STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY NATHANIEL DRAYTON,

APPELLANT

APPELLATE CASE NO. 2025-001071

INITIAL BRIEF OF APPELLANT

JORDAN WAYBURN
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

STATEMENT OF ISSUE ON APPEAL

1. Did the trial court err in denying Appellant's motion for a directed verdict where the state presented no evidence the bank thief intended to intimidate anyone in order to steal money?

2. Did the trial court unconstitutionally comment on the facts of the case by instructing the jury how it ought to evaluate credibility, including by giving a list of questions for the jurors to ask themselves and admonishing that "a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it"?

STATEMENT OF THE CASE

Appellant Anthony Drayton was indicted by the York County grand jury on February 29, 2024, for a violation of section 16-11-380(A) of the South Carolina Code. R. *. He proceeded to trial before Judge William McKinnon and a jury on May 5 and 6, 2025. Tr. 1. He was represented at trial by Fred Davis and Jerry White. Tr. 2. Heather Burdette and Mathew Hogg represented the state. Tr. 2. Ultimately, the jury returned a verdict finding Appellant guilty, and the trial court issued a twelve-year sentence. Tr. 221:21-25, 242:1-4.

This appeal follows.

STATEMENT OF FACTS

On September 29, 2023, a thief wearing a fake beard and wig walked into the First Citizens Bank in Fort Mill. Tr. 75:15-77:6; State's Ex. 1 ("Camera 6"). He walked up to the teller Michaelle Gainey and handed her a note. Tr. 76:7:18; State's Ex. 1 ("Camera 6"). Gainey testified at trial that while she was reading the note, he took it back and told her "shut up, give me the money." Tr. 76:15-18, 77:10-16. She testified he "just whispered to me, hurry up, shut up." Tr. 77:25-78:1. Gainey gave the man roughly $1,200 because the bank's policy is to comply with would-be thieves. Tr. 78:4-16. The thief then walked away. The entire exchange took less than thirty seconds and was caught on the bank's security camera, which was introduced at trial as State's Exhibit 1. Tr. 69:9-70:11; State's Ex. 1 ("Camera 6").

Gainey then called 911, and the recording was introduced and published at trial as State's Exhibit 2.[1] Tr. 79:22-80:17. She described gave a general description of a light-skinned man who was approximately five foot, seven inches tall and weighed 150 pounds. Tr. 80:19-24; State's Ex. 2. When law enforcement officers arrived, they uncovered no physical evidence other than a fake beard disposed of behind the bank. Tr. 118:9-25. They found no DNA or fingerprints. Tr. 120:5-9, 139:7-11.

Brittany Johnson—Appellant's sister—testified at trial that he lived with her in Simpsonville at the time. Tr. 86:18-87:11. She testified that on November 29, 2023, Appellant showed her a Facebook post—introduced as State's Exhibit 4—seeking information about the First Citizens Bank theft. Tr. 87:23-89:20. She claimed Appellant told her "it was him." Tr. 89:11-12. She did not believe him at the time and "thought he was lying," though she eventually

[1] All of the exhibits referred to herein are on file with this Court or reproduced in the record on appeal.

testified that the man on the security camera is Appellant. Tr. 89:24-90:5. On cross-examination, she explained Appellant was staying with her at the time because she was hospitalized after a brain aneurysm. Tr. 90:18-23, 93:7-15. She testified that she told their mother about it the following morning, November 30, 2023. Tr. 98:5-14.

Valerie Johnson—Appellant's mother—also testified at trial. Tr. 100:1-19. She lost custody of Appellant when he was a baby and never regained custody. Tr. 94:7-19. Valerie testified that when she saw the Facebook post, she believed it was Appellant and called law enforcement to report him on November 29, 2023. Tr. 106:2-8. On cross-examination, she admitted she did not know what her relationship with Appellant was like around the time of the theft, though she testified that she loved him. Tr. 110:8-15. Appellant challenged her "motherly instinct" after having lost custody of Appellant to then tell law enforcement officers he is the bank thief. Tr. 109:17-110:17. Valerie also testified that Brittany and Appellant had conflict about Brittany's husband while they lived together. Tr. 112:9-113:19.

Devon Aycok of the Fort Mill Police Department testified Valerie called him on November 29, 2023, and immediately drove to Greenville to speak with Valerie and Brittany. 142:6-21. Officers from Greenville County arrested Appellant the next day. Tr. 144:1-5. Neither Aycok nor any other officers recovered any cash or the fake wig from Appellant's space. He did find a pair of black boots he believed look like the boots the thief can be seen wearing in the security footage. Tr. 150:1-151:2.

In closing Appellant presented two broad arguments or theories of his defense. First, he argued he was not the thief. He does not actually look like the person on the security camera. Tr. 207:19-23. His family members were not credible in part because his mother and sister are unreliable and specifically were incorrect about the dates involved. Tr. 208:5-209:20. Finally,

the generic clothing the thief wore is just that—generic—so it is unconvincing that Appellant had clothing that looked somewhat similar. App. 211:1-7.

Second, Appellant argued that even if he was the thief, the state failed to prove an essential element of the crime: an intent to steal *by force, threats, or intimidation.* Tr. 211:17-212:1. He pointed out that "certainly there was no force," and the teller never described any threats. Tr. 211:17-212:6. Instead the teller described the bank's policy to cooperate: "[T]hey comes to your window, okay, you want money? Here you go. I don't have to be intimidated. You don't have to use any force, you don't have to use any threats. Company policy is they just cooperate." Tr. 212:13-17. He then argued that other people in the bank could have been called to describe any threatening or intimidating behavior, but they were not even interviewed. Tr. 212:18-21. Appellant specifically used the security footage to point to another customer at the next teller to the one that was stolen from, and that customer is perfectly calm and is not reacting in the way that someone would if a bank robber were using force, threats, or intimidation. Tr. 212:22-213:23. Altogether, Appellant argued there was not sufficient evidence to conclude he was the thief or that the thief intended to steal by use of force, threats, or intimidation.

The jury instruction will be addressed below. Ultimately the jury found Appellant guilty as charged. Tr. 221:21-25. The trial court issued a twelve-year sentence. Tr. 242:1-4.

STANDARD OF REVIEW

Directed Verdict

"When reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the state." *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004) (citing *State v. Burdette*, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." *Id.* (citations omitted). *Cherry*, 361 S.C. at 593-94, 606 S.E.2d at 478. Whether there exists "any evidence" sufficient to reach the jury is a question of law reviewed de novo. *Cf. State v. Williams*, 427 S.C. 246, 249, 830 S.E.2d 904, 906 (2019) ("Whether there is any evidence to support [a jury charge] is a question of law.").

Unconstitutional Comment on the Facts

Whether a given jury charge is an unconstitutional comment on the facts should be reviewed on appeal de novo as a question of law. The question is whether the charge given violates Article V, section 21 of the South Carolina Constitution. That section is a limitation on the judicial authority of this state, and as such its application raises a question of law this Court reviews de novo. *See State v. Frasier*, 437 S.C. 625, 633-34, 879 S.E.2d 762, 766 (2022) (holding constitutional criminal procedure questions of law are reviewed de novo); *State v. Miller*, 441 S.C. 106, 119, 893 S.E.2d 306, 313 (2023) (extending *Frasier* to voluntariness of a confession); *cf. Powell v. Keel*, 433 S.C. 457, 462, 860 S.E.2d 344, 346 (2021) (interpretation of a statute is reviewed de novo).

ARGUMENT

I. The trial court erred by denying Appellant's motion for a directed verdict because there was no evidence of an intent to steal by intimidation.

Under subsection 16-11-380(A), it is unlawful to enter a bank "with intent to steal money, securities for money, or property, either by force, intimidation, or threats." By its terms, the intent to steal by force, intimidation, or threats is an element of the offense. *See* 59 Corpus Juris *Statutes* § 595, at 995 (1932) ("[I]t is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof."). For this case there are two critical points. First, a mere intent to steal standing alone is not sufficient, nor is everyone who steals from a bank guilty under this statute. Second, the statute is concerned only with *intent* rather than with actual use of force, intimidation, or threats. The trial court erred by submitting this case to the jury because there was no evidence Appellant intended to steal the money by intimidation. *See* 16 Corpus Juris *Criminal Law* § 47, at 80 (1918) ("There are certain crimes of which a specific intent to accomplish a particular purpose is an essential element, and for which there can be no conviction upon proof of mere general malice or criminal intent. In these cases it is necessary for the state to prove specific intent either by direct or circumstantial evidence." (footnote omitted)).

A case should be sent to the jury only "if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." *State v. Martin*, 340 S.C. 597, 602, 533 S.E.2d 572, 574 (2000) (citing *State v. Williams*, 321 S.C. 327, 332, 468 S.E.2d 626, 629 (1996)). "[W]hen there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict." *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting *State v. Schrock*, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984)). Where the state fails to offer sufficient proof on any element of the

offense, the trial court should enter a directed verdict in favor of the defendant. *State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004) (citations omitted).

As an initial point, there was no evidence of an intent to use force or threats. As the solicitor expressly argued to the jury, "There's no force here, there's no threats here, it's intimidation." Tr. 204:19-25. The thief entered the building, asked the teller for money, and then left. There was never evidence of a weapon, and the teller did not describe any threats. The security footage shows the bearded thief walks into the bank and up to the counter, hands the teller a note, and less than thirty seconds later he walks away. He looks and appears calm throughout the exchange, and the testimony was that he never raised his voice or threatened anyone. The customer standing mere feet away does not react in any meaningful way to the theft. Any conclusion that he intended to steal the money by use of force or threats would be entirely speculative. *See Brown*, 360 S.C. at 586, 602 S.E.2d at 395 ("The accused is entitled to a directed verdict when the evidence merely raises a suspicion of guilt."). Thus, this case required the state to present sufficient proof of an intent to intimidate.

There was also not substantial circumstantial evidence from which the jury could infer Appellant intended to steal the money by intimidation. *See State v. Arnold*, 361 S.C. 386, 389, 605 S.E.2d 529, 531 (2004) (citations omitted). In this statute the General Assembly expressed its desire specifically: this crime covers entering a bank with intent to steal *only* when done with an intent to do so by use of force, threats, or intimidation. Entering a bank even with intent to steal is not sufficient on its own to violate section 16-11-380. By necessary implication from its terms, there are factual circumstances where a person might commit larceny, or intend to commit larceny, of a bank without violating this statute. This is one of those times.

To assume an intent to intimidate (or use force or threats) by the mere entry or intent to steal alone is to speculate and expand the scope of the statute. Here, none of the thief's conduct indicates an intent to intimidate, and the mere speculation based on entry alone is insufficient. Again, not every attempted or actual bank theft is a violation of subsection 16-11-380(A). The text of the statute requires more, and to allow this conviction to stand would be to write out and disregard the specific *mens rea* required under the statute. *See State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." (quoting *Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995))); *Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) ("When the language of a statute is clear and explicit, a court cannot rewrite the statute . . . ." (citing *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 401, 175 S.E.2d 805, 817 (1970))). The state failed to present any direct or substantial circumstantial evidence that Appellant entered the bank with an intent to steal money by intimidation, so the trial court should have granted Appellant's motion for a directed verdict.

Appellant recognizes the state could likely have charged him with some form of larceny or burglary, and if the jury concluded he was the person who entered that bank, it could have found him guilty. But the state made a different choice. It charged Appellant with violating this specific statute and alleged he entered the bank "with intent to steal money, securities, or property, either by force, intimidation, or threats." R.* (indictment). It took the burden of proving every element of the offense beyond a reasonable doubt, and that includes the intent to use force, threats, or intimidation. It told the jury this case was not about force or threats, and it offered no evidence the thief intended to steal the money by intimidation. There was no violence and no escalation. There was no weapon ever found or seen at the crime scene. There was only

the teller's testimony that the thief handed her a note—and she could not recall what it said—and whispered to her to give him money. That is not enough to demonstrate an intent to steal the money by intimidation. To the contrary, the absence of a weapon, the simple and quiet use of the note, and his apparent demeanor on the video recording demonstrates the thief did not intend to intimidate anyone. Rather, he wanted to be in and out of the bank quietly and without conflict, consistent with the bank's policy to cooperate with would-be robbers.

II. The trial court made an unconstitutional comment on the facts by instructing the jury with factors it should consider in evaluating credibility and that "a simple mistake doesn't mean a witness wasn't telling the truth."

The trial court instructed the jury on credibility as follows:

> Credibility and believability of witnesses. Ladies and gentlemen, when I say you consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say and how important their testimony was. In making these decisions, you may believe or disbelieve any witness in whole or in part. The number of witnesses testifying about something doesn't necessarily matter.
>
> To decide whether you believe a witness, I suggest that you ask yourself a few questions. Did the witness impress you as one who was telling the truth? Did the witness have any particular reason to not tell the truth or have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to accurately observe the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the testimony differ from other testimony or other evidence?
>
> However, please keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So if a witness misstated something, you must decide whether it was because of an innocent lapse, or mistake in memory, or an intentional deception. The significance of your decision may depend on whether the misstatement was about an important fact or unimportant detail.

Tr. 194:7-195:10.

a. *Error*

Our constitution is clear: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21; *see State v. Brown*, 443 S.C. 196, 198-199, 904 S.E.2d 448, 449-50 (2024) (collecting cases). It is not proper for courts to give charges "instructing juries on how to interpret and use evidence." *Pantovich v. State*, 427 S.C. 555, 562, 832 S.E.2d 596, 600 (2019). Here, the trial court unconstitutionally commented on the facts of the case by instructing the jury that in evaluating credibility it should consider "a few questions" the court believed are important. That is not the court's role. It should never tell a jury to "please keep in mind" any specific points in evaluating credibility, nor is it permitted to explain why a witness might be mistaken. By doing "the trial court emphasize[d] the weight of that evidence in the eyes of the jury." *State v. Stukes*, 416 S.C. 493, 499, 787 S.E.2d 480, 483 (2016). Instead, "It is the exclusive province of the jury to weigh the testimony and determine its force and effect, and when the circuit judge invaded that province, and undertook to advise the jury how they might weigh the testimony . . . it undoubtedly was a violation of both of the letter and spirit of the constitution." *State v. Mitchell*, 56 S.C. 524, 35 S.E. 210, 213 (1900).

For example, long ago our Supreme Court affirmed the trial court's refusal to instruct the jury that they "are not bound to take everything [the witness] may say as true, unless they do believe with good reason that he is telling the truth." *State v. Anderson*, 24 S.C. 109, 114 (1886). It reasoned this charge would have been an unconstitutional comment on the facts:

> In view of the very stringent provisions of our constitution, which forbids the judges from charging juries 'in respect to matters of fact,' we cannot say there was any error in refusing to charge in the language of the request. The jury were properly told that they were 'the sole judges of the credibility of the witnesses,' and it would have been an invasion of their exclusive province if the Circuit Judge had gone further and undertaken to instruct them as

> to the kind of reasons which ought to influence them in reaching a conclusion as to a question of which they were the sole judges.

Anderson, 24 S.C. at 115. The charge given here did precisely what *Anderson* sought to avoid: it charged the jury with "the kind of reasons which ought to influence them" in determining credibility—questions for the jurors to ask themselves and an admonition that "a simple mistake" might be unimportant. The trial court went further than is permitted or necessary, and in doing so it was likely to influence the jury on a question of which it was the sole judge.

Particularly as to the "simple mistakes" instruction, the charge plainly implies the trial court's opinion on facts in evidence, the inferences to be drawn from those facts, and the weight to be given them. This it cannot do. *State v. Burdette*, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019). Even by merely drawing attention to these factors in this way, the court has commented on the facts. *See Stukes*, 416 S.C. at 499, 787 S.E.2d at 483 ("By addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury."). The trial court went to far by expressly telling the jury it should consider these factors and in this way. Such suggestions from the court concerning credibility are unconstitutional:

> If there could have been any doubt upon this subject prior to the adoption of the present constitution, such doubt is effectually dispelled by the emphatic and mandatory language used in the present constitution, "Judges shall not charge juries in respect to matters of fact, but shall declare the law,"—omitting the permission previously given in the constitution of 1868 to "state the testimony," which omission clearly shows that the purpose was to forbid the judge, *unqualifiedly*, from charging the jury in respect to matters of fact, and thus *leaving such matters exclusively to the jury, unaided by any suggestions from the judge.*

State v. Mitchell, 56 S.C. 524, 35 S.E. 210, 213 (1900) (emphasis added).

In addition to its unconstitutionality, this instruction is simply unnecessary. *See* 16 Corpus Juris *Criminal Law* § 2438, at 1012 (1918) ("[I]t is not necessary to instruct the jury that

they are the judges of the credibility of witnesses and as to the weight to be given their testimony, and that they have a right to credit or to discredit the testimony of any witness."). In every person's life, in virtually all interactions with others, people inherently and automatically recognize their obligation to evaluate credibility, and they need no guidance on how to do so. *Cf. Burdette*, 427 S.C. at 503, 832 S.E.2d at 583 ("It is axiomatic that some matters appropriate for jury argument are not proper for charging. 'Do jurors need the court's permission to infer something? The answer is, of course not.'" (quoting *Belcher*, 385 S.C. at 612 n.9, 685 S.E.2d at 810 n.9)).

b. *Prejudice*

An error is harmless and does not require reversal only if "the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt." *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) (citing *Arnold v. State*, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992)). In general, this Court should hesitate to find this type of constitutional violation harmless beyond a reasonable doubt:

> It has long been recognized that even a slight remark, apparently innocent in its language, may, when uttered by the court, have a decided weight in shaping the opinion of the jury. Vested as the trial judge is, with superior authority, disinterested, and possessing experience not available to the ordinary layman, jurors, as a rule, are anxious to catch his view, upon which to found their conclusions.

State v. Pruitt, 187 S.C. 58, 196 S.E. 371, 372 (1938). In this case, with a charge directly telling the jury how to determine what it believes to be true, it cannot be said this Court can know beyond a reasonable doubt that the charge given did not contribute to the verdict. *State v. Thorne*, 237 S.C. 248, 252, 116 S.E.2d 854, 856 (1960) (reversing due to an unconstitutional comment on the facts because it was "impossible to say just what effect this portion of the

instruction, coming so late in the charge, had upon the jury, but it must be assumed that it was no[t] disregarded").

This error was not harmless beyond a reasonable doubt. No DNA or fingerprint evidence linked Appellant to the bank. His recorded police interrogation is not incriminating in any meaningful way. In sum, there was nothing "conclusive, such as a confession, DNA evidence demonstrating guilt," so harmlessness cannot be assumed. *Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018). The state's case depended on the jury's evaluation of the credibility of his sister and mother. The jury had to decide if the bank teller and law enforcement officers were truthful, accurate, and should be believed. This Court cannot say the credibility determination the jury apparently made—and thus Appellant's conviction—was "surely unattributable" to the unconstitutional instruction. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

For one example, part of Appellant's defense was to challenge his sister's credibility because she testified inaccurately about certain dates in the case. In closing, Appellant specifically argued her dates and timeline were wrong and that "[d]amage to the brain . . . is a serious thing. So you can't say, oh, trust her memory and trust her testimony and then say, well, but don't trust her on this, because it's inconvenient for our timeline. Doesn't make any sense." Tr. 208:14-23. With the court's prompting, the jury might have done exactly what it was told to do: conclude that inaccuracy was an unimportant "simple mistake" rather than indicative of what Appellant contended, that she had memory issues or a vendetta against Appellant and simply could not keep her story straight. On the court's advice, it might have concluded she is not a liar but rather was simply mistaken.

Our Supreme Court in *Smalls* addressed at-length some of the considerations in a prejudice analysis. *Smalls*, 422 S.C. at 191-95, 810 S.E.2d at 845-47. Importantly, that case considered a PCR claim for ineffective assistance of counsel, which raises a substantially lower standard than in this case because there, the *defendant* was required to prove "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." 422 S.C. at 188, 810 S.E.2d at 843 (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). Nonetheless, Smalls did prove prejudice because when "potentially strong evidence . . . is tainted . . ., it should not be considered as part of 'overwhelming evidence' that precludes a finding of prejudice." 422 S.C. at 194, 810 S.E.2d at 846. There, of course, the "taint" was the error of counsel and here it was an unconstitutional comment by the court itself. But the reasoning should be the same: this Court should not assume the error did not contribute to the verdict when the error could have influenced the jury's evaluation of the entire case. If anything, for the reasons explained by the Court in *Pruitt*, this error by the trial court was likely of even more weight.

c. *Preservation*

Appellant recognizes there was no objection to this instruction at trial. However, in *State v. Orr*, 128 S.C. 279, 122 S.E. 771 (1924), our Supreme Court held a challenge concerning the "constitutional prohibition as to a charge on the facts" need not be raised below to be challenged on appeal. 128 S.C. at 280, 122 S.E. at 771. The Court there considered an appeal challenging the trial court's instruction on the facts without objection. *Id.* It reversed, holding:

> It is said, however, that, if his honor misstated the issues, it was the duty of the defendant to call the attention of the court to it, and, not having done so, he cannot now complain. That is a rule of court and must give way to the constitutional prohibition as to a charge on the facts. This assignment of error must be sustained.

Id. Therefore, objections to a charge on the facts need not be raised below to be argued on appeal because the constitutional prohibition outweighs the general issue preservation requirement.

Appellant recognizes this rule has not been used since *Orr*. However, in virtually all recent comment-on-the-facts cases the jury instruction issue was preserved so the *Orr* rule was unnecessary to consider. *See State v. Brown*, 443 S.C. 196, 198, 904 S.E.2d 448, 449 (2024); *State v. Stewart*, 433 S.C. 382, 386, 858 S.E.2d 808, 810 (2021); *State v. Smith*, 430 S.C. 226, 229, 845 S.E.2d 495, 496 (2020); *State v. Burdette*, 427 S.C. 490, 493, 832 S.E.2d 575, 577 (2019); *Pantovich v. State*, 427 S.C. 555, 832 S.E.2d 596 (2019); *State v. Stukes*, 416 S.C. 493, 497, 787 S.E.2d 480, 482 (2016); *State v. Witherspoon*, 418 S.C. 641, 642, 795 S.E.2d 685, 686 (2016); *State v. Cheeks*, 401 S.C. 322, 327, 737 S.E.2d 480, 483 (2013); *State v. Belcher*, 385 S.C. 597, 601, 685 S.E.2d 802, 804 (2009); *State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000), *overruled in unrelated part by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009); *State v. Roof*, 298 S.C. 351, 353, 380 S.E.2d 828, 829 (1989); *State v. Grant*, 275 S.C. 404, 406, 272 S.E.2d 169, 170 (1980); *State v. Franks*, 432 S.C. 58, 80, 849 S.E.2d 580, 592 (Ct. App. 2020); *State v. Owens*, 427 S.C. 325, 329, 831 S.E.2d 126, 128 (Ct. App. 2019), *aff'd,* 433 S.C. 482, 860 S.E.2d 357 (2021); *State v. Brooks*, 428 S.C. 618, 626, 837 S.E.2d 236, 240 (Ct. App. 2019); *State v. Huckabee*, 388 S.C. 232, 244, 694 S.E.2d 781, 787 (Ct. App. 2010).

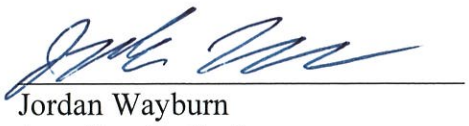
Although not expressly used in modern times, the *Orr* rule is a logical exception to the typical preservation requirement because it is a constitutional restriction directly on the judicial power of the trial courts. Article V establishes the judicial branch, and it empowers and limits the courts in specific ways, such as the prohibition in section 21 on factual commentary by the court. As a restriction on the actual judicial power itself, this constitutional rule must be more

closely guarded than any other. *See Orr*, 128 S.C. at 280, 122 S.E. at 771. This is for good reason: "the real object of this clause of the constitution is to leave the decision of all questions of fact to the jury exclusively, uninfluenced by any expressions of opinion by the judge, whose position would very naturally add great weight to any opinion he might express upon any question of fact arising in a case." *State v. White*, 15 S.C. 381, 392 (1881). The separation of roles between judge and jury is part of the foundation of our justice system. *See Sumter Tr. Co. v. Holman*, 134 S.C. 412, 132 S.E. 811, 817 (1926) ("The people of South Carolina have said that it is the province of the courts to state the law and of juries to determine the facts.").

Our constitutional prohibition represents the general rule that "it is the office of the judge to instruct the jury in points of law and of the jury to decide matters of fact." 64 Corpus Juris, *Trial* § 313, at 299 (1933). As was explained at the time of its adoption, "the strict prohibition of the constitution" must be enforced because it is that important. *Norris v. Clinkscales*, 47 S.C. 488, 25 S.E. 797, 810 (1896). "This imperative mandate found in the organic law of the land, this court, even if disposed to do so, cannot and will not evade the responsibility of enforcing whenever such mandate is violated." *Mitchell*, 56 S.C. 524, 35 S.E. at 213 (reversing conviction where trial court improperly commented on credibility of witnesses).

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand the case with instructions to enter a directed verdict in his favor or proceed to a new trial.



Jordan Wayburn
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of January, 2026.