

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal From York County
The Honorable William H. Seals, Jr., Circuit Court Judge JUL 14 2014
On Writ of Certiorari to the Court of Appeals
Appellate Case No. 2013-001143 **S.C. Supreme Court**

THE STATE,

Petitioner,

vs.

FRANCIS LARMAND,

Respondent.

BRIEF OF PETITIONER

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ISSUE PRESENTED

In reversing the circuit court's denial of Respondent's directed verdict motion, the Court of Appeals failed to use the appropriate standard of appellate review, improperly weighed the evidence and made credibility determinations, and improperly substituted its judgment of the evidence for the circuit court's findings and the jury verdict.

STATEMENT OF THE CASE

A York County jury convicted Respondent and a Co-Defendant on one count of second degree lynching, one count of conspiracy, and one count of pointing and presenting a firearm. In an opinion filed March 13, 2013, the South Carolina Court of Appeals reversed Respondent's convictions, holding the circuit court erred in denying Respondent's directed verdict motion as to all charges. (Appendix, pp. 1-8).

Petitioner filed a Petition for Rehearing, which the Court of Appeals denied by Order filed May 16, 2013. (Appendix, pp. 9-20). Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals on May 29, 2013, which this Court granted by Order dated June 26, 2014.

STATEMENT OF FACTS

On July 16, 2009, the York County Grand Jury indicted Respondent Francis V. Respondent, Jr. ("Respondent"), and his brother-in-law Leo David Lemire ("Co-Defendant"), 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.

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, with 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 he stopped it because it could be the SUV in the BOLO. Respondent was driving the vehicle, and Co-Defendant was the passenger, and both were wearing dark shirts and dark pants. After talking to them, Officer Watson arrested Co-Defendant for pointing and presenting a firearm, and allowed Respondent to leave at that time. (Record on Appeal [R.], pp. 8-21).

The victim, Ryan Lochbaum ("Lochbaum"), testified he knew Respondent prior to April 30, 2009, because he worked for Respondent's locksmith business, Pop-A-Lock, until October, 2008, but only met Co-Defendant once. He stated he never invited Respondent or Co-Defendant to his home in Rock Hill, and to his knowledge, neither individual had ever been there. (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 Respondent, was standing in front of his home and wanted to talk to him. Lochbaum testified he was shocked to see Respondent, and when he realized Respondent was upset, he asked his neighbors for some privacy and they walked away. (R., pp. 96-102).

Lochbaum and Respondent began having a heated discussion. At some point, Respondent broke eye contact and looked off to the side. When Lochbaum looked in the same direction, he saw Co-Defendant approaching him at a fast pace, carrying a “very large handgun.”¹ He testified Co-Defendant got within 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 cocked the gun. When Co-Defendant got closer, Lochbaum grabbed the gun, and as they struggled on the ground for the gun, Respondent put Lochbaum in a choke hold from behind. (R., pp. 101-106, 166).

Lochbaum’s neighbors ran back and tried to get Respondent off Lochbaum and the gun away from Co-Defendant. During the struggle with Co-Defendant, Lochbaum sustained injuries to his knuckles and hands from being dragged across the pavement. Lochbaum and the neighbors eventually got the gun away from Co-Defendant, and Respondent and Co-Defendant fled the scene. (R., pp. 101-111).

¹ The gun was subsequently identified as a .45 caliber revolver.

During cross-examination, Lochbaum was questioned extensively about "call interception," and testified he told the police Respondent tried to lure him to Knights Stadium. The following colloquy occurred:

Q - Isn't it a fact that Mrs. Larmand caught you? She made what's an industry-recognized way of finding someone who's scamming by making a mystery shopper call. Do you know anything about those?

A - I don't know about that.

Q - You say you know everything about the business. Tell the jury what a mystery shopper call is.

A - A mystery shopper, especially when you have a company where you have people in the field, you want to send someone out who's not, who can critique them, but them not know they're being critique (sic) because they act naturally.

Q - Isn't that in fact what Mrs. Larmand had done on that night?

A - No, it's not.

Q - He (Mike Taylor) called you to say, hey, how do I get to Knights Stadium, right?

A - Un-huh

Q - A legitimate question, okay?

A - Right, okay.

Q - And you became suspicious of that call?

A - No, not until they came to my home with a gun - -

Q - Just answer my question. Were you suspicious of that call at that time?

A – Not at all.

Q – How could they be trying to lure you to Knights Stadium if you weren't doing anything wrong? If you weren't going to go there and take the call from - - Mike Taylor?

A – Because I didn't realize until the next day that the fact that Mike Taylor was doing a call in Fort Mill was suspicious. It wasn't until I saw the facts in the correct context that I put two and two together.

Q – Well, you characterize it as they were trying to lure you there. Couldn't it also be characterized from a legitimate business standpoint of Kerriann Larmand of trying to find out who's stealing and who's doing call interception from her?

A – Well, you would have to say she would have to be focusing (sic) on Mike Taylor in order to make that statement.

Q – Exactly.

A – Right.

Q – Which is what she was doing.

A – Mike Taylor was by far her best employee.

Q – And was not Mike Taylor fired the day after this incident?

A – Yes, he was.

Q – Because he was making calls to you, right?

A – No.

Q – Why not?

A – Because Mrs. Larmand overheard me talking to the detectives at the bond hearing. Because they asked me specifically who gave me that information, and I told them.

(R., pp. 129-133).

Whittington testified he lived about five homes 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 Respondent, wore a black shirt and black pants, and appeared to be “kind of edgy.” After Lochbaum and Respondent started talking, Whittington, Edward, and Fivecoat walked down the street, but Whittington thought there might be trouble and observed Lochbaum and Respondent 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.” (R., pp. 21-28).

As Lochbaum and Respondent continued to talk, Whittington saw a second man, later identified as Co-Defendant, 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 Co-Defendant. Whittington testified Co-Defendant was on the ground, Lochbaum was on top of Co-Defendant, and Respondent had Lochbaum in a choke hold. Whittington grabbed Respondent around the waist, and pulled him off Lochbaum while the other men got the gun away from Co-Defendant. Respondent and Co-Defendant then ran down the street and Whittington called the police as he chased them. Respondent and Co-Defendant sped away in their vehicle, which was parked about a half a mile down the road from Lochbaum’s home. (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 Respondent. He saw Respondent push Lochbaum, 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 Co-Defendant, was involved in the scuffle, and Respondent had Lochbaum in a choke hold. Harris initially attempted to put Respondent in a choke hold to get him off Lochbaum, but he let go when he realized a gun was involved. (R., pp. 63-66).

Harris testified Co-Defendant 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 Co-Defendant let go of the gun, Co-Defendant 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 Respondent off of Lochbaum, who could not breathe because of Respondent's choke hold, was purple in the face, and appeared to be dying. He further testified Co-Defendant did not let go of the gun until he kicked him twice in the groin. (R., pp. 63-72).

Edward testified he accompanied Whittington to Lochbaum's home that night, and Lochbaum appeared shocked when Respondent, who appeared to be agitated, unexpectedly showed up. He walked away with Whittington and Fivecoat after Lochbaum and Respondent 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." Co-Defendant was at the bottom below Lochbaum, and Respondent'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 Co-Defendant and Respondent ran down the street. (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 Respondent 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 Co-Defendant was disarmed, Fivecoat followed Co-Defendant and Respondent 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. (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. In the course of that investigation, he spoke to Lochbaum, who told him he thought Respondent had tried to set him up to go to Knights Stadium. As a result of his investigation, he issued additional warrants against Co-Defendant, and issued warrants against Respondent. Herring testified Respondent’s hometown of Kannapolis, North Carolina, is at least an hour drive away from Rock Hill. (R., pp. 229-237).

After the State rested, Respondent 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 Co-Defendant brandished the gun, and thus presented no evidence or testimony he agreed or conspired to have Co-Defendant bring and brandish the gun. The State argued it presented sufficient circumstantial evidence of a common agreement or understanding between Respondent and Co-Defendant to find each responsible for the other’s actions under the hand of one is the hand of all doctrine. The circuit court denied Respondent’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. (R., pp. 258-261).

Respondent 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 Respondent was speaking with Lochbaum, Co-Defendant appeared, Lochbaum jumped on Co-Defendant, and Respondent merely reacted to Lochbaum’s actions by jumping into the fray. He further

argued the State failed to prove the required premeditation. The Stated argued it presented strong circumstantial evidence Respondent's and Co-Defendant'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." (R., pp. 261-266).

Kerriann Larmand ("Kerriann"), Respondent's wife, testified Pop-A-Lock employed Lochbaum for almost three years before she fired him in October, 2008. 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. Her records indicated Pop-A-Lock received a call requesting assistance at Knights 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. Respondent and Co-Defendant waited at Knights Stadium, but neither Mike Taylor nor Lochbaum showed up at the stadium. (R., pp. 279-293).

Respondent testified he sometimes helped his wife with the Pop-A-Lock business, and 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. (R., pp. 340-347). He stated he asked Co-Defendant to accompany him on the sting that night, but he did not know Co-Defendant had a gun with him, and they never conspired or agreed to do anything to Lochbaum. (R., pp. 354-355).

When no one responded to the mystery call at Knights Stadium, he 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, so he called his wife to get the address and directions. He then drove approximately twenty-five minutes to Lochbaum's home, and 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 home, but drove past Lochbaum's home and parked up the street, out of sight. He stated he told Co-Defendant he wanted to talk to Lochbaum, and to stay in the truck. (R., pp. 348-359, 382).

Respondent testified he and Lochbaum exchanged words, and he was walking back to his vehicle when he heard Co-Defendant say, "don't f**k with my family." He saw Co-Defendant and Lochbaum struggling for the gun, and the neighbors running back. He stated he jumped into the pile because there were two guys on Co-Defendant, 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 Co-Defendant. (R., pp. 359-366). Respondent stated he helped Co-Defendant up when the struggle was over, they walked back to their vehicle, and drove away. (R., pp. 366-373).

On cross-examination, Respondent again admitted he did not see any Pop-A-Lock magnets and could not identify any Pop-A-Lock employees at Lochbaum's home when he drove by. He said he wanted to talk with Lochbaum anyway, and parked down the street because he did not want Co-Defendant to get involved. He admitted he walked up and immediately accused Lochbaum of misconduct in front of the group of people there, but stated he never heard or saw Co-Defendant coming behind him. (R., pp. 376-391).

Co-Defendant testified Respondent asked him to help him with a “sting” at Knights Stadium. He had the gun on him at the time, and put it under the seat in Respondent’s vehicle, but said he never told Respondent he had it. He testified they only talked about family on the way to South Carolina, and never discussed Lochbaum. (R., pp. 422-437).

Co-Defendant stated they “didn’t really talk about the mystery call” while they waited in the Knights Stadium parking lot. When they left the parking lot, he agreed to go with Respondent to Lochbaum’s home to see if there were any Pop-A-Lock signs on any car at Lochbaum’s home, or if any Pop-A-Lock employees were there, and he stayed in the vehicle when Respondent went to talk to Lochbaum. He said he heard a loud voice that was not Respondent’s and some swearing, so he grabbed his gun and walked toward the home. (R., pp. 437-445).

As Co-Defendant approached the home, he saw Respondent walking up the street toward the vehicle, with Lochbaum walking behind him. He testified he then saw people running up behind Lochbaum and Respondent 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. (R., pp. 445-449).

After the defense rested, Respondent renewed his previous motion for a directed verdict, which the circuit court again denied. Co-Defendant did not move for a directed verdict. (R., pp. 494-495).

The jury convicted Respondent and Co-Defendant on all charges, and after the jury rendered its verdict, Respondent asked the court to set the verdict aside based on jury charge issues raised during trial. The circuit court denied the motion, and sentenced Respondent and Co-Defendant to ten years incarceration on the second degree lynching conviction, with five year concurrent terms on the criminal conspiracy and firearm convictions. (R., pp. 569-570, 573-602).

The following day, Co-Defendant moved for a new trial on the grounds raised during the trial. After the circuit court denied his motion, both Respondent and Co-Defendant 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 Respondent and Co-Defendant “would be a danger to the community,” (R., pp. 582-585). This appeal followed.

In an *en banc* Opinion filed March 13, 2013, the Court of Appeals reversed Respondent’s convictions, holding the circuit court erred in denying Respondent’s motion for directed verdict because the State failed to present evidence of: 1) premeditation and intent as to the lynching charge; or 2) an agreement as to the conspiracy and pointing and presenting charges. (Appendix, pp. 1-8). The State petitioned for rehearing, and Respondent moved for an appeal bond. (Appendix, pp. 9-18). On May 16, 2013, the Court of Appeals denied the State’s rehearing petition, and by

separate Order issued the same day, granted Respondent's appeal bond motion.²
(Appendix, pp. 19-20).

On May 29, 2013, the State filed a Petition for Writ of Certiorari to the Court of Appeals. This Court granted certiorari by Order dated June 26, 2014.

² Respondent is still out on bond.

ARGUMENT

The Court of Appeals erred in reversing the circuit court's denial of Respondent's directed verdict motion.

The State submits the Court of Appeals: 1) applied an improper standard of appellate review by construing the evidence and its inferences in the light most favorable to the defense, rather than properly construing the evidence in the light most favorable to the State; 2) expressly credited the defense evidence, which the jury implicitly rejected in its verdict, while ignoring significant parts of the State's evidence; 3) improperly made credibility determinations in accepting the defense's evidence; and 4) improperly weighed the evidence. In essence, the Court of Appeals erroneously substituted its judgment for the circuit court's findings regarding the sufficiency of the evidence at the directed verdict stage, and ultimately the jury's verdict.

When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728, 732-33 (2008). In reviewing the denial of a directed verdict motion, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State, and the appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Brown, 402 S.C. 119, 740 S.E.2d 493, 495 (2013); State v. Gilliland, 402 S.C. 389, 741, S.E.2d 521, 525 (Ct. App. 2012). If there is any direct evidence, or substantial circumstantial evidence, reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to

the jury. Brown, 740 S.E.2d at 495; State v. Gentry, 363 S.C. 93, 610 S.E.2d 494, 500 (2005); Gilliland 741 S.E.2d at 525.

A. Standard of Appellate Review

Even though the Court of Appeals expressly acknowledged the limited scope of appellate review on directed verdict issues, it failed to apply it. Rather than consider the evidence and all reasonable inferences in the light most favorable to the State, the Court ignored much of the State's evidence, including the testimony of witnesses to the attack on Lochbaum, instead relying extensively, and almost exclusively, on the testimony of Respondent and Co-Defendant.

The Court of Appeals opinion discusses the testimony of Respondent and Co-Defendant at length, while completely ignoring the State's witnesses' testimony. (Appendix, pp. 2-3, 5-6). In ultimately concluding the record was "devoid of any evidence" tending to prove Respondent and Co-Defendant acted with the premeditated purpose and intent required for the lynching conviction, the Court specifically relies on the defense testimony regarding events immediately preceding the attack on Lochbaum. (Appendix, pp. 5-6). As to the conspiracy and pointing and presenting charges, the Court again cited and relied on the defense testimony in concluding there was no evidence of an agreement to attack Lochbaum. (Appendix, pp. 7-8).

As set forth below, and contrary to the Court of Appeals' findings, the State presented substantial circumstantial evidence and direct evidence in its case-in-chief, much of which was subsequently corroborated by the defense's evidence, from which the jury could reasonably infer premeditation and intent as to the lynching charge, and the

existence of an agreement as to the conspiracy and firearm charges. The Court of Appeals' heavy reliance on the defense's evidence, to the exclusion of significant State's evidence, in finding the circuit court erroneously denied the directed verdict motion is contrary to the appropriate standard of appellate review regarding directed verdict motions.

B. The Evidence and Reasonable Inferences

The fallacy of the Court of Appeals analysis in this case is amply demonstrated by its extremely truncated summation of the State's evidence. According to the Court of Appeals, the State merely presented evidence Respondent and Co-Defendant drove together to Lochbaum's home at midnight; they were uninvited; they parked down the street from Lochbaum's home; they wore dark clothing;³ and they approached the home separately on foot with Co-Defendant carrying a loaded .45 caliber handgun pointed at Lochbaum. (Appendix, p. 5). Contrary to the Court of Appeals' summation, however, when considered **in the light most favorable to the State**, there was ample direct and circumstantial evidence to support the circuit court's denial of Respondent's directed verdict motion.

1. The State's Evidence

The evidence in the State's case-in-chief established Lochbaum worked for Respondent's wife's business (Pop-A-Lock) for several years, but was fired in October 2008. By April 2009, Respondent thought Lochbaum was working with a current Pop-A-

³ To minimize the clothing issue, the Court of Appeals relied on the defendants' explanations of why they were wearing dark clothes. (Appendix, p. 5, fn. 6).

Lock employee to scam the company by intercepting service calls: (R., pp. 97, 121-133, 137-138).

On April 30, 2009, Respondent and Co-Defendant (Respondent's brother-in-law) traveled together over an hour to Knights Stadium in Rock Hill in an attempt to prove Lochbaum was working with a current Pop-A-Lock employee (Mike Taylor) to intercept service calls, and then drove to Lochbaum's home when he did not show up at the stadium. They both wore all black clothing, and Co-Defendant had a "very large," loaded gun. When they arrived at Lochbaum's home around midnight, there was several men standing in the driveway around Lochbaum's van, so they parked around the corner out of sight of the home. (R., pp. 24-26, 33, 35, 64-66, 100-101, 105-106, 167-168).

Respondent approached the home alone, and asked to speak with Lochbaum. After the neighbors in Lochbaum's yard walked off, Respondent argued with Lochbaum about messing with Pop-A-Lock's business, shoved him and started walking down the street away from where the neighbors were standing. The neighbors were suspicious because Respondent suddenly showed up in the middle of the night, wearing dark clothes and acting nervous, so they stood down the street from Lochbaum's home and watched. (R., pp. 24, 27-29, 42-44, 64, 79, 92, 100-101, 177-179, 201, 204, 208-210, 221-222, 224-225). Significantly, the same circumstances the Court of Appeals dismissed as insufficient to support denial of the directed verdict motion were sufficient to make the

neighbors immediately suspect Respondent's intentions, but the Court of Appeals completely ignored the neighbors' testimony about the incident itself.⁴

While Respondent and Lochbaum were arguing, Co-Defendant approached along the dark street, unnoticed by Lochbaum or his neighbors, then suddenly emerged from the darkness and ran toward Lochbaum with the loaded handgun. Co-Defendant cocked the gun and pointed it at Lochbaum, yelling "this is what you get when you f**k with my family." (R., pp. 29-30, 45, 65-66).

Lochbaum defended himself by grabbing for the gun, and as he struggled with Co-Defendant, Respondent put Lochbaum in a choke hold from behind. 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 Co-Defendant to release the gun, he responded, "f**k you, he's f**king with my family." During the struggle for the gun, the trigger was pulled, and the gun would have fired but for a neighbor's finger between the hammer and the firing pin. (R., pp. 65-71, 105-108, 185).

After the neighbors pulled Respondent off Lochbaum, and Co-Defendant finally dropped the gun, Respondent and Co-Defendant ran down the street with Lochbaum's neighbors following them and yelling the police were on the way. Rather than wait on law enforcement to arrive, or even calling law enforcement themselves, however,

⁴ The Court of Appeals opinion referred to the neighbors as mere "bystanders," who "called the police," and did not discuss their testimony, or involvement in the incident, at all. (App., p. 3). In fact, the only testimony the opinion discusses in any depth is the defense's testimony, but then fails to note significant differences between that testimony and the neighbors' accounts of the events. (App., pp. 2-8). This establishes beyond any doubt the extent to which the Court of Appeals ignored the State's evidence.

Respondent and Co-Defendant fled the scene in Respondent's vehicle. (R., pp. 9-12, 32-33, 59-60, 74, 77, 109-110, 186-185, 215-219).

A reasonable inference from the State's evidence regarding the events of April 30, 2009, was that Respondent and Co-Defendant **jointly** traveled for over an hour from Kannapolis, NC, to York County that night to take care of someone they believed was "f**king with [their] family." When their **initial** plan to deal with Lochbaum at Knights Stadium failed, they were so determined to take care of the perceived problem, they took the time to get directions and drive over to Lochbaum's home in the middle of the night, and then parked out of sight of the home. Respondent approached Lochbaum and engaged him in an argument, with Co-Defendant waiting in the darkness.

While Respondent had Lochbaum distracted, Co-Defendant came out of the darkness, pointing a loaded, cocked gun at Lochbaum. Co-Defendant's words as he ran toward Lochbaum spoke volumes about why he and Respondent were there that night: "[t]his is what you get when you f**k with my family," a sentiment he repeated multiple times while Lochbaum and his neighbors attempted to get the gun away from him. (R., pp. 67, 72). When it became clear their plan to deal with Lochbaum had completely failed, they no longer had the "very large" gun and the police were on the way, Respondent and Co-Defendant fled the scene, from which guilt can also be inferred.

2. The Defense Evidence

Respondent and his wife confirmed their plan to lure someone to Knight's Stadium that night, but denied the plan targeted Lochbaum. Respondent ultimately

admitted, however, he suspected Lochbaum was “in cahoots” with one of the company employees. (R., pp. 282-288, 295-297, 300-301, 303, 308-312, 345-353, 358-359).

Respondent testified he and Co-Defendant sat in the Knight’s Stadium parking lot for approximately an hour, but no one showed up to take the “mystery shopper” call. (R., pp. 351-353). After leaving the parking lot, Respondent stopped for gas on Carowind’s Blvd., and called his wife for directions to Lochbaum’s home, allegedly so he could drive by and see if there were any company signs on cars in the driveway, or any company employees there. The drive from the gas station to Lochbaum’s home took approximately twenty-five minutes, and they drove by the home at approximately midnight. (R., pp. 353-354, 381-383, 409). Respondent stated he decided to go by Lochbaum’s home because no one showed up at Knight’s Stadium, but he continued denying Lochbaum was the target, even though he did not seek directions to anyone else’s home that night.

Both Respondent and Co-Defendant testified they never talked about Respondent’s suspicions regarding Lochbaum, or what they would do if they found Lochbaum, even though they were in the car together for almost three hours before arriving at Lochbaum’s home. Significantly, in spite of purportedly having no conversations with Respondent about the purpose of the “mystery shopper” “sting, Co-Defendant knew exactly what to say when he received the confirmation call from a Pop-A-Lock employee. (R., pp. 381-385, 410-412, 432-436, 492-493).

While the Court of Appeals relied almost exclusively on the defense evidence, it ignored significant parts of that evidence less favorable to Respondent, such as his

specifically seeking directions to Lochbaum's home, and **only** Lochbaum's home, and the twenty-five minutes it took for them to get there, which provided even more time for Respondent and Co-Defendant to discuss what they were going to do if they saw Lochbaum. It is certainly possible Respondent and Co-Defendant were together in a vehicle for three hours and **never** talked about the reason for the trip, Lochbaum, or what they were going to do if they found Lochbaum, but that was ultimately a question of fact for the jury.

In addition, when asked on cross-examination why he did not simply call Lochbaum from the gas station and tell him to leave the business alone, Respondent stated he "didn't know [victim's] cell phone number off the top of [his] head," but then conceded his wife, the person he called to get Lochbaum's address and directions to his home, **did** know the number. (R., pp. 353-54, 388). The fact Respondent made no effort to call Lochbaum before showing up at his home, and traveled an additional twenty-five minutes to Lochbaum's home in the middle of the night, supports the implication Respondent and Co-Defendant intended to deal with Lochbaum in person that night, and to do far more than simply "talk" to him.⁵ Again, their intent was a question of fact for the jury.

C. Effect of Court of Appeals Analysis

The gist of the Court of Appeals' conclusion in this case is that the State's case failed because there was no testimonial evidence of an express agreement between

⁵While Respondent did not call Lochbaum **before** going to his home, Respondent did call him **after** Co-Defendant was arrested. (R., pp. 115, 368-369). Clearly, Respondent was able to get Lochbaum's number when it suited him to do so.

Respondent and Co-Defendant to attack and injure Lochbaum because they claimed there was no such agreement. The effect of the Court of Appeals' analysis is that unless the State can produce evidence of actual discussions between co-conspirators while planning the crime, a defendant's testimony (after the State rests its case-in-chief) that he never conspired with his co-defendants, and never intended to commit a crime, will mandate a directed verdict on any charge requiring an agreement, premeditation and intent to commit a crime.⁶ The defendants' concerted actions leading up to and during the crime will be irrelevant because their protestations of innocence and lack of intent will be paramount. Such a result renders the well-established directed verdict analysis, and the applicable standard of appellate review, completely meaningless.

It is undisputed there was a confrontation between Respondent and Lochbaum, which Respondent initiated by going to Lochbaum's home in the middle of the night and calling Lochbaum out. During that confrontation, Co-Defendant came out of the darkness toward Lochbaum with a very large, loaded and cocked gun (.45 caliber revolver), shouting "this is what you get when you f**k with my family." When Lochbaum tried to disarm Co-Defendant, Respondent put him in a chokehold from behind, to the point Lochbaum was purple in the face, and appeared to be dying. Fortunately, Lockbaum's neighbors were there to intervene, and Lockbaum only sustained injuries to his hand during the struggle

⁶Indeed, if the Court of Appeals published opinion stands, criminal defendants will no doubt cite it for this very proposition.

This case ultimately hinged on whether the jury believed Respondent and Co-Defendant were in a car together for over three hours, never discussed what they were going to do if they found Lochbaum, and everything that happened at Lochbaum's home occurred as a matter of happenstance. The jury was present in the courtroom and able to observe the witnesses' credibility, and by rendering guilty verdicts, it clearly determined the claims of innocence by Respondent and Co-Defendant were not credible. In essence, the Court of Appeals weighed the evidence, decided Respondent and Co-Defendant were credible, and substituted its judgment for the jury's verdict based on their testimony alone.

CONCLUSION

Based on the foregoing, Petitioner submits the Court of Appeals decision should be reversed, and Respondent's convictions and sentences reinstated.

Respectfully submitted,

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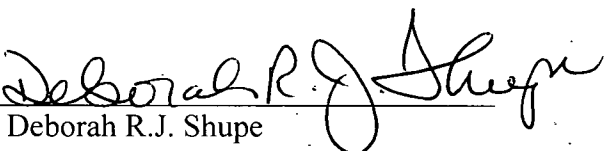
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July 14, 2014

Columbia, SC

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From York County
The Honorable William H. Seals, Jr., Circuit Court Judge
On Certiorari to the Court of Appeals
Appellate Case No. 2013-001143

THE STATE,

Petitioner,

vs.

FRANCIS LARMAND,

Respondent.

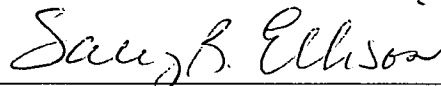
CERTIFICATE OF SERVICE

I, Sally B. Ellison, hereby certify I served the Brief of Petitioner on Respondent by placing three copies in the United States Mail Service, postage pre-paid, addressed as follows:

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I further certify that all parties required by Rule to be served have been served.

This 14th day of June, 2014.


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