himself by grabbing for the gun. As he and Lemire struggled on the ground, Larmand put Lochbaum in a choke hold. One witness testified Lochbaum was purple in the face, could not breathe, and appeared to be dying. When Lochbaum's neighbors intervened and tried to get Lemire to release the gun, he responded, "f**k you, he's f**king with my family." Fortunately, due to his neighbors' intervention, Lochbaum only suffered minor injuries to his knuckles and hand from being dragged on the pavement. Without the neighbors' courage, however, Lochbaum could have been shot and killed by Lemire, or choked to death by Larmand.

In addition, attempts to flee the scene of a crime serve as evidence of guilt. *See State v. Al-Amin*, 353 S.C. 405, 578 S.E.2d 32, 36-37 (Ct. App. 2003) ("Flight from prosecution is admissible as evidence of guilt"); *see also State v. Crawford*, 362 S.C. 627, 608 S.E.2d 886, 890 (Ct. App. 2005) ("Evidence of flight has been held to constitute evidence of defendant's guilty knowledge and intent"). "The critical factor to the admissibility of

evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities.” Crawford, 608 S.E.2d at 891 (citing State v. Beckham, 334 S.C. 302, 513 S.E.2d 606, 612 [1999]). “It is sufficient that circumstances justify an inference that the accused’s actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose.” *Id.* (citing Beckham, 513 S.E.2d at 612).

In this case, Larmand and Lemire knew the police were coming because as he ran after them, Fivecoat yelled at them that the police were on the way. (TT, p. 262; R., p.218). Rather than stay and deal with the police, they immediately left the scene in Larmand’s vehicle, but were quickly stopped by the police after speeding at a rate of about twenty-five miles per hour over the speed limit. (TT, p. 54; R., p. 9). Thus, their attempt to flee the scene serves as further circumstantial evidence of their guilt.

Larmand relies on State v. Hernandez, 382 S.C. 620, 677 S.E.2d 603 (2009), to contend the State’s proof of premeditation is purely speculative, and merely proved he and Lemire were present at the scene of the crime. The defendants in Hernandez were convicted of trafficking marijuana under S.C. Code §44-53-370 (Supp. 2006), which criminalizes knowingly possessing or attempting to possess marijuana. They rented and drove a Ryder truck to a location where they met and formed a caravan with a tractor trailer and a Thunderbird, the occupants of which were also implicated in the crime. The tractor trailer, driven by undercover agents, contained 900 pounds of marijuana for transport. When the tractor trailer and Ryder truck got stuck in the mud, the agents call off the operation and arrested the defendants, but the occupants of the Thunderbird escaped. *Id.* at 605.

The Supreme Court held there was insufficient circumstantial evidence the defendants knew about the contents of the tractor trailer or knew the occupants of the Thunderbird, finding the conclusion they did was "mere speculation." The Court further found, "[a]lthough [defendants'] actions may have been suspicious, mere suspicion is insufficient to support the verdict." *Id.* at 605-606.

This case is distinguishable from Hernandez. Even if the surreptitious manner in which Larmand and Lemire arrived at Lochbaum's house could be described as merely suspicious, their subsequent attack on Lochbaum undoubtedly evinced their guilty intent and purpose. Their premeditated intent as brothers-in-law to inflict harm on Lochbaum is further manifested in Lemire's statement to Lochbaum: "this is what you get when you f**k with my family." Finally, their attempt to flee indicates they were not merely present at the scene with innocent intentions, but committed the crime with the requisite premeditated intent and purpose.

There is more than sufficient evidence indicating Larmand and Lemire assembled with the premeditated plan and intent to commit the act of violence they did in fact commit. Considering the evidence in the light most favorable to the State, there was ample evidence warranting submission of the case to the jury, and the circuit court properly denied Larmand's directed verdict motion as to the second degree lynching charge.

III. The circuit court properly denied Appellant's directed verdict motions on the charges of criminal conspiracy and pointing and presenting a firearm, because there was ample evidence of Appellant's guilt to submit the charges to the jury. (Appellant's Issues IV & V)

Larmand also contends the circuit court erred in denying his directed verdict motions on the charge of criminal conspiracy because the State failed to provide sufficient evidence of an agreement with Lemire to commit the crimes of lynching or pointing and presenting a firearm. In support of his contention, Larmand argues the State's evidence was speculative and established a conspiracy "by piling inference upon inference." He further contends the lack of evidence on the conspiracy charge mandated a directed verdict on the pointing and presenting charge since it was undisputed he never had the gun. Contrary to his contentions, there was ample evidence Larmand and Lemire conspired to commit the crimes of lynching and pointing and presenting a firearm.

Criminal conspiracy is defined under S.C. Code §16-17-410(2003) as "a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means." "The essence of a conspiracy is the agreement." State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402, 405 (2001). "[P]roof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties." *Id.* (citing State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 [1998]); *see also* State v. Sanders, 388 S.C. 292, 696 S.E.2d 592, 596 (Ct. App. 2009) ("Often proof of conspiracy is necessarily by circumstantial evidence alone").

"[T]he law calls for an objective, rather than subjective, test in determining the

existence of a conspiracy.” State v. Crocker, 366 S.C. 394, 621 S.E.2d 890, 897 (Ct. App. 2005). It is sufficient to show the participants involved “intended to act together for their shared mutual benefit within the scope of the conspiracy charged.” State v. Sims, 377 S.C. 598, 661 S.E.2d 122, 126 (Ct. App. 2008), *aff’d*, 387 S.C. 557, 694 S.E.2d 9 (2010) (*quoting State v. Stuckey*, 347 S.C. 484, 556 S.E.2d 403, 412-13 [Ct. App. 2001]).

The evidence in this case of a premeditated plan to attack Lochbaum is discussed in depth above. That evidence was also sufficient to support the remaining charges. The suspicious manner and circumstances under which Larmand and Lemire sought out Lochbaum late at night, got him alone, and then effectively ambushed him, were indicative of their intent and agreement to commit these crimes. *See State v. Barroso*, 320 S.C. 1, 462 S.E.2d 862, 867-68 (Ct. App. 1995) (“Although . . . a conspiracy does not require overt acts, where there is evidence of overt acts done in furtherance of the conspiracy, an inference may be drawn as to the existence and object of the conspiracy.”).

Further, Lemire’s statement “this is what you get when you f**k with my family” indicated he and Larmand, as brothers-in-law, were acting together for their shared mutual benefit. Finally, Larmand and Lemire’s attempt to flee the scene further evinces their guilty intent. *See Crawford*, 608 S.E.2d at 890 (“Evidence of flight has been held to constitute evidence of defendant’s guilty knowledge and intent”).

Evidence of Larmand and Lemire’s suspicious conduct, overt acts, statements, and flight from the scene, constituted sufficient proof of “acts, declarations, or specific conduct” necessary to withstand a directed verdict motion on the charge of conspiracy. *See Sanders*, 696 S.E.2d at 592 (“Although each of these factors alone may have supported only a mere

suspicion of a conspiracy . . . when considered together, they yield the requisite level of proof of 'acts, declarations, or specific conduct' . . . to withstand a directed verdict motion") (quoting Hernandez, 677 S.E.2d at 605). Lemire's act of pointing the gun at Lochbaum was an overt act in furtherance of the conspiracy, for which Larmand was criminally liable under the hand of one doctrine. Considering the evidence in the light most favorable to the State, the circuit court properly denied Larmand's direct verdict motion as to the conspiracy and firearm charges, and its ruling should be affirmed.

IV. The circuit court's jury charge on the inference of guilt as a principal under S.C. Code §16-3-240 was a proper statement of the law. (Appellant's Issue VI)

Larmand asserts the circuit court erred in charging the jury they could infer all persons present as members of a mob when the act of violence is committed are guilty as principals. He argues this charge was redundant, confusing, and ambiguous in light of the circuit court's other charges on the statutory definition of a "mob" under S.C. Code §16-3-230 (2003), liability for the "natural and probable consequences" of the acts of a co-conspirator, the theory of "the hand of one is the hand of all," and "mere presence." He further contends the instruction improperly constituted a charge on the facts, an instruction that particular evidence receive special weight or consideration, or an opinion as to the weight or sufficiency of the evidence, all in violation of the South Carolina Constitution.

As a threshold matter, these particular issues concerning the jury charge were never raised at trial, and are not preserved for appellate review. It is axiomatic an issue must have been raised to and ruled on by the trial court to preserve the issue for review on appeal. *See e.g., State v. Price*, 368 S.C. 494, 629 S.E.2d 363 (2006) (issue must have been raised to and ruled on by trial judge to be preserved for appellate review); *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004) (argument procedurally barred when it was not made to the trial judge); *State v. Taylor*, 355 S.C. 392, 585 S.E.2d 303 (2003) (when particular argument was not presented to the trial court, it was not preserved for appellate review); *State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003) (party need not use exact name of legal doctrine to preserve an issue for appellate review, but it must be clear that the argument was presented on that ground).

At trial, the only objection Larmand and Lemire made regarding the permissive inference under S.C. Code §16-3-240 (2003), was that it unconstitutionally shifted the burden of proof. (TT, pp. 321-322, 517, 574, 582, 603; R., pp. 277-278, 495, 552, 560, 582). Neither Larmand nor Lemire ever asserted the inference language was ambiguous, redundant, or confusing to the jury. Further, neither asserted the jury charge amounted to an improper charge on the facts, an instruction to give certain evidence special weight or consideration, or an opinion as to the weight or sufficiency of the evidence. Therefore, those issues were not preserved for appellate review and should not be considered by this court.

Even if those issues were preserved, however, they are meritless. The circuit court's charge was a clear, comprehensible, and proper statement of the law. In reviewing jury charges for error, an appellate court must consider the trial court's jury charge as a whole in light of the evidence and issues presented at trial. State v. Mattison, 388 S.C. 469, 697 S.E.2d 578, 583 (2010). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *Id.* (quoting State v. Adkins, 353 S.C. 312, 577 S.E.2d 460, 463 [Ct. App. 2003]). "A jury charge that is substantially correct and covers the law does not require reversal." *Id.* (citing State v. Foust, 325 S.C. 12, 479 S.E.2d 50 [1996]).

"The trial court is required to charge only the current and correct law of South Carolina." *Id.* (citing Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462, 472 [2004]). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *Id.* at 584 (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 [2007]). "A confusing charge alone is insufficient to warrant reversal." State v. Lee-Grigg,

374 S.C. 388, 649 S.E.2d 41, 50 (Ct. App.2007) (citing State v. Kerr, 330 S.C. 132, 498 S.E.2d 212, 218 [Ct. App. 1998]).

The jury charge at issue in this case simply stated the law pertaining to second degree lynching. Consistent with §16-3-220, the circuit court instructed the jury the State must prove “the defendants acting as a mob committed an act of violence upon the body of another that did not result in death.” The charge defined a “mob” 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.” See §16-3-230. Using language taken directly from §16-3-240, the circuit court then instructed the jury “[i]t 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.” (TT, p. 566-567; R., pp. 544-545) (emphasis added).

In support of his contention the §16-3-240 inference charge was redundant, Larmand argues the court’s previous charge on the statutory definition of a mob under §16-3-230 already told the jury “if a person plans on inflicting an act of violence upon a person and is present they are guilty of the crime of lynching.” This contention is meritless because §16-3-230 contemplates only the *intent* of those assembled to commit an act of violence, while §16-3-240 contemplates the actual *commission* of the act of violence and the contemporaneous *presence* of mob members. Simply stated, the charge under §16-3-240 instructed the jury it must first find the person to be a member of a mob under §16-3-230, *i.e.*, the person assembled with others with the premeditated intent to commit an act of violence, before it could infer the person was guilty as a principal if he was present when the

act of violence was actually committed.

In support of his contention the permissive inference charge was confusing. Larmand argues the court's previous charges on natural or probable consequences, the hand of one is the hand of all, and mere presence could have led the jury to believe "they may infer all persons present are members of a mob." To the contrary, the charges Larmand references further clarified that the jury could **not** infer guilt from mere presence.

The circuit court's charge explained the hand of one is the hand of all "[i]f two or more people **are together, acting together, assisting each other** in committing the offense." Further, "[w]hen two or more acting with a **common plan** or **intent** are present at the commission of a crime it does not matter who actually commits the crime. . . . The hand of one is the hand of all." The court further explained "[a] person who joins with 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." Finally, the court plainly instructed the jury "**mere presence** at the scene of a crime is **insufficient** to convict one as principal on the theory of aiding and abetting." (TT, pp. 564-566; R., pp. 542-544) (emphasis added).

Larmand relies on State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), in support of his contention the permissive inference in this case is improperly ambiguous and confusing. In Belcher, the Supreme Court held a trial court errs in charging malice may be inferred by the use of a deadly weapon where "evidence is presented that would reduce, mitigate, excuse, or justify" the commission of a homicide or assault and battery with intent to kill. 685 S.E.2d at 809. In its reasoning, the Court observed the definition of malice

“includes the absence of justification, excuse and mitigation,” and the absence of these factors “cannot be inferred from the use of a deadly weapon standing alone.” *Id.* at 808 (citing Glenn v. State, 68 Md.App. 379, 511 A.2d 1110, 1126 [1986]). By way of illustration, the Court stated:

Say, for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because “if one intentionally kills another with a deadly weapon, the implication of malice may arise.”

Id. at 809 (quoting State v. Elmore, 279 S.C. 417, 308 S.E.2d 781, 784 [1983]). In these specific circumstances, the Court found the inference of malice from the use of a deadly weapon would be confusing and prejudicial. *Id.*

This case is readily distinguishable from Belcher. Notably, the permissive inference in this case pertained to second degree lynching, a crime for which malice is **not** an express element. Further, the permissive inference in this case did not allow the jury to infer the existence of any of the substantive elements of second degree lynching. Through accomplice liability principles, the charge only permitted the jury to infer persons guilty of lynching as **principals**, rather than mere accessories, if the jury **first** found those persons were present as **members of a mob** when the act of violence was committed, i.e., they assembled with the premeditated intent and purpose of committing an act of violence. Finally, unlike the judicially created malice inference at issue in Belcher, the inference in §16-3-240 is legislatively created for cases involving lynching, and reveals the legislative intent to allow the jury to infer principal versus accessory liability under properly delineated circumstances.

Larmand's contentions the permissive inference charged to the jury was improper as a charge on the facts, an instruction that particular evidence receive special weight or consideration, or an opinion as to the weight or sufficiency of evidence are equally without merit. "Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error." State v. Jackson, 297 S.C. 523, 377 S.E.2d 570, 572 (1989). "[T]he test is what a reasonable juror would have understood the charge as meaning." *Id.*

In this case, the circuit court's instruction on the permissive inference of §16-3-240 merely explained the legal conclusion the jury could find if certain facts were established. *See State v. Dickey*, 380 S.C. 384, 669 S.E.2d 917, 927 (Ct. App. 2008) ("A charge that states the legal conclusions that would result from the establishment of certain facts is not necessarily an improper charge on the facts, nor a mandate to the jury to assume the truth of the facts stated."). The instruction at issue properly instructed the jury they could legally hold persons liable as principals if they found the evidence showed those persons **assembled as a mob** with the **premeditated** intent to commit an act of violence, and those persons **were present** when the act of violence was committed.

The instant case is analogous to the jury charge upheld by the Supreme Court in State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006). In Rayfield, the trial judge charged the jury, consistent with applicable statutory law, that a victim's testimony need not be corroborated for a conviction of first degree criminal sexual conduct with a minor. *Id.* at 249. On appeal, the defendant argued the charge improperly commented on the facts, emphasized the testimony of one witness, and carried a strong possibility of biasing the jury.

Id.

In upholding the trial judge's charge, the Court concluded a judge's decision to charge the statutory law "does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law." *Id.* at 250. The Court noted the trial judge "fully and properly" instructed the jury on "the State's burden of proof and the jury's duty to find the facts and judge the credibility of the witnesses." *Id.* The Court further observed, "[t]he Legislature has decided it is reasonable and appropriate in criminal sexual conduct cases to make abundantly clear - not only to the judge but also to the jury - that a defendant may be convicted solely on the basis of a victim's testimony." *Id.*

Similar to the jury instructions in Rayfield, the instructions in this case did not unduly emphasize the permissive inference of §16-3-240, and the charge as a whole comported with the law. The circuit court repeatedly instructed the jury on the State's burden of proof and the jury's exclusive duty to decide all issues of fact and assess the credibility of witnesses. (TT, pp. 564-567; R., pp. 542-545).

Finally, any alleged error in the circuit court's jury instructions was harmless. *See Belcher*, 685 S.E.2d at 809 ("Errors, including erroneous jury instructions, are subject to harmless error analysis"). For purposes of §16-3-240, the State presented ample evidence Larmand and Lemire were more than merely present at the scene. The record shows they assembled as a mob for purposes of §16-3-230, and committed an act of violence on Lochbaum for purposes of §16-3-220. In light of the overwhelming evidence of Larmand and Lemire's guilt, any error in charging the applicable statutory law was harmless beyond a reasonable doubt.

The circuit court charge as a whole was substantially correct and adequately covered the applicable law. Accordingly, Larmand's conviction should be affirmed.

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CONCLUSION

Based on the foregoing, Respondent respectfully submits that Larmand's convictions and sentences should be affirmed.

Respectfully submitted,

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April 1, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From York County
The Honorable William H. Seals, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

FRANCIS LARMAND,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

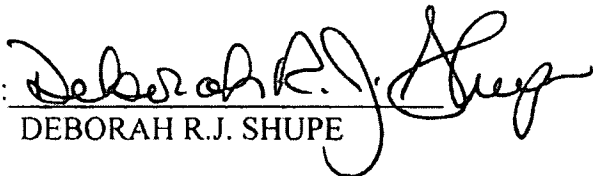
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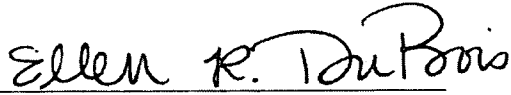
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I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM YORK COUNTY
In the Court of Common Pleas**

Honorable William H. Seals, Jr., Circuit Court Judge

**Case No. 2009-GS-46-02834
Case No. 2009-GS-46-02835**

The State **Respondent**

vs

Francis Larmand **Appellant**

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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?

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 on their use can the State adequately argue that sending the instructions was not prejudicial to a defendant.

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 forewoman 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 themselves. 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 19. 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 exactly what the trial judge instructed the jury to do in this case. Rec. on App. at 567, 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 the forewoman was 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 forewoman 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 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 on 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 under 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 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 charged 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 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 years. 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, 137, 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 a planned 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 35, 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 144, ll 12-17. The melee that followed was described as a “chain reaction.” Rec. on App. at 49, 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 houses 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 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 tends to be 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 78, 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 12, ll24-25 to 13, ll 1-3. Apparently Mr. Larmand was not even given a ticket for speeding. Rec. on App. at 14, ll 1-13.

Mr. Lemire testified that he was told to remain in the car. Rec. on App. at 441, ll 15-20. He did not leave the truck until after he heard a loud argument. Rec. on App. at 444, 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 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 principles?

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 is not preserved. 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 495, ll 5-18; Rec. on App. at 278, 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 542, 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 544, 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 545, 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 of the crime of lynching is the inference used to help prove? Section 16-3-230 and § 16-3-240 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 without adequate instruction.

April 4, 2011



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