

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Honorable Alex Kinlaw Jr., Circuit Court Judge

Appellate Case No. 2018-001769

THE STATE,

Respondent,

v.

OLANDIO R. WORKMAN,

Appellant.

PETITION FOR REHEARING

On July 13, 2022, this Court issued a published opinion reversing Appellant Olandio Workman's conviction for Domestic Violence of a High and Aggravated Nature. State v. Workman, Op. No. 5922 (S.C.Ct.App. filed July 13, 2022) (Howard Adv.Sh. No.25 at 21). The Court held Workman was prejudiced by the trial court's refusal to define the offense of Domestic Violence in the Second Degree within in its charge on the lesser-included offense of Domestic Violence in the First Degree. Because DV 2nd may, in some circumstances, form an element of DV 1st, the Court held the trial court's charge on DV 1st was incomplete. The Court held that Workman was prejudiced because the jury was not given the option of finding him guilty of DV

1st under § 16-25-20 (B)(5). Pursuant to Rule 221(a) of the South Carolina Appellate Court rules, Respondent respectfully petitions this Court for rehearing.

While the State disagrees with the Court's holding that the trial court abused its discretion, the State's argument on this issue is sufficiently laid out in its brief and will not be repeated here. Rather, the State's primary purpose in filing this petition is to respectfully ask this court to reconsider its ruling finding Workman was prejudiced by the charge. Even if the trial court should have included a definition of DV 2nd within its charge on DV 1st, the omission did not contribute to the verdict in this case because: 1) the un rebutted evidence showed Workman used a gun; and 2) even if the trial court had defined DV 2nd, the jury would not have found guilt under that subsection.

1. The question whether a jury charge is prejudicial is a fact-specific question.

The Court's opinion in this case focused primarily on the prejudice analysis. Noting the State's reliance on State v. Bunnell, 455 S.E.2d 426 (N.C. 1995), the Court surveyed relevant South Carolina precedent and out-of-state law addressing the "skip rule," which stands for the proposition that when a jury is given the choice between a charged offense and two lesser-included offenses and the trial court gives an erroneous instruction on the lowest offense, the jury's finding of guilt on the highest offense will render the error harmless. The Court explained that this exact scenario is not presented in this case because DV 2nd was not charged as a lesser-included offense, but rather stood as a potential basis for guilt as an element of DV 1st. Nonetheless, the Court focused almost exclusively on the State's argument that the jury's verdict of guilt of DVHAN rendered the defect in the charge on DV 1st harmless.

However, there is much more to the prejudice analysis in this case. The question whether an erroneous jury instruction is prejudicial to a defendant depends on the evidence presented and

arguments of counsel. The question is "whether the erroneous jury charge affected the jury's deliberations" and, thus, contributed to the verdict. State v. Bowers, Op. No. 2019-001776, 2 (S.C. Sup.Ct. filed June 29, 2022) (Howard Adv.Sh. No.23 at 23). To say that an error did not contribute to the verdict is to find that error **"unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."** Arnold v. State, 309 S.C. 157, 166, 420 S.E.2d 834, 839 (1992). The significance of the erroneous charge must be judged based on its probable impact on "reasonable jurors, when measured against other evidence considered by those jurors" Id. "Harmless error review looks to the basis on which the jury **actually rested its verdict."** Lowry v. State, 376 S.C. 499, 508, 657 S.E.2d 760, 765 (2008) (emphasis added).

Near the end of its opinion, this Court wrote the following: "Because the supreme court has not opted to find the failure to give instructions harmless when the jury convicted on the higher offense, we will not find the error in failing to give a complete charge on the lesser included offense harmless here." State v. Workman, Op. No. 5922 (S.C.Ct.App. filed July 13, 2022) (Howard Adv.Sh. No.25 at 37). Respectfully, this passage gives the reader the impression that an error in a jury instruction on a lesser offense cannot be harmless. As discussed above, a finding of prejudice from an erroneous jury instruction will always turn on the facts of each particular case. While it may not always be appropriate to find error harmless when a trial court gives an incomplete charge on a lesser-included offense, neither is it appropriate to always find such an error prejudicial. While the jury's verdict for DVHAN strongly indicates that Workman was not prejudiced by the instruction on the lower charge, there is even greater support to be found in the larger context of the record.

2. The un rebutted evidence showed Workman used a gun while committing domestic violence against Ms. Workman.

The unrebutted evidence presented in this case was that Workman used a firearm while assaulting Ms. Workman. Ms. Workman testified that Workman threatened her with guns while he beat her, and at one point struck her with the butt of a gun. (R.299). During his cross-examination of Ms. Workman, defense counsel did not question Ms. Workman's testimony that Workman threatened and hit her with a gun. (R.319). Again, during his cross-examination of the investigator, defense counsel merely questioned the details of the manner in which the gun was used without rebutting the fact. (R.270). Workman did not present any contradictory evidence.

In his closing argument, defense counsel more or less ignored the evidence that Workman used a gun. He argued: "And I'm, frankly, not going to talk about the gun very much. Because y'all are either going to decide the gun was there or not. And I think I made it pretty clear that these guns belong to Ms. Workman. She knew where they were. They were in the room she was in. So that whole thing gives me pause. She was in the house that whole day by herself with the guns." (R.488).

That the jury found Workman guilty of DVHAN shows they believed he used a gun. The facts did not support a conviction for DVHAN under § 16-25-65 (A)(1) or A(3). The jury therefore must have believed Workman's conduct "would reasonably cause a person to fear great bodily injury or death" to find him guilty under § 16-25-65 (A)(2), as the solicitor argued. (R.454). Based on the evidence presented in this case, the only conduct reasonably supporting a conviction under this section would be Workman's use of a gun, as the solicitor argued. (R.p.455). Thus, the facts of this case, when applied to the law, tend strongly to show the jury properly found Workman guilty of DVHAN on that basis. Accordingly, it is not only the jury's finding of guilt of the greater offense which proves harmlessness. Rather, it is the greater factual

and legal context that shows the jury did not even reach DV 1st.¹ This was the "actual basis" for the jury's verdict. See Lowry, 376 S.C. at 508, 657 S.E.2d at 765. Nothing in the omitted charge would have changed it.

3. Even if the trial court defined DV 2nd, the jury would not have found guilt under that subsection.

Even if the jury would have reached DV 1st, they would not have found guilt under §16-25-20 (B)(5), the subsection at issue in this case. If anything, the jury would have found Workman guilty under § (B)(4), which provides that a person is guilty of DV 1st if he "uses a firearm in any manner" while committing domestic violence. This is what the solicitor argued. (R.458).

Ms. Workman's injuries as detailed in this case did not meet the statutory definition of moderate bodily injury. S.C. Code Ann. § 16-25-10 provides: "Moderate bodily injury" means physical injury that involves prolonged loss of consciousness or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ or injury that requires medical treatment when the treatment requires the use of regional or general anesthesia or injury that results in a fracture or dislocation. **Moderate bodily injury does not include one-time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that do not ordinarily require extensive medical care.**" (emphasis added). Ms. Workman's injuries consisted of bruises and facial swelling, for which she was seen at her home by first responders. She did not go to the hospital or receive any follow-up treatment. (R.274; 305; 311). The definition of moderate

¹ As the Court notes in its opinion, the jury sent a note asking whether they were required to consider DV 1st "if one point is met" as to DVHAN. (R.549). This further supports a finding of harmlessness.

bodily injury seems to preclude that finding under the facts of this case. Even defense counsel made a point in closing that her injuries should have been "much worse" if her story was true. (R.484). Workman could not have been guilty of DV 1st under §16-25-20 (B)(5) and could not have been prejudiced by the court's failure to elaborate on this portion of the statute.

In footnote 1 of its opinion, the Court noted that the solicitor referenced other aggravating factors in its closing argument: that the offense occurred in the presence of a minor and during the commission of a kidnapping. The Court points out that the solicitor referenced these factors first in relation to their significance as aggravating factors to support a finding of DVHAN. The Court then points out that the solicitor also referenced these aggravating factors in relation to DV 1st, where they may be used as enhancers in conjunction with the presence of moderate bodily injury.

While the solicitor did briefly and summarily mention that these aggravating factors when discussing DV 1st, this was apparently unintentional. The solicitor did not argue that Ms. Workman suffered moderate bodily injury, a necessary predicate for these factors to have any significance in relation to DV 1st. He mentioned these aggravating factors in passing, noting that he had already discussed these factors in his argument related to DVHAN.

The solicitor had just argued explicitly that Workman met the elements for DV 1st under §(B)(4) by virtue of his use of a gun: "[T]here's multiple ways to prove it. I want you to look at number four. The person uses a firearm in any manner **That's what the defendant did. The State meets that element.**" (App.458, lines 2–11). By contrast, the solicitor did not argue that the State met the elements of (B)(5). He stated: "Likewise, if the offense is committed in the presence or [while being] perceived by a minor. We've already gone over that. Also, C, the offense is committed during the commission of a kidnapping. That's what we're going to discuss

right now." (App.458, lines 12–16). This passing reference was the extent of the solicitor's argument relating to (B)(5).

The solicitor was not arguing for guilt under this subsection, and likely did not really intend to quote from it. He barely mentioned the fact that the offense was perceived by a minor, noting he had "already gone over that" when discussing DVHAN. Likewise, his passing reference to kidnapping was not an argument in earnest that this aggravating factor was present in the context of DV 1st. Rather, the solicitor merely noted that kidnapping "[is] what we're going to discuss right now" because Workman was charged with kidnapping. The solicitor immediately went on to discuss the elements of kidnapping. Accordingly, while the solicitor did briefly mention these aggravating factors in passing while discussing DV 1st, he did not argue that Workman was guilty under subsection (B)(5) of the DV 1st statute, and a reasonable juror would have understood the comments in that way. As noted above, the solicitor never argued Ms. Workman suffered moderate bodily injury and never uttered the words "moderate bodily injury" or "Domestic Violence in the Second Degree" during his entire closing argument. The State respectfully disagrees with the Court's finding that the State argued "it met the elements [of DV 1st] in ways other than the use of a firearm" But regardless of the solicitor's argument, the facts did not support a finding of guilt under (B)(5) and so the jury could not reasonably have convicted under that subsection.

4. This case is distinguishable from Casey and Lowry.

In its opinion, the Court relied on State v. Casey, 305 S.C. 445, 409 S.E.2d 391 (1991), and State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993). This case is distinguishable. In Casey, the trial court refused to instruct the jury on involuntary manslaughter despite evidence that the defendant and victim struggled over a gun, and in spite of the legal maxim that trial

courts should give requested charges on lesser included offenses if there is any evidence whatsoever that the defendant committed the greater rather than the lesser crime. Casey was entitled to an involuntary manslaughter charge because the evidence supported the charge.

Likewise, in Lowry, the supreme court reversed Lowry's conviction because the trial court refused to give a charge on voluntary manslaughter. This was because the evidence supported a finding that Lowry acted in the heat of passion, but the jury was not given the option to consider the lesser offense. The court explained that even "though the jury was not convinced that Lowry acted in self-defense, the jury could have discerned, consistent with the evidence, that there was sufficient legal provocation and heat of passion to find Lowry guilty of voluntary manslaughter." State v. Lowry, 315 S.C. 396, 400, 434 S.E.2d 272, 274 (1993).

In this case, Workman was entitled to a charge on DV 1st because there was evidence tending to show he committed DV 1st rather than DVHAN; the jury could have found he did not act with extreme indifference towards the value of human life despite using a gun. But that evidence had nothing to do with moderate bodily injury or DV 2nd, the aggravating factor laid out in subsection (B)(5) and requested by Workman. In fact, there was only one aggravating factor that could have supported guilt for DV 1st: the use of a gun "in any manner," which is proscribed by subsection (B)(4). Workman was not prejudiced by the trial court's refusal to define DV 2nd because Workman would not have been found guilty under subsection (B)(5) under the evidence presented in this case. The jury could not "have discerned, consistent with the evidence" that Workman was guilty under subsection (B)(5) rather than (B)(4) or DVHAN. See Lowry, 315 S.C. at 400, 434 S.E.2d at 274. This distinguishes this case from Lowry and Casey and precludes a finding of prejudice.

CONCLUSION

In this case, Workman was not prejudiced because, based on the evidence, arguments of counsel, and the verdict itself, the omission of the definition of DV 2nd did not contribute to the jury's verdict finding Workman guilty of DVHAN. This Court should grant respondent's petition and affirm Workman's conviction for DVHAN.

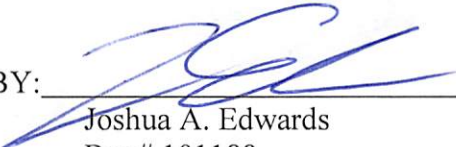
Respectfully submitted,

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July 28, 2022

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APPEAL FROM GREENVILLE COUNTY
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Hon. Edward W. Miller, Circuit Court Judge

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PROOF OF SERVICE

I, Leigh Ann Stone, certify I have served the within Petition for Rehearing on Appellant by sending an electronic copy via email to the address listed in AIS for the following individual:

Kathrine H. Hudgins
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.
This 28th day of July, 2022.



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From: Leigh Ann Stone
Sent: Thursday, July 28, 2022 4:04 PM
To: 'khudgins@sccid.sc.gov'
Cc: Josh Edwards; William Blicht; 'Stock, Chris'
Subject: State v. Olandio R. Workman (2018-001769)
Attachments: WORKMAN, Olandio R. - Petition for Rehearing (03060547xD2C78).PDF

Good Afternoon Ms. Hudgins,

Attached please find a copy of the Petition for Rehearing in The State v. Olandio R. Workman (2018-001769). This petition will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

Please let us know if further information is needed.

Thank you,

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