THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Edward M. Miller, Circuit Court Judge

Appellate Case No. 2014-001336

State of South Carolina, ... Respondent,

v.

Elijah Fernandez Wilson, ... Appellant.

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

1) Did the trial court commit reversible err in refusing to give a requested charge on spontaneous acts not being sufficient to establish premeditated intent and purpose of mob?

2) Did the trial court err in refusing to grant the Appellant's motion for directed verdict?

STATEMENT OF THE CASE

Elijah Wilson and Brittany Irby were each indicated by grand jury in Greenville County with assault and battery by mob in the first degree pursuant to S.C. Code Section 16-3-220. A jury trial June 9-12, 2014, the Honorable Edward W. Miller presiding. Jeffrey Westson and Katrina Salsbury represented the State. Ernest Hamilton represent Elijah Wilson. Alex Kornfeld represented Irby. The jury returned a verdict of not guilty for Irby. Wilson was found guilty and sentenced to forty years incarceration. Wilson filed a timely notice of appeal. James H. Price, III and J. Falkner Wilkes represent Wilson in the appeal of this case.

ARGUMENT

I. THE COURT ERRED IN REFUSING TO CHARGE THE JURY THAT SPONTANEOUS ACTS DO NOT MEET THE PREMEDITATED ELEMENT OF ASSAULT AND BATTERY BY MOB.

In the present case the prosecution offered testimony that Wilson was in a gang or group known as the Hit Squad. (R. p. 342). Some of the state witnesses testified that they were in a group or gang called the Tough Money Boys. There was testimony of some loose association between the Hit Squad and the Tough Money Boys. (R. p. 516-518). The Tough Money Boys had met earlier that night at Falls Park where prospective members of the group would have to fight group members for two minutes to join the group. (R. p. 410-412). At some point after leaving Falls Park, some of the Tough Money Boys walked to a party. (R. p. 411-414). The party had apparently been announced on social media. (R. p. 133). Wilson and a couple of the other group were also at the party. (R. p. 359). Although there were members of both groups at the party, there was no evidence that they planned to go together or that they went there for any unlawful purpose.

At the party Ronald Brown, *aka*, Lil Ru, a member of the same group as Wilson, created a disturbance by making gang signs. (R. p. 413). Wilson and Brown did not go to the party together, Brown was already at the party when Wilson arrived. (R. p. 359). Brown was asked to leave but apparently remained inside the building. (R. p. 360). As a result of Brown's disturbance and his refusal to leave the building, the party was shut down early. (R. p. 413-414). The announcement of the party's premature end resulted in two girls running up to Brown accusing him of ruining the party. (R. p. 360; 375; 395). This resulted in Brown hitting one or both girls. (R. p. 360; 375; 395; 416). A melee then ensued. In response to Brown hitting one or both of the

girls, the victim (Debron Harrison) grabbed Treveion Anderson who was standing near Brown. (R. p. 395). The victim was then struck and knocked down, after which he apparently got up and took off running. (R. p. 416-417). At this point it appears that everybody started running. (R. p. 396). Fighting continued outside when the victim attempted to jump over a fence where he was grabbed and fatally assaulted by an unknown number of people. (R. p. 136; 396-397).

The record fails to show that any of the events leading up to the death of the victim were planned in advance. Nor does the record show that Wilson, or anyone else, went to the party with a premeditated intent or purpose to cause this victim any harm. Although the prosecution offered testimony that Wilson was one of the people that attacked the victim, state witness Samson Groves testified that at some point in this sequence of events Wilson was attempting to intervene to stop Groves from starting or engaging in the fight. (R. p. 345). At best the record show only that a serious of unexpected events leading spontaneously to fights that ultimately resulted in the death of the victim. Based on these facts Wilson requested a charge on the law relating to the spontaneous nature of the events. (R. p. 651-652). The court denied the charge. (R. p. 652).

In this case Wilson was charged with the offense of assault and battery by mob pursuant to § 16-3-210. Mob is defined specifically as the assemblage of persons for the premeditated purpose of committing an act of violence upon another person:

> "(A) For purposes of this section, a "mob" is defined as the assemblage of two or more persons, without color or authority of law, for the premeditated purpose and with the premeditated intent of committing an act of violence upon the person of another."

S. C. Code § 16-3-210(A).

Based on this Court's prior decision in Larmand the defense requested the court charge the jury that spontaneous acts do not meet the premeditated requirement of assault and battery by mob. (R. p. 651-652; 713). The defense argued that the charge proposed by the court was confusing and requested a charge that intent and purpose cannot be formed spontaneously. The State objected to the defense's request. (R. p. 651-652). The request for charge was consistent with the prior law on lynching holding that: "The premeditated purpose and intent underlying a charge of lynching can not be spontaneous." State v. Larmand, 402 S.C. 184 (Ct. App. 2013).

The state argued that the spontaneous act exception was applicable only to lynching and therefore, inapplicable to the offense of assault and battery by mob. (R. p. 651-652). Although correct in its argument that Section 16-3-220 was repealed, the state and the trial court overlooked that Section 16-3-210 was simultaneously amended to define mob exactly as it had been under Section 16-3-220. *See* Act No. 273, § 5, eff. June 2, 2010:

Lynching/assault and battery by mob

SECTION 4. Section 16-3-210 of the 1976 Code is amended to read:

> "Section 16-3-210. (A) For purposes of this section, a 'mob' is defined as the assemblage of two or more persons, without color or authority of law, for the premeditated purpose and with the premeditated intent of committing an act of violence upon the person of another.

Act No. 273, § 5, eff. June 2, 2010.

In addition to maintaining the premeditation purpose and intent element found in lynching, the legislature maintained the title of the Article 3 of Title 16 as "Lynching". It clearly did not intend to alter the elements required to constitute a mob. Wilson's jury charge request therefore rested soundly in the law.

This Court in Larmand discussed the elements of mob under the lynching law, which it equated to mob under 16-3-230:

> At the time of Larmand's conviction for second-degree lynching, section 16-3-220 of the South Carolina Code defined second-degree lynching as "[a]ny act of violence inflicted by a mob upon the body of another person and from which death does not result. . . ." S.C. Code Ann. § 16-3-220 (2003).[fn4] Section 16-3-230 defined a mob as "the assemblage of two or more persons, without color or authority of law, for the premeditated purpose and with the premeditated intent of committing an act of violence upon the person of another." S.C. Code Ann. § 16-3-230 (2003).[fn5] "Although '[t]he common intent to do violence' may be formed before or during the assemblage, to sustain a conviction for lynching the State must produce at least some evidence of premeditation." State v. Smith, 352 S.C. 133, 137, 572 S.E.2d 473, 475 (Ct.App.2002) (*quoting* State v. Barksdale, 311 S.C. 210, 214, 428 S.E.2d 498, 500 (Ct.App.1993)). "[T]he premeditated purpose and intent underlying a charge of lynching cannot be spontaneous." Id. at 137, 572 S.E.2d at 475.

State v. Larmand, 402 S.C. 184 (Ct. App. 2013).

The charge Wilson requested was appropriate, as the charge relating to mob specifically requires that the assemblage of persons be for the premeditated purpose and intent of harming another. As given, the charge was not a correct statement of the law. Here, Wilson requested a charge sufficient to instruct the jury that the intent underlying the charge of assault and battery by mob cannot be spontaneous. Wilson sought to have the jury charged as did the defense in Larmand. Here, as in Larmand, the charge given without the requested instruction was not a correct statement of the law.

This court has further discussed the premeditation requirement of mob in State v. Smith, 352 S.C. 133, 137, 572 S.E.2d 473, 475 (Ct.App.2002):

> "Mob" is further defined as "the assemblage of two or more persons, without color or authority of law, for the premeditated purpose and with the premeditated intent of committing an act of violence upon the person of another." S.C. Code Ann. § 16-3-230 (1985) (emphasis added); Knox, 340 S.C. at 84, 530 S.E.2d at 888. Although "[t]he common intent to do violence" may be formed before or during the assemblage, State v. Barksdale, 311 S.C. 210, 214, 428 S.E.2d 498, 500 (Ct.App. 1993), to sustain a conviction for lynching the State must produce at least some evidence of premeditation. *See* § 16-3-230; Barksdale, 311 S.C. at 214, 428 S.E.2d at 501 ("The State is required to prove every element of the crime for which an accused is charged.").
>
> Premeditation connotes "willful deliberation and planning" or "conscious consideration" preceding a particular act. Black's Law Dictionary 1199 (7th ed. 1999); *see also* Webster's New World College Dictionary 1134 (4th ed. 1999) (defining legal definition of premeditation as "a degree of planning and forethought sufficient to show intent to commit an act"). By definition then, the premeditated purpose and intent underlying a charge of lynching cannot be spontaneous.

State v. Smith, 352 S.C. 133, 137, 572 S.E.2d 473, 475 (Ct.App.2002).

In Smith three witnesses testified to an assault. One of the witnesses testified that he was talking to Moore, the victim, when Smith inexplicably said "You don't know me like that . . . " and began hitting him. Another witness testified that the victim had "mumbled something" before Smith got out of the truck and hit him. After Smith struck the victim, another individual come across and hit the victim in the back of the head causing the victim to fall to the ground. When the victim attempted to get up, a passenger in Smith's truck exited the vehicle and cut the victim with a blade.

In Smith this Court found that all of the testimonial evidence presented by the State indicated only that the defendant became upset at something the victim said, jumped out of his truck, and hit him. The second individual that came over from across the street and hit victim in the back of the head neither arrived with the defendant nor was with the other two when the

incident began. The court found that this evidence showed only that as the defendant and a second person independently attacked the victim, the passenger in the defendant's truck then got out and attacked the victim as well. The impulsive attack by Smith that was later joined by two others was found insufficient to meet the premeditation requirement of "mob". As in Smith, the facts of this case show no more than an impulsive act by Brown that resulted in a spontaneous melee that led to the victim's death.

In this case the instantaneous nature of the events precludes any finding of premeditation. Young testified that two girls rushed Brown. (R. p. 395). Ianteves Rogers testified that when the two girls ran at Brown, he hit them. (R. p. 375). According to Young, when Brown hit the two girls, the victim "started off" on Treveion Anderson. (R. p. 395). The victim was then struck and knocked down, after which he apparently got up and took off running. (R. p. 458-459). Rogers testified that when the victim got hit, "we chased him". (R. p. 376). Young testified: "I just started running. I pulled him off the fence. I guess we was going to beat him." (R. p. 397). As in Smith, the events were spontaneous individual acts and not the premeditated intent and purpose of Wilson.

In the present case none of the State's witnesses testified they saw any signs of premeditated intent by Wilson or any one in either group in going to the party. Once at the party the events that led to the death of the victim occurred rapidly. The record is devoid of any evidence, direct or circumstantial, proving that Wilson acted with the required premeditated purpose and intent to assemble and injure the victim. [1] As all of the events leading up to the

[1] At trial Ianteves Rogers denied that he heard Wilson say anything as Rogers came out of the building as the victim was being chased. The state offered Roger's prior testimony from family court that Wilson said "You better go get him" as impeachment. (R. p. 379). Chrisitan Williams testified that it was Ronald Brown that said "Y'all better get him". (R. p. 508-509).

victim's death were a spontaneous chain of individual acts, the record fails to satisfy the premeditated requirement necessary to constitute a "mob."

Generally, a defendant is entitled to a requested jury charge as long as it is a correct statement of law on an issue raised by both the indictment and evidence presented at trial. State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989). An appellate court will not reverse the trial [court]'s decision absent an abuse of discretion. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. *Id.* at 570, 647 S.E.2d at 166-67. The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law. *Id.* at 570, 647 S.E.2d at 167; State v. Sams, 410 S.C. 303 (2014). Here, Wilson requested a correct statement of the law, which the trial court refused. That error constituted an error of law and was therefore an abuse of discretion.

To warrant reversal, a trial [court]'s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Commander, 396 S.C. 254, 721 S.E.2d 413 (2011). In order for an error to warrant reversal, the error must result in prejudice to the appellant. *See* State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000); *see also* State v. Wyatt, 317 S.C. 370, 453 S.E.2d 890 (1995) (holding error without prejudice does not warrant reversal). Prejudice here can be shown by the verdict despite the insufficiency of evidence.

In Wilson's case the jury charge as given allowed the jury to consider the spontaneous chain of events as evidence of guilt.[1] The failure of the trial court to give the requested jury

[1] This is even more problematical in light of the court's *hand of one-hand of all* charge, which allowed the jury to find Wilson guilty despite a lack of premeditation on his part if it found premeditation on the part of any member of the two groups.

instructions constitutes reversible error when the charges given fail to afford the proper test for determining the issues. *See* State v. Burkhart, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002). Here, the jury could have considered any act in a chain of spontaneous events as evidence of Wilson's guilt. In light of the lack of evidence as to premeditation of the purpose and intent to injure the deceased, it is likely that the jury did exactly that. This allowed Wilson's conviction without the State having clearly established premeditation on the part of Wilson. Wilson was therefore entitled to have the jury charged that spontaneous acts are insufficient to establish the premeditated purpose and intent requirement for the offense charged. The refusal of that charge constitutes reversible error.

II. THE TRIAL COURT ERRED IN REFUSING TO GRANT THE DEFENSE MOTION FOR DIRECTED VERDICT.[2]

The defense moved for a directed verdict based on insufficiency of the evidence. (R. p. 549; 552; 643.) Wilson specifically raised a lack of evidence sufficient to establish premeditation as necessary element of the offense charged. (R. p. 643). As more fully set forth above, the record fails to establish the assemblage of two or more persons, without color or authority of law, for the premeditated purpose and with the premeditated intent of committing an act of violence upon the person of another as required under Section 16-3-210. Because the necessary premeditated intent and purpose can not be spontaneous Wilson was entitled to a directed verdict of acquittal on the charge. *See* State v. Larmand, 402 S.C. 184 (Ct. App. 2013); State v. Smith, 352 S.C. 133, 137, 572 S.E.2d 473, 475 (Ct.App.2002). Here, the State at best proved only a serious of unplanned individual acts that occurred spontaneously. This fails to constitute evidence of premeditation.

[2]The facts and argument of Issue I are incorporated herein.

In ruling on a motion for directed verdict in a criminal case, a trial court must view the evidence in the light most favorable to the State. *See* State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001). In so doing, the court is concerned with the existence of evidence, not its weight. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). This Court, in reviewing a refusal to grant the motion, must also view the evidence in a light most favorable to the State. State v. McGowan, 347 S.C. 618, 557 S.E.2d 657 (2001). If the record reveals any direct or substantial circumstantial evidence which reasonably tends to prove guilt, then this Court must find the trial court acted properly in submitting the case to the jury. *See* Buckmon, 347 S.C. at 321, 555 S.E.2d at 404; Lollis, 343 S.C. at 584, 541 S.E.2d at 256.

On the other hand, if the State fails to present sufficient evidence of the offense, a defendant is entitled to a directed verdict from the court. State v. Parris, 353 S.C. 582, 578 S.E.2d 736 (Ct.App. 2003) *citing* State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002). Hence, "where the facts of the case, even if proved, do not constitute the alleged criminal conduct, a directed verdict must be granted." State v. Jackson, 338 S.C. 565, 569, 527 S.E.2d 367, 369 (Ct.App. 2000).

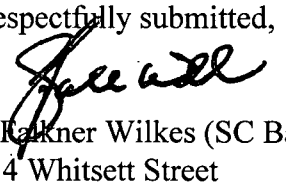
To sustain a conviction, the State must prove every element of the offense charged. State v. Jackson, 338 S.C. 565, 527 S.E.2d 367 (Ct.App. 2000). Here, to establish the offense of assault and battery by mob the state must establish that there was the assemblage of two or more persons, without color or authority of law, for the premeditated purpose and with the premeditated intent of committing an act of violence upon the person of another. Because the intent can not be formed spontaneously, the state failed to establish all of the elements of the

offense. Wilson was therefore entitled to a direct verdict on that basis. The trial court therefore erred in failing to grant Wilson's motion for a directed verdict.

CONCLUSION

Based on the foregoing the conviction of the Appellant should be reversed.

Respectfully submitted,



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I certify that the Brief of Appellant complies with Rule 211 SCACR.

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CERTIFICATE

I certify that on September 28, 2015, I served the Brief of Appellant, Appellant's Reply, and Certificates by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel for the Respondent, and others as indicated below:

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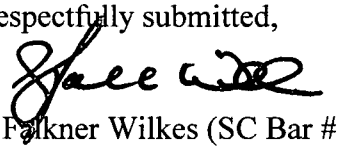
Respectfully submitted,



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