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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of General Sessions

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2014-001336

THE STATE,

Respondent,

v.

ELIJAH FERNANDEZE WILSON,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 East North Street, Suite 325
Greenville County Courthouse
Greenville, SC 29601
(864) 467-8282

ATTORNEYS FOR RESPONDENT

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II.

The trial court properly denied Appellant's directed verdict motion because direct evidence existed to establish each element of the crime charged.

STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Appellant for first-degree assault and battery by mob. (SROA. 1) On June 9-12, 2014, Appellant and his codefendant Brittany Irby proceeded to trial before the Honorable Edward W. Miller and a jury. Ernest Hamilton, Esquire, represented Appellant, Alex Kornfield, Esquire, represented Irby, and Assistant Solicitors W. Jeffrey Weston and Katryna B. Salisbury represented the State. The jury found Appellant guilty and Irby not guilty. (R. 715.) Judge Miller sentenced him to forty years' imprisonment. (R. 729.)

On June 16, 2014, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

On April 20, 2013, police responded to a disturbance involving a large crowd during Camilla Palmer's sweet sixteen birthday party at the West End Community Center in Greenville. (R. 101, lines 11-16; R. 181, line 18-R. 182, line 21.) At approximately 9:30 p.m., Ronald Brown (Lil Ru) began "throwing" gang hand gestures and was asked to leave. (R. 104, lines 1-24; R. 113, line 16-R. 115, line 18; R. 133, line 18-R. 135, line 11.) However, Lil Ru did not leave and when confronted by Palmer and her friend Diamante Jones, he hit both girls. (R. 135, line 21-R. 136, line 8.) Palmer's cousin, Debron Harrison (Victim) intervened and began fighting with Lil Ru. (R. 136, lines 8-11.) Victim took off running and a crowd of more than fifty people chased him behind the building and across the street, where he attempted to climb a fence but was pulled down and beaten and kicked by members of the crowd. (R. 136, line 11-138, line 14; R. 345, lines 23-24; R. 360, lines 2-6; R. 375, line 2-R. 376, line 16; R. 396, line 1-R. 397, line 14.) Victim later died of his injuries. (R. 239, lines 7-14; R. 328, line 12-R. 330, line 12.) An investigation led to multiple arrests, including the arrest of Appellant and codefendant Brittany Irby. (R. 260, lines 17-23; R. 268, lines 4-6.) Appellant was charged with first-degree assault and battery by mob and proceeded to trial. (SROA. 1)

Julian Palmer, brother of Camilla, testified regarding what happened at his sister's party when Lil Ru started causing problems and was asked to leave. (R. 113, line 14-R. 115, line 3.) He testified Lil Ru threatened him after he was asked to leave. (R. 116, lines 2-22.) His cousins restrained him from going after Lil Ru, and when he finally got out the door he was approached by Appellant and another man. (R. 117, lines 9-23.) The men told him, "Nobody is going to touch my boy, Lil Ru," and they got into fighting stances as if they were going to jump him. (R. 118, lines 3-9.)

Camilla Palmer testified about Lil Ru disturbing the party by yelling and throwing hand gestures. (R. 134, line 1-R. 135, line 5.) She explained that she and her friend Diamante confronted him and he hit both girls. (R. 135, line 7-R. 136, line 8.) At that point, Victim and Lil Ru fought, which led to Victim running away with the crowd in pursuit. (R. 136, lines 8-19.) She testified a whole crowd of at least fifty jumped Victim and chased him behind the building. (R. 136, line 20-R. 138, line 3.)

The State called many of the juveniles who had already been adjudicated in family court in relation to the crime. Ianteves Rogers testified he pled guilty to the reduced charge of second-degree assault and battery by mob and was required to testify in Appellant's trial. (R. 369, lines 13-21.) He testified he was a member of the Tough Money Boys and had to fight his way into the group. (R. 370, lines 2-8.) After meeting downtown for an initiation, he and a group of people went to the sixteenth birthday party at the community center. (R. 371, line 9-R. 373, line 1.) At first, people were dancing, but then the party stopped and Lil Ru and everybody with him were ordered to leave. (R. 373, lines 5-9.) He and some of his friends left and went outside. (R. 373, lines 22-25.) He observed two females run toward Lil Ru, saw Lil Ru hit them, and then saw Victim jump in to protect the females. (R. 374, lines 2-8.) He then saw Victim get hit and take off running. R. 374, lines 8-9.) Rogers testified he and two others chased Victim to the parking lot and hit him, and then Victim tried to run as the rest of the crowd surrounded him in the parking lot. (R. 375, lines 2-11.)

During direct examination, the solicitor showed Rogers the transcript from his family court plea proceeding. (R. 378, lines 12-15.) After allowing him to read it, the solicitor asked him about a conversation he had told the family court judge about that he had with Appellant while in pursuit of Victim. (R. 378, lines 12-16.) Rogers recalled

Appellant saying, "You better go get him, too." (R. 378, lines 17-18; R. 380, lines 11-17.) However, he was unsure whether Appellant was talking directly to him or to others in the parking lot. (R. 378, lines 18-20; R. 380, lines 8-17.) Although Rogers claimed he did not remember that happening, he said it was true. (R. 378, line 21-R. 379, line 19.) He remembered telling the family court judge Appellant had a gun out when he said it. (R. 379, line 20-R. 380, line 20.)

Jyquavious Young testified he saw his brother chase Victim across the street and joined him. (R. 396, lines 1-6.) When Victim tried to hop the fence, he pulled him down. (R. 396, lines 8-16.) When asked what they were planning to do when they caught up with Victim, Young said, "I guess we was just going to beat him." (R. 396, lines 17-19.) After he pulled Victim off the fence, everybody else started beating, punching, and kicking him, and Young took Victim's cell phone out of his pocket. (R. 396, line 22-R. 397, line 19.)

Kyzer Thomas testified he chased Victim with about twenty others, saw Appellant strike Victim, and witnessed a lot of people kicking and hitting Victim. (R. 419, line 3-R. 422, line 17.) He told the people to stop because "he didn't look like he was alive," but they did not. (R. 422, line 18-R. 423, line 1.) Treveion Anderson testified he hit Victim and Victim grabbed him and then Victim was attacked by a number of people and tried to escape by running and ended up across the street. (R. 450, line 19-R. 451, line 25.) Anderson testified that Lil Ru was the one who told him to hit Victim. (R. 456, lines 9-20.) When the solicitor pointed out that Anderson said in his family court transcript that Appellant was the main one hitting Victim, he said that was a lie. (R. 464, line 23-R. 465, line 20.) He admitted snitching on somebody would get you jumped and that he was a little bit afraid of Appellant and Irby. (R. 469, line 22-R. 470, line 8.)

Christian Williams testified on cross-examination that Lil Ru was the main one beating Victim and told the others they better get Victim or he would shoot them. (R. 507, line 12-R. 508, line 3.)

After the State rested, Appellant's codefendant moved for a directed verdict, which the trial court denied. (R. 548, line 21-R. 549, line 11.) Appellant did not move for a directed verdict at that time. (R. 549, lines 12-13.) However, after a lunch break Appellant stated to the trial court:

> Your Honor, I want to - - before we proceed, I want to make sure that the record is clear that at the close of the State's case, [Appellant] has moved for a directed verdict on the grounds that there's insufficient evidence to identify him and make him a party to this crime.

(R. 551, lines 17-22.) The trial court accepted the motion and denied it. (R. 551, line 23.) After the defense rested, Appellant made a motion for a directed verdict, arguing the State had failed to establish each and every element of assault and battery by mob, specifically "a motive or a premeditated determination." (R. 643, lines 10-17.) The trial court disagreed and denied the motion. (R. 643, lines 18-19.)

Appellant requested a jury charge on independent acts of a conspiracy or group, and the trial judge agreed to consider it overnight. (R. 644, lines 3-17.) The State pointed out that Appellant's proposed charge including language about the premeditated purpose and intent underlying the charge referred to lynching, not assault and battery by mob. (R. 652, lines 1-5.) The trial court assured Appellant the content of what he asked for was going to be charged but reminded him that lynching was repealed and replaced with assault and battery by mob. (R. 652, lines 11-17.) Appellant made no further argument.

ARGUMENT

I.

Appellant's issue regarding jury charges is not preserved for review, but even if preserved, the trial court properly excluded the exact wording of Appellant's request to charge the jury that spontaneous acts do not meet the premeditated element of assault and battery by mob because it determined the content of what Appellant asked for would be charged.

Appellant argues the trial court erred by refusing to charge the jury that spontaneous acts do not meet the premeditated element of assault and battery by mob. Initially, this issue is likely not preserved for appellate review. After Appellant handed the trial judge his proposed instruction, the trial judge told him, "I think the content of what you've asked for . . . is going to be charged." (R. 652, lines 11-12.) Besides clarifying the lynching statute in Appellant's proposed charge had been repealed and replaced by assault and battery by mob, Appellant made no further objection once the trial court told him the content of what he requested was going to be charged. Additionally, Appellant made no objection to the exclusion of a charge on spontaneous acts after the charges were given. Because it appears Appellant accepted that the charges the trial court gave were sufficient to contain what he requested, this issue is not preserved for review by this Court. However, if this Court finds the issue is preserved, the trial court charged the current and correct law. Furthermore, even if the trial court erred, Appellant has not shown any prejudice. Therefore, this Court should affirm the trial court's decision.

Preservation

Error in jury instructions is not preserved for review if the defendant fails to object. See Rule 20(b), SCRCrimP (stating failure to object to the giving or failure to

give a jury instruction shall constitute waiver of the objection); State v. Whipple, 324 S.C. 43, 52, 476 S.E.2d 683, 688 (1996) (noting the failure to object to a charge as given, or to request an additional charge when given an opportunity to do so, constitutes a waiver of the right to complain on appeal).

After the trial court assured Appellant its charges would contain the content he was requesting, it was incumbent upon Appellant to bring it to the trial court's attention if this was not done. After the trial judge charged the jury, he asked if there were any exceptions or objections from any of the parties. Appellant stated that he "may have omitted the request for charge for responsibility." (R. 713, lines 14-15.) The trial judge replied that it was all contained in the charge he gave and that he did not misstate or omit anything in the law as Appellant submitted. (R. 713, lines 16-19.) At no time did Appellant object that the trial court did not charge his requested "spontaneous act" language.

Merits

"Generally, the trial judge is required to charge only the current and correct law of South Carolina." State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. Here, the charge was a current and correct statement of the law on assault and battery by mob in South Carolina.

Appellant requested a jury charge he described as "instructions on independent acts of a conspiracy and group." (R. 644, lines 3-5.) The State did not object. The State requested a charge on assault and battery by mob that the intent can be formed in an instant. The trial court asked for both proposed charges to be submitted the following morning. Appellant objected to the State's proposed charge. The trial court made no

ruling on the State's proposed charge, and it is unclear whether the trial court used any part of what the State proposed. However, no language including "intent can be formed in an instant" was contained in the charges the trial court gave the jury.

Appellant's proposed charge included the statute itself and two statements from State v. Smith, 352 S.C. 133, 137, 572 S.E.2d 473, 475 (Ct. App. 2002): "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," and "The premeditated purpose and intent underlying the charge of lynching cannot be spontaneous." (Defendant's Request to Charge.) The following exchange took place:

> The Court: I'm more concerned about the common intent to do violence. I think that's covered in the one that you gave me.
>
> [The State]: That's correct, Your Honor.
>
> The Court: So I think the content of what you've asked for, Mr. Hamilton, is going to be charged.
>
> Mr. Hamilton: Your Honor, but you're saying that the—this lynching—it's under the statute for lynching.
>
> The Court: Lynching was repealed. It was replaced by this assault and battery by mob. It's the same concept, but the statute is gone.
> Okay. Anything else?

(R. 652, lines 7-18.) (emphasis added.) Based on this exchange, it appears Appellant got what he requested when the trial court told him the content he asked for was going to be charged and he made no further argument when asked if there was anything else.

The trial judge instructed the jury:

> Now, for purposes of this offense, 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. To constitute a mob under this statute, the assemblage need not have been formed with the premeditated purpose and intent of committing an act of violence on that person or another–of the person of another, but the required premeditated purpose and intent may be formed after the participants are assembled. And any act of violence inflicted by a mob upon the body of another person which results in the death of the person shall constitute the crime of assault and battery by mob in the first degree.

(R. 710, line 15-R. 711, line 3.) This charge reflects the direct wording of the statute plus language from State v. Barksdale, 311 S.C. 210, 216, 428 S.E.2d 498, 501 (Ct. App. 1993). Nothing in the charge is contradictory to the notion that the premeditated purpose and intent cannot be spontaneous. Indeed, the language Appellant requested from State v. Smith states that the intent can be formed before or during the assemblage in addition to its conclusion, based on the definition of premeditation, that "the premeditated purpose and intent underlying a charge of lynching cannot be spontaneous." 352 S.C. 133, 137, 572 S.E.2d 473, 475 (Ct. App. 2002). And State v. Larmand, 402 S.C. 184, 191, 739 S.E.2d 898, 902 (2013) *cert. granted*, also contains both types of language.

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Commander, 396 S.C. 254, 270-71, 721 S.E.2d 413, 422 (2011).

> A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. The law to be charged must be determined from the evidence presented at trial. When reviewing the trial court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant.

Id. "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." State v. Dickey, 394 S.C. 491, 512, 716 S.E.2d 97, 108 (2011).

> When a party requests the trial court charge a correct and applicable principle of law, the court must charge it. However, the court is not required to use any particular language in explaining the principle. When reviewing a challenge to a trial court's refusal to use the specific language in a request to charge, an appellate court must consider the charge as a whole in evaluating whether the trial court charged the correct law applicable to the case. Therefore, there is no error of law in refusing to give a specific request to charge where (1) the charge requested is an incorrect statement of law, or (2) the trial court used language different from that requested, but considering the charge as a whole, the charge as given stated the requested principle of law correctly.

State v. Marin, 404 S.C. 615, 620, 745 S.E.2d 148, 151 (Ct. App. 2013) (emphasis added). "The substance of the law is what must be charged to the jury, not any particular verbiage." State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011).

When considered as a whole, the jury charges the trial court gave here contain the correct definition and adequately cover the law of assault and battery by mob. Additionally, the charges afford the proper test for determining the issues. Our case law, including Barksdale, Smith, and Larmand, make clear the premeditation element of lynching (now assault and battery by mob) may be formed before or during the assemblage. This language was present in the trial court's instructions to the jury and was sufficient to provide the jury the proper test to determine whether Appellant committed the crime of assault and battery by mob based on the statutory definition. Thus, no prejudicial error is present. Dickey, 394 S.C. at 512, 716 S.E.2d at 108. Appellant argues "[p]rejudice can be shown by the verdict despite the insufficiency of the

evidence." (App.Br.8.) However, as discussed further in the directed verdict section of the brief, sufficient evidence was presented to demonstrate premeditated purpose and intent based on the testimony of numerous witnesses. The jury was presented with sufficient evidence to have reached the verdict it reached.

II.

The trial court properly denied Appellant's directed verdict motion because direct evidence existed to establish each element of the crime charged.

Appellant argues the trial court erred in refusing to grant his directed verdict motion. Specifically, he argues the State failed to establish evidence of premeditation as required by the statute for assault and battery by mob. On the contrary, the State presented evidence establishing the assemblage of two or more persons for the premeditated purpose and intent of committing an act of violence upon the person of another as required by statute. Thus, sufficient evidence established each element of the crime, and the trial court properly denied the directed verdict motion and submitted the case to the jury for its resolution. This Court should affirm the trial court's decision.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. Id. "If there is *any direct evidence* or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury." Id. at 292-93, 625 S.E.2d at 648 (emphasis added). The trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. State v. Hernandez, 382 S.C. 620, 625-26, 677 S.E.2d 603, 605-06 (2009). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Ladner, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007).

Appellant was charged with first-degree assault and battery by mob.

> (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.
>
> (B) Any act of violence inflicted by a mob upon the body of another person, which results in the death of the person, shall constitute the felony crime of assault and battery by mob in the first degree and, upon conviction, an offender shall be punished by imprisonment for not less than thirty years.

S.C. Code Ann. § 16-3-210 (Supp. 2014).

In State v. Larmand, 402 S.C. 184, 192, 739 S.E.2d 898, 902 (2013) *cert. granted*, this Court found the trial court erred in denying Larmand's motion for a directed verdict. This Court found the record devoid of any evidence tending to prove Larmand and his codefendant, Lemire, acted with the premeditated purpose and intent required to sustain a conviction. Id. The evidence presented by the State to show premeditation included Larmand and Lemire driving together to the victim's house at midnight uninvited, their parking down the street from the house, their wearing dark clothing, and their separate approaches to the house on foot with Lemire carrying a gun and pointing it at the victim. Id. at 191, 739 S.E.2d at 902. This Court considered the testimony that Larmand told Lemire to stay in the car and was not aware he had a gun. Id. at 191-92, 739 S.E.2d at 902. Likewise, Lemire testified Larmand told him to stay in the car and did not know he had a gun. Id. This Court noted none of the State's witnesses testified they saw any signs of premeditated intent between Larmand and Lemire to harm the victim. Id.

In State v. Smith, 352 S.C. 133, 137, 572 S.E.2d 473, 475 (Ct. App. 2002), this Court also found the record devoid of any evidence tending to prove Smith acted with the premeditated purpose and intent required to sustain a conviction. The evidence in Smith

showed he became upset at something the victim said, jumped out of the truck, and hit him. Id. at 138, 572 S.E.2d at 475. Furthermore, the evidence showed Tori Rawlinson, the other person who struck the victim, came from across the street and was not with Smith. Id. The evidence showed the attacks were independent and that Smith attacked the victim impulsively. Id.

This Court distinguished Smith from State v. Barksdale, 311 S.C. 210, 216, 428 S.E.2d 498, 501 (Ct. App. 1993). The facts in Barksdale are very similar to the case at hand. It involved an altercation outside a nightclub, in which the defendants were involved in a verbal confrontation in which the victim intervened. The defendants took turns assaulting the victim, who later died from his injuries. This Court noted the defendants' intent in assembling was transformed from a lawful purpose to an unlawful one when they returned to the club with the expressed purpose and intent to commit an act of violence upon the victim. Id. Here, we have similar facts. Lil Ru hit the two girls and Victim intervened. He and Lil Ru fought, but then Victim ran away. At that point, the altercation had ended. However, the fact that people chased Victim and beat him after the original fight was over transformed any lawful purpose into an unlawful one.

In Barksdale, this Court noted that "mob" has been held practically synonymous with "riot." 311 S.C. at 213, 428 S.E.2d at 500. This Court noted the Supreme Court has defined riot as:

> [A] tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist each other against anyone who shall oppose them, and putting their design into execution in a terrific and violent manner, whether the object was lawful or not.

Id. at 214, 428 S.E.2d at 500 (quoting State v. Albert, 257 S.C. 131, 134, 184 S.E.2d 605, 607 (1971), *cert. denied,* 409 U.S. 966 (1972)).

Here we have several of the State's witnesses, many of whom participated in the crime, who testified regarding signs of premeditated intent. The State presented evidence that Appellant and others—including his codefendant Brittany Irby, Lil Ru, and a number of juveniles who testified—chased, beat, and kicked Victim. Ianteves Rogers recalled Appellant holding a gun and saying, "You better go get him, too," while he was in pursuit of Victim. (R. 378, line 17-R. 380, line 20.) When asked what they were planning to do when they caught up with Victim, Jyquavious Young said, "I guess we was just going to beat him." (R. 396, lines 17-19.) Christian Williams testified Lil Ru told the others they better get Victim or he would shoot them. (R. 507, line 12-R. 508, line 3.) Camilla Palmer testified a whole crowd of at least fifty jumped Victim and chased him behind the building. (R. 136, line 20-R. 138, line 3.) Kyzer Thomas testified he chased Victim with about twenty others, saw Appellant strike Victim, and witnessed a lot of people kicking and hitting Victim. (R. 419, line 3-R. 422, line 17.) He told the people to stop because "he didn't look like he was alive," but they did not. (R. 422, line 18-R. 423, line 1.)

All of the above testimony provided direct evidence establishing the elements of assault and battery by mob. Premeditation was shown by the statements made by Appellant and Lil Ru that the others better get him while also either saying or implying they would shoot the others if they did not comply. The fact that the group continued beating Victim even after Thomas told them to stop because he did not look like he was alive indicates "forethought sufficient to show intent to commit an act" or in this case, continue an act. See Smith, 352 S.C. at 137, 572 S.E.2d at 475 (defining premeditation as "a degree of planning and forethought sufficient to show intent to commit an act").

Unlike Larmand and Smith, the record here is not devoid of any evidence tending to prove Appellant acted with the premeditated purpose and intent required to sustain a conviction. As is clear from our case law, including Barksdale, Smith, and Larmand, the premeditation element of lynching (now assault and battery by mob) may be formed before or during the assemblage. Even if the group did not determine ahead of time it was going to beat Victim, the evidence shows the crowd began working together to commit an act of violence once members of the group, including Appellant, encouraged others to participate in the beating and continued beating Victim even after he tried to get away. Premeditation was established, and the trial court correctly denied the directed verdict motion and submitted the case to the jury for its resolution.

CONCLUSION

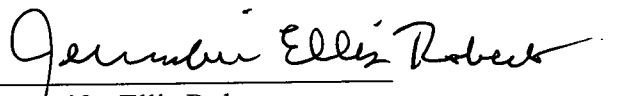
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY: 
Jennifer Ellis Roberts
Bar # 79818

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY: Jennifer Ellis Roberts
Jennifer Ellis Roberts
Bar # 79818

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

James H. Price, Esquire
James H. Price, III, P.A.
644 East Washington Street
Greenville, SC 29601

J. Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601

I further certify that all parties required by Rule to be served have been served.
This 28th day of September, 2015.

Angela Bennett

ANGELA BENNETT
Administrative Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727