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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable Marvin H Dukes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JESSE SEBASTIAN BROUGHTON,

APPELLANT

APPELLATE CASE NO. 2025-000621

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court comment on the facts—in violation of article V, section 21 of the South Carolina Constitution—when it instructed the jury it could infer Appellant intended to distribute the marijuana found in his car because he possessed more than one ounce of the drug?
2. Can a defendant raise on appeal without objection below a challenge to an unconstitutional comment on the facts in a jury instruction as the Supreme Court held in *State v. Orr*, 128 S.C. 279, 122 S.E. 771 (1924)?

STATEMENT OF THE CASE

On April 11, 2024, a Colleton County grand jury indicted Appellant for possession with intent to distribute marijuana. R. 138. On March 24, 2025, Appellant's case was called before the honorable Marvin H. Dukes, III, and a jury. R. 1. Matthew Walker represented Appellant. R. 1. Jillian Contestabile and Julie Keeney prosecuted for the state. R. 1.

The jury found Appellant guilty as indicted. R. 123:8-11. Judge Dukes issued a five-year sentence suspended upon the service of two years in prison followed by three years of probation. R. 133:10-21.

This appeal follows.

STATEMENT OF FACTS

On March 30, 2023, Officer Jermaine Smith stopped Appellant for speeding. R. 30:4-17. When Smith approached Appellant, he asked if he knew why he was being stopped. Appellant quickly admitted to Smith he was speeding. R. 38:8-14; State's Ex. 1, at 3:29-3:40. After a short conversation, Appellant disclosed he had marijuana in the car and consented to the officer searching his vehicle. R. 33: 5-8; State's Ex. 1, at 3:54. He had approximately 7.5 ounces of marijuana. R. 64:8-13. Smith also collected approximately eight thousand dollars and empty packages with the "symbol of marijuana" on them. R. 33:25, 36:9-10.

At trial the only question for the jury to decide was whether Appellant intended to distribute this marijuana or rather intended it for his personal use. Appellant's entire defense was that he was guilty only of simple possession and not possession with intent to distribute. During opening statements, defense counsel told the jury, "[Appellant] and I both want and expect you to find him guilty," but of only possession of marijuana. R. 24:14-22, 28:18-29:6.

During closing the solicitor argued the state showed "intent to distribute based off three things: money in [Appellant's] pocket, 215 grams worth of marijuana, and 15 empty baggies." R. 82:25-83:4. In response, defense counsel argued there was no intention to distribute the drugs, expressly admitting Appellant possessed them:

They can prove possession, and we admit possession because the facts are he was stopped with illegal drugs in Colleton County. It's definitely him. . . . He's not disputing that he had it. . . . But the state wants to go one step further and have you start guessing and being a mind reader and saying maybe or probably [he intended to distribute the marijuana.]

R. 87:7-17. Counsel further contended the state was requiring the jury to "guess" what Appellant's intent was rather than weigh the facts as shown by the evidence. R. 96:7-97:3.

As to possession with intent to distribute marijuana, the trial court instructed the jury:

The defendant is charged with possession with intent to distribute marijuana. The State must prove beyond a reasonable doubt that the defendant possessed marijuana with the intent to distribute it. To prove possession, the State must prove beyond a reasonable doubt the defendant had both the power and the intent to control the disposition or use of the marijuana. . . .

The state must also prove beyond a reasonable doubt the defendant intended to distribute the marijuana. Intent may be shown by acts and conduct of the defendant and other circumstances from which you naturally and reasonably infer intent. In determining whether the defendant had the intent to distribute the marijuana, you may consider the circumstances surrounding the defendant's alleged possession. You may consider the amount of the substance alleged to have been possessed; the manner in which it was allegedly possessed; the place where it was allegedly possessed; and other factors which you consider to be important. You must find the defendant did not intend to have the marijuana solely for his own use.

Possession of more than 28 grams or 1 ounce of marijuana creates a permissive inference that the defendant possessed the marijuana with intent to distribute it. This permissive inference does not relieve the State from proving beyond a reasonable doubt that the defendant had the intent to distribute. It is simply an evidentiary fact to be taken into consideration by you along with other evidence in the case and to be given the weight you decide it should have. If you find the State has failed to prove beyond a reasonable doubt the defendant is guilty of possession with intent to distribute marijuana, you may consider whether the State has proved beyond a reasonable doubt the defendant is guilty of possession of marijuana. Possession does not require an intent to distribute marijuana.

R. 107:24-109:21.

The jury began deliberating at 2:32 p.m. R. 115:15. At 3:53 p.m. the jury asked, "can we get a printout of the law as it is written for possession with intent to distribute." R. 115:16-20; 135. After discussion the court answered: "Except as authorized by this article it shall be unlawful for any person: to . . . possess with the intent to manufacture, distribute, dispense, deliver, or purchase a controlled substance or a controlled substance analogue. In addition, you

must consider that the parties have stipulated that marijuana is a controlled substance under the above act." R. 115:17-120:2; 136. Three hours later the jury returned and found Appellant guilty of possession with intent to distribute marijuana. R. 123:1-11.

STANDARD OF REVIEW

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 issues 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. Trial courts should never instruct the jury that possession of a given weight of drugs could raise an inference the defendant intended to distribute them.

Subsection 44-53-370(a) of the South Carolina Code (2018) prohibits, among other things, the possession of controlled substances with an intent to distribute them. Subsection (d)(5) provides that a person who "possess[es] more than . . . twenty-eight grams or one ounce of marijuana . . . is prima facie guilty of [a] violation of subsection (a) of this section." § 44-53-370. Apparently relying on this provision, courts have crafted a jury instruction like the one given in this case:

Possession of more than 28 grams or 1 ounce of marijuana creates a permissive inference that the defendant possessed the marijuana with intent to distribute it. This permissive inference does not relieve the State from proving beyond a reasonable doubt that the defendant had the intent to distribute. It is simply an evidentiary fact to be taken into consideration by you along with other evidence in the case and to be given the weight you decide it should have.

R. 109:8-15. The instruction is a mistake, and the trial court never should have given this charge because it is an unconstitutional comment on the facts and unwarranted by the statute.

A. An instruction that the jury can infer an intent to distribute based on weight is an unconstitutional comment on the facts.

"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 never proper for the court to instruct a jury that a given fact creates an "inference"—even a "permissive inference"—an element of a crime has been satisfied. *Pantovich v. State*, 427 S.C. 555, 562, 832 S.E.2d 596, 600 (2019) ("The modern trend . . . has cast doubt upon the validity of charges instructing juries on how to interpret and use evidence."); *see Brown*, 443 S.C. at 198-199, 904 S.E.2d at 449-50 (inferred malice instruction); *State v.*

Smith, 430 S.C. 226, 229, 845 S.E.2d 495, 496 (2020) (same); *State v. Burdette*, 427 S.C. 490, 494, 832 S.E.2d 575, 577 (2019) (same); *Pantovich*, 427 S.C. at 562, 832 S.E.2d at 600 ("good character" charge); *State v. Stukes*, 416 S.C. 493, 498-99, 787 S.E.2d 480, 482-83 (2016) (statutory rule that criminal sexual conduct "victim's testimony need not be corroborated with additional evidence"); *State v. Witherspoon*, 418 S.C. 641, 642, 795 S.E.2d 685, 686 (2016) (applying *Stukes*); *State v. Cheeks*, 401 S.C. 322, 327, 737 S.E.2d 480, 483 (2013) (holding improper charge that "actual knowledge [of the possession of drugs] is strong evidence of intent to control its disposition or use." (alteration original)); *State v. Belcher*, 385 S.C. 597, 601, 685 S.E.2d 802, 804 (2009) (inferred malice charge).

For drug charges, the leading comment-on-the-facts case is *State v. Stewart*, 433 S.C. 382, 858 S.E.2d 808 (2021). In *Stewart* the Court unequivocally held, "The jury charge instructing a jury it may infer knowledge or possession when a substance is found on property under the defendant's control should no longer be given." 433 S.C. at 391, 858 S.E.2d at 813. Giving that charge is error because "the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury." 433 S.C. at 392, 858 S.E.2d at 813 (quoting *Burdette*, 427 S.C. at 502, 832 S.E.2d at 582. In every case, "[i]t remains the burden of the State to convince the jury the defendant had the requisite knowledge and intent." *Stewart*, 433 S.C. at 389, 858 S.E.2d at 811.

Here, as in *Stewart*, the jury charge was an unconstitutional comment on the facts because with it "the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury." *Id.* (quoting *Burdette*, 427 S.C. at 502, 832 S.E.2d at 582). This inference instruction "unduly emphasizes" the state's evidence, and it "deprives the jury of its prerogative both to draw inferences and to weigh evidence." *Id.* (quoting *Cheeks*, 401

S.C. at 328, 737 S.E.2d at 484). Instructing the jury that weight can imply an intent to distribute is not materially different from the *Stewart* instruction that ownership of the property where drugs are found can imply possession. They both directly tell the jury that it could infer an element of the offense if it finds certain other facts. That is not proper.

In a similar way, the Court in *State v. Cheeks* overturned prior case law approving the trial court's instruction that "actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use." 401 S.C. at 328-29, 737 S.E.2d at 484 (overturning *Solomon v. State*, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994)). Again, it is no significant extension to conclude courts should not instruct juries that "[p]ossession of more than twenty-eight grams or one ounce of marijuana creates a permissive inference that the defendant possessed the marijuana with intent to distribute it." In a more general way, these modern cases forbidding such instructions reflect a longstanding facet of the law: specific intent crimes must be carefully charged to the jury to avoid misunderstandings and improperly prejudicing them towards a finding of intent. See 16 Corpus Juris, *Criminal Law* § 2390, at 985 (1918) (stating general rule that presumption of intention for one's actions should not be charged "where a specific intent is the gist of the offense charged").

Simply put, there was no valid basis for the trial court to tell the jury this inference may arise because that is something it cannot and need not do. See *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 *State v. Belcher*, 385 S.C. 597, 612 n.9, 685 S.E.2d 802, 810 n.9 (2009))). "Simply because certain facts may be considered by the jury as evidence of guilt . . . , it does not follow . . . juries should be charged that these facts are probative of guilt." *Cheeks*, 401 S.C. at

328, 737 S.E.2d at 484. By instructing the jury that a certain weight of drugs may raise an inference the defendant intended to distribute them, the trial court has directly commented on facts in evidence, emphasized those facts, told the jury how to weigh the evidence, and placed its thumb on the scale towards a finding of intent and guilt. Article V, section 21 forbids such instructions. Even if "[t]he inference is a valid one for the jury to draw . . . [t]he *jury instruction* explaining the inference . . . is improper." *Stewart*, 433 S.C. at 391, 858 S.E.2d at 813 (emphasis in original).

B. It is unimportant that this inference is in some way related to section 44-53-370 because it is unconstitutional regardless, and the instruction is not actually warranted by that statute.

i. *Even if the instruction is required by section 44-53-370, article V, section 21 cannot be overruled by statute.*

There is only one legitimate difference between the instruction struck down in *Stewart* and the instruction here: this instruction has some relation to section 44-53-370. It is in all other respects legally indistinguishable, for the reasons explained above. In either event, the trial court has "directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury." *Burdette*, 427 S.C. at 502, 832 S.E.2d at 582. It has instructed the jury how it could evaluate the evidence and what inference it might draw. That is an unnecessary, unconstitutional comment on the facts. *See Cheeks*, 401 S.C. at 328, 737 S.E.2d at 484.

Even assuming the instruction is warranted or required by the statute—an assumption challenged *infra*—this instruction is still unconstitutional. The General Assembly has no authority to abrogate or minimize provisions of the constitution, and it cannot grant to trial courts a power deprived by the constitution. If it would be unconstitutional to give this instruction absent the statute—and it obviously would be—then it is unconstitutional despite the statute. *See*

State v. Stukes, 416 S.C. 493, 499, 787 S.E.2d 480, 483 (2016) (holding instruction based on S.C. Code Ann. § 16-3-657 (2015) is an unconstitutional comment on the facts).

ii. *This Court should overrule State v. Andrews*, 324 S.C. 516, 479 S.E.2d 808 (Ct. App. 1996), *because the instruction is now bad law and was never warranted by the statute.*

Even if this Court would conclude that the trial court can comment on the facts of a case if provided by statute, that would not save this instruction because it is not actually required by the statute.

In *State v. Andrews*, in an opinion written by Judge Anderson, this Court declared section 44-53-370 created "a permissive inference to be considered by the jury in evaluating guilt or innocence in cases where the defendant possesses a certain quantity of marijuana." 324 S.C. at 522, 479 S.E.2d at 812. Other than quotation of the statute, no analysis explained how the statutory language created a "permissive inference" *or* why it should "be considered by the jury." *Id.* *Andrews* continued to hold the trial court erred by charging the jury "that possession of 28 grams or one ounce of marijuana is prima facie evidence that the subsection that I just read to you was violated." *Andrews*, 324 S.C. at 526, 479 S.E.2d at 812, 814. Relying on *State v. Neva*, 300 S.C. 450, 452, 388 S.E.2d 791, 792 (1990), this Court held the "proper method" for the charge would have been as a permissive inference. 324 S.C. 516, 525, 479 S.E.2d at 813-14. The Court then continued, "[f]or the edification of the Bench and Bar," and "suggest[ed]" the permissive inference charge that is often used today—the charge given by the trial court here, with only minimal difference.¹

¹ The trial court here actually omitted one sentence from the charge suggested in *Andrews*: "The resulting implication only permits rather than requires the jury to infer a violation of the section." 324 S.C. at 526, 479 S.E.2d at 814; R. 109: 8-15. It is otherwise functionally identical.

State v. Andrews was wrong to instruct trial courts to give this charge, and subsequent comment-on-the-facts case law has eroded any plausible propriety of the instruction. See *Pantovich*, 427 S.C. at 562, 832 S.E.2d at 600 ("The modern trend . . . has cast doubt upon the validity of charges instructing juries on how to interpret and use evidence."). As explained, *Andrews* is now bad law in light of *Stewart*, *Cheeks*, *Stukes*, and *Burdette* and its progeny. Further, as noted, the Court in *Andrews* gave no reason for concluding the statute requires this permissive inference instruction, and no reason obviously appears from the statute.²

Most likely, the statute was written for one of two purposes. First, it could have been an attempt to establish a rebuttable presumption of intent based on weight. That, however, has already been held improper by the Supreme Court as it is impermissible burden shifting. *State v.*

² It is likely *Andrews* was premised on a similar mistake the Supreme Court corrected in *Stewart*. The Court's specific holding in *Stewart* explained it had previously erred in *State v. Adams*, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987), by instructing trial courts to instruct juries there is a permissive inference of possession based on ownership of property. *Adams* had held the "proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control." 291 S.C. at 135, 352 S.E.2d at 486 (first citing *State v. Hudson*, 277 S.C. 200, 203, 284 S.E.2d 773, 775 (1981); then citing *State v. Brown*, 267 S.C. 311, 315-17, 227 S.E.2d 674, 676-77 (1976)). *Stewart* overruled *Adams* because it incorrectly relied on cases on appeal from the denial of a directed verdict, which considers a totally different question from whether a jury charge is proper. *Stewart*, 433 S.C. at 391, 858 S.E.2d at 812-13 ("Our reliance on *Hudson* and *Brown* was misplaced because neither case approves of the trial court explaining the inference of knowledge and possession to the jury.").

A similar mistake was made in *Andrews* when it approved of this charge. The *Andrews* Court specifically relied on the "proper method" of giving such instructions as stated in *State v. Neva*, which in turn relied, in part, on the now-overturned *Adams*. *Andrews*, 324 S.C. at 525, 479 S.E.2d at 813-14 (citing *Neva*, 300 S.C. at 452, 388 S.E.2d at 792). In fairness to the *Andrews* Court, it was considering the charge as a burden-shifting issue, and relying on *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979), it invalidated the charge given in that case as unconstitutional burden-shifting. *Andrews*, 324 S.C. at 526, 479 S.E.2d at 814. It did not consider the charge as a comment on the facts. *Id.* Nonetheless, section 44-53-370 provides for a prima facie showing of intent to distribute that will, when demonstrated, always suffice to defeat a motion for a directed verdict. It goes no further, however, and that part of *Andrews* instructing courts to give this permissive inference should be overruled.

Key, 282 S.C. 413, 414, 319 S.E.2d 338, 338 (1984) (first citing *State v. Legette*, 282 S.C. 11, 12, 316 S.E.2d 411, 411 (1984), then citing *State v. Cooper*, 279 S.C. 301, 302, 306 S.E.2d 598, 599 (1983)); *Taylor v. State*, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993); *see generally Sandstrom v. Montana*, 442 U.S. 510, 520-24 (1979) (addressing the constitutionality of burden-shifting jury instructions.

Second, the rule could be interpreted to serve a purpose in simplifying or standardizing non-jury decision-making. *Cf. Stukes*, 416 S.C. at 499, 787 S.E.2d at 482 (citing favorably prior language that in a criminal sexual conduct case, "the statute [S.C. Code Ann. § 16-3-657 (2015)] is not the proper subject of a charge, but merely serves to guide trial and appellate courts in analyzing the sufficiency of evidence" (citing *State v. Rayfield*, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006) (Pleicones, J., dissenting))); *see also* 16 Corpus Juris, *Criminal Law* § 1005, at 534 (1918) (explaining that presumptions are "merely an administrative assumption for procedural purposes" and "only make[] a prima facie case"). Several other effects of the rule could easily justify the statute without requiring—or permitting—trial courts to instruct it to juries. For example, perhaps the provision was written to ensure the sheriff's office charges someone with distribution if they find more than an ounce of marijuana on someone, regardless of the surrounding circumstances. Of course, it allows the solicitor to defeat a directed verdict motion without further evidence of intent. *State v. Goldsmith*, 301 S.C. 463, 466-67, 392 S.E.2d 787, 788-89 (1990); *State v. Elmore*, 368 S.C. 230, 235-37, 628 S.E.2d 271, 273-74 (Ct. App. 2006). Partly, the one-ounce line divides misdemeanor possession triable in magistrates court from felony possession triable in circuit court. § 44-53-370(d)(5). But these other purposes served by the rule are no reason to inform the jury about some claimed inference not actually provided by the statute, one which is in any event an unconstitutional comment on the facts.

C. The instruction was not harmless because Appellant's entire, express defense at trial was that he did not intend to distribute the drugs.

"When considering whether an error with respect to a jury instruction was harmless, an appellate court must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting *State v. Kerr*, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)). The relevant question "is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." *Id.* (quoting *Kerr*, 330 S.C. at 145, 498 S.E.2d at 218).

In general, appellate courts should be hesitant to find improper comments on the facts 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). Where the unconstitutional comment goes to an element of the offense, it should be the very rare case where the court can conclude with sufficient confidence that the error did not contribute to the jury's verdict. Since the analysis goes to the possibility of the effect on the jury, these errors will often not be harmless beyond a reasonable doubt because it will be "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." *State v. Thorne*, 237 S.C. 248, 252, 116 S.E.2d 854, 856 (1960). This is one of those cases.

At the very start of his opening statement, trial counsel told the jury: "[Appellant] and I both want and expect you to find him guilty at the end of this trial, but what we want you to do is find him guilty of what he did, not of something you have to guess at." R. 24:19-22. He continued: "They're arguing that you can infer from the circumstances that he intended it not for his own use, but for someone else. Of course, that's what we take issue with." R. 26:24-27:2. He concluded describing the video eventually made State's Exhibit 1 and argued, "Jesse likes to smoke pot. It was his pot. And he was not distributing [and] had no intent to distribute." R. 28:13-17.

In closing arguments, Appellant argued the intent to distribute is all that was missing from the state's case. R. 86:1-11. As noted, Appellant argued expressly:

They can prove possession, and we admit possession because the facts are he was stopped with illegal drugs in Colleton County. It's definitely him. . . . He's not disputing that he had it. . . . But the state wants to go one step further and have you start guessing and being a mind reader and saying maybe or probably [he intended to distribute the marijuana.]

R. 87:7-17. He continued: "The issue, again, is whether he has it for him or he has it for other people or wants to give it other people." R. 92:23-24.

In this context where Appellant's intent was the *only* question in dispute, it cannot be harmless beyond a reasonable doubt that the trial court's instruction had nothing to do with the jury's verdict. The court "directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury." *Stewart*, 433 S.C. at 392, 858 S.E.2d at 813 (quoting *Burdette*, 427 S.C. at 502, 832 S.E.2d at 582). Because the commentary went to the very heart of the case and undermined Appellant's entire defense, Appellant was prejudiced by the unconstitutional instruction.

II. Pursuant to *State v. Orr*, 128 S.C. 279, 122 S.E. 771 (1924), an unconstitutional comment on the facts can be raised on appeal for the first time because it is a limitation on the judicial power itself.

Appellant's trial counsel did not object to the given charges. However, Appellant asserts the general issue preservation requirement does not and should not apply to a trial court's unconstitutional comment on the facts. This is in part because article V, section 21 of the South Carolina Constitution is clear such comments are outside of the judicial power to make: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." This provision "prohibit[s] courts from commenting to the jury on the facts of a case." *Stukes*, 416 S.C. at 499, 787 S.E.2d at 483. "Accordingly, it is not within the province of the court to express an opinion to the jury on its view of the facts." *Id.*; see generally *Norris v. Clinkscales*, 47 S.C. 488, 25 S.E. 797 (1896) (providing a detailed analysis and history of the then-newly adopted strict prohibition on charging the facts in any way and explaining the effect of its amendment from a prior version in which trial courts could "state the testimony").

In *State v. Orr*, 128 S.C. 279, 122 S.E. 771 (1924), the Supreme Court recognized the importance of this rule and its place in the constitution of our state. 128 S.C. at 280, 122 S.E. at 771. Thus, the 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. In *Orr* the Court 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 rule 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 requirements 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 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."); 64 Corpus Juris, *Trial* § 313, at 299 (1933) ("[I]t is the office of the judge to instruct the jury in points of law and of the jury to decide matters of fact."). Therefore, "the strict prohibition of the constitution" must be enforced because it is that important. *Norris*, 47 S.C. 488, 25 S.E. at 810; see *State v. Kennedy*, 272 S.C. 231, 234, 250 S.E.2d 338, 339 (1978) (applying this provision and stating, "A fundamental concept of our system of justice is that every person charged with a crime has an absolute right to a fair and impartial trial").

The rule also fairly represents modern practice in this area because on multiple occasions the Supreme Court has held a jury charge was or would be a comment on the facts despite the issue not being squarely presented on appeal. For example, in *State v. Cartwright*, 425 S.C. 81, 819 S.E.2d 756 (2018), the Court established a three-part test to determine when evidence of a defendant's attempted suicide is admissible as evidence of guilt, affirming the trial court's admission of the evidence in that case. 425 S.C. at 92-93, 819 S.E.2d at 762. It then went further and held that trial courts should not instruct the jury on evidence of a suicide, even though on appeal the defendant challenged solely the admission of the evidence. 425 S.C. at 90, 93, 819 S.E.2d at 760, 762.

Similarly, in *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), the defendant had asserted only that his case fell within the narrower proscription against inferred malice instructions where "there was evidence presented that could reduce, excuse, justify, or mitigate

the homicide," which was first established in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). *Burdette*, 427 S.C. at 493-94, 832 S.E.2d at 577. He did not challenge the wholesale impropriety of an inferred malice charge in every case; nonetheless the Court addressed the issue *after* holding there was evidence to reduce or mitigate the homicide and thus the charge was improper under *Belcher*. 427 S.C. at 495, 501-02, 832 S.E.2d at 578, 582. The Court then forbid the implied malice charge in all cases, even though that was not necessary to decide the case *or* raised by the defendant. 427 S.C. at 495, 501-04, 832 S.E.2d at 578, 582-83.

Orr should also be upheld precisely because the typical issue preservation requirement is not new. The Court at the time of *Orr* regularly refused to address exceptions to jury charges—for issues other than comments on the facts—unless raised to the circuit court. *E.g.*, *Stanford v. Cudd*, 93 S.C. 367, 76 S.E. 986, 986 (1913) ("[W]e have frequently held that we can consider no question which was not presented to or decided by the circuit court."); *see Morrison v. Mut. Benev. Ass'n of Chesterfield Cnty.*, 78 S.C. 398, 59 S.E. 27, 28 (1907)); *Smith v. S.C. & Ga. R.R.*, 62 S.C. 322, 324, 40 S.E. 665, 665 (1902); *State v. Chiles*, 58 S.C. 47, 49, 36 S.E. 496, 497 (1900); *Youngblood v. S.C. & Ga. R.R.*, 60 S.C. 9, 22, 38 S.E. 232, 236 (1901). Nonetheless, the *Orr* Court recognized the general preservation requirement as "a rule of court" that "must give way to the constitutional prohibition" in article V, section 21. 128 S.C. at 280, 122 S.E. at 771. It appears that by "rule of court," the Court was referring to Rule 11 of the Circuit Court Rules (1922), which required parties to submit requests to charge prior to argument. That Rule eventually became Rule 20, SCRCrimP. If the constitutional prohibition prevailed over the old court rule, it prevails over the new one as well. The constitution must be the supreme law; it cannot be altered nor its protections weakened by mere amendment to the rules of court. *Cf. Cooper v. Poston*, 326 S.C. 46, 483 S.E.2d 750, 751 (1997); *see* 12 Corpus Juris, *Constitutional*

Law § 41, at 699 (1917) ("A written constitution is to be interpreted and effect given to it as a paramount law to which all other laws must yield, and it is equally obligatory on individual citizens and on all departments of the government.").

The Court's decision in *Orr* should not be easily discarded now, and thus appellant can challenge the unconstitutional instruction. *See State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) (citing the principle of stare decisis and stating, "we see no reason to revisit [the prior decision] today").

CONCLUSION

Appellant requests this Court hold trial courts should never instruct juries that they might infer a defendant intended to distribute drugs based on the weight of the drugs involved. That instruction is an unconstitutional comment on the facts that unduly emphasizes facts in evidence. It is too likely to influence juries to do precisely what the instruction suggest. In addition, Appellant requests this Court re-affirm *State v. Orr* and hold challenges to unconstitutional comments on the facts can be raised for the first time on appeal.

For the foregoing reasons, he requests this Court reverse his convictions and remand for a new trial where the court does not place its thumb on the scale.



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This 11th day of June, 2026.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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