STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEMETRIUS DEON THOMPSON,

APPELLANT

APPELLATE CASE NO. 2021-001254

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to charge the lesser included offenses of assault and battery first, and second degree?

STATEMENT OF THE CASE

In May of 2021, the Beaufort County Grand Jury indicted Appellant, Demetrius Deon Thompson, for attempted murder, indictment #2020[1]-GS-07-02336. In September of 2021, the Beaufort County Grand Jury indicted Appellant for possession of a weapon during the commission of a violent crime, indictment #2021-GS-07-01405. On October 18, 2021, a jury was selected and on October 20, 2021, Appellant proceeded to jury trial before the Honorable Carmen Mullen. Melissa G. Rogers represented Appellant at trial. Daniel Gourley and Hunter Swanson prosecuted the case. The jury returned verdicts of guilty. Judge Mullen sentenced Appellant to twelve (12) years for attempted murder and five (5) years concurrent for the weapon charge. A timely notice of intent to appeal was served on October 27, 2021. This appeal follows.

[1]It is unclear why the indictment has a 2020 number when the grand jury true billed the indictment in May of 2021.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "An appellate court will not reverse the trial judge's decision regarding jury charges absent an abuse of discretion." State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct.App.2006). Generally, the trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). A charge to the jury is correct if it contains the correct definition of the law when read as a whole. Id. at 665, 594 S.E.2d at 472-73.

"In criminal cases, appellate courts sit to review only errors of law." State v. Sams, 410 S.C. 303, 307, 764 S.E.2d 511, 513 (2014); see also State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). An appellate court is bound by a trial court's factual findings unless they are clearly erroneous. Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

"The law to be charged to the jury is determined by the evidence presented at trial." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense." Sams, 410 S.C. at 308, 764 S.E.2d at 513; see also State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986); *State v. Gourdine*, 322 S.C. 396, 472 S.E.2d 241 (1996). "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. "In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant." Sams, 410 S.C. at 308, 764 S.E.2d at 513 (citing State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)). "The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense." Id. (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995); State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994)).

ARGUMENT

The trial judge erred in refusing to charge the lesser included offenses of assault and battery first, and second degree.

The jury found Appellant guilty of attempted murder for cutting Joellette Holloway following a dispute over money. Ms. Holloway refused to honor her subpoena and did not appear or testify at trial. (Tr. pp. 105-110). A paramedic who treated Ms. Holloway testified that she observed about a four inch laceration to the neck. (Tr. p. 48, line 12). The paramedic testified that the cut was deep and she could see veins and the carotid artery. (Tr. p. 48, lines 18-23). The State, over objection, introduced a photograph of the wound marked as State's exhibit #2. (Tr. p. 48, lines 2-9). Ms. Holloway was transported to Beaufort Memorial Hospital. The State did not call a doctor to testify about the injury.

At the close of the State's case Appellant requested a jury instruction on the lesser included offense of assault and battery first degree but not assault and battery of a high and aggravated nature [ABHAN]. (Tr. p. 182, lines 17-23). The State argued that ABHAN was the more appropriate lesser included offense as there was an injury. (Tr. p. 184, lines 14-19). Appellant also requested a self-defense charge. (Tr. p. 184, line 23). In his written statement to police Appellant stated that Ms. Holloway struck him in the face before the razor blade hit the back of her neck. (R. p. **, State's Exhibit #52, written statement). The judge commented, "I think we have an attempted murder case or an assault and battery of a high and aggravated nature case." (Tr. p. 188, lines 21-22). The judge did not instruct the jury on the law of self-defense.

Appellant also requested a jury instruction on assault and battery in the second degree. (Tr. p. 193, lines 18-20). The judge responded, "If I charge that, I have to do assault and battery in the first degree, so it goes all the way down the line." (Tr. p. 193, lines 21-23). The State objected to charging the lesser included offense of assault and battery second degree

arguing that the injury constituted great bodily injury rather than moderate bodily injury. (Tr. p. 194, lines 16-20). The State also argued, "Again, as Your Honor has already pointed out, if we're going to charge assault and battery second, we've got to go with assault and battery first, which we've already determined is not an appropriate charge in this case." (Tr. p. 194, lines 21-24). Appellant argued that the testimony from EMS supported a finding that the injury was moderate. (Tr. p. 195, lines 1-12). The judge adjourned for the day but told the parties, "And I would be very interested in seeing, Mr. Gourley, anything from either one of you on whether or not a judge has charged ABHAN and not assault and battery first, but they have charged ABHAN and assault and battery second or assault and battery third. Okay?" (Tr. p. 197, line 24 – p. 198, lines 1-3).

The next day, the State cited State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014), in support of the objection to charging assault and battery first degree. (Tr. p. 198, line 12 – p. 199, lines 1-2). Appellant correctly noted that the Court in Middleton found error in the trial judge's refusal to charge the lesser included offense of assault and battery first degree. (Tr. p. 199, lines 5-10). The Court in Middleton, however, found the error harmless. Appellant argued, "And unlike Middleton, the evidence in this case is capable of more than one conclusion as there was no testimony from the victim and no testimony from a physician regarding the extent of injuries and what medical treatment was required." (Tr. p. 199, lines 21-25). Appellant distinguished the present case from State v. Williams, 427 S.C. 148, 829 S.E.2d 702 (2019), where the South Carolina Supreme Court found no error in the trial court's failure to charge the lesser included offense of assault and battery first degree. (App. p. 200, line 4 – p. 201, lines 1-2). In addition to requesting the lesser included offense of assault and battery in the second degree, Appellant

requested a jury instruction on the lesser included offense of assault and battery third degree. (Tr. p. 199, lines 16-19).

The judge found that assault and battery first degree was not an appropriate lesser included offense because there was evidence of an injury. (Tr. p. 201, lines 15-23). The judge said, "I can tell you, as far as the facts of this case or our case is concerned, assault and battery in the first degree is not appropriate because once you take out what pertains to our facts, all it can be is an offer or attempt. In this case, it was more than an offer or an attempt. It was actually – he landed the blade on her neck and she was injured and she did get medical treatment. So it wouldn't be appropriate to charge assault and battery in the first degree because of the facts of our case." (Tr. p. 201, lines 15-23).

The judge acknowledged that the jury could find moderate bodily injury rather than great bodily injury stating, "The question then becomes whether or not it would be appropriate to jump over assault and battery second degree because the jury potentially could find that there was moderate bodily injury. And that's my real question, is whether or not you can jump over the assault and battery first degree and go from attempted murder to ABHAN to assault and battery second degree." (Tr. p. 201, line 24 – p. 202, lines 1-5).

Although the trial judge acknowledged that a question existed as to the degree of injury, the judge denied Appellant's request to charge the lesser included offenses of assault and battery second and third degree. The judge stated:

> The real question in this case is number one, under attempted murder, did he attempt to kill her? Number one, that's the question that is before the jury for the attempted murder. Then if they say no, there was no intent to kill, then the next question would be, under the ABHAN statute, whether or not there was great bodily injury. And that's for the jury to determine with the facts that they've gotten.

> I mean, that's for you, Ms. Rogers, to argue that there's no victim. There is no medical testimony by the doctor who treated her. How are you supposed to make a determination of great bodily injury? And if you can't make a determination, obviously, that's reasonable doubt as to an element of the offense and you can find him not guilty.
>
> So I think that's the way it goes. I think it's – I'm comfortable it's not going to be reversed. I also know that if we were to try to do the lesser-includeds, I think it's just going to get really messy and this jury is not going to understand.

After the judge instructed the jury with the law, Appellant objected to the judge's failure to charge the lesser included offenses. (Tr. p. 238, lines 1-3). The trial judge erred in refusing to instruct the jury on the lesser included offenses of assault and battery first, and second degree.

Attempted Murder

S.C. Code Ann. § 16-3-29 provides that, "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code §16-3-600 provides four statutory lesser included offenses of attempted murder: 1.) assault and battery of a high and aggravated nature [ABHAN]; 2.) assault and battery in the first degree; 3.) assault and battery in the second degree; and 4.) assault and battery in the third degree. There was evidence in the record from which the jury could have found Appellant guilty of the lesser included offenses because, as acknowledged by the trial judge, there was a question about the degree of the injury.

Assault and Battery of a High and Aggravated Nature

S.C. Code §16-3-600(B)(1) provides, "A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and: (a) great bodily injury to another person results; or (b) the act is accomplished by means likely to produce death or great bodily injury." S.C. Code §16-3-600(A) provides, "For purposes of this section: (1) 'Great bodily injury' means bodily injury which causes a substantial risk of death or

which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ." The trial judge properly instructed the jury on the lesser included offense of ABHAN.

Assault and Battery in the First Degree

S.C. Code §16-3-600 provides:

> (C)(1) A person commits the offense of assault and battery in the first degree if the person unlawfully:
>
> (a) injures another person, and the act:
> (i) involves nonconsensual touching of the private parts ... with lewd and lascivious intent; or
> (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft, **or**
>
> (b) offers or attempts to injure another person with the present ability to do so, and the act:
> (i) is accomplished by means likely to produce death or great bodily injury; or
> (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.

S.C. Code §16-3-600(C)(3) provides, "Assault and battery in the first degree is a lesser-included offense of assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29." The trial judge correctly found that section (C)(1)(a) was inapplicable. There is no allegation that the injury involved nonconsensual touching of the private parts with lewd and lascivious intent or occurred during the commission of a robbery, burglary or kidnapping or theft.

The trial judge refused to charge the lesser included offense of assault and battery first degree because there was an injury. (Tr. p. 201, lines 15-23). In State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014), the South Carolina Supreme Court clarified that first degree assault and battery under section (C)(1)(b) does not require an injury. The Court in Middleton did not address whether first degree assault and battery under section (C)(1)(b) requires the **absence** of resulting injury.

As noted by the trial judge, the applicable portion of the assault and battery first degree statute requires an offer or attempt to injure. In the present case, however, there is evidence of more than an offer or attempt as there was testimony from the paramedic that there was an injury. If the offer or attempt to injure includes a completed injurious act, the judge erred in refusing to charge the lesser included offense of assault and battery first degree. If section (C)(1)(b) of the assault and battery first degree statute requires the absence of injury, the judge erred in refusing to instruct the jury on the lesser included offense of assault and battery in the second degree which does not require the absence of an injury.

Assault and Battery in the Second Degree

S.C. Code §16-3-600(D)(1) provides, "A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and: (a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted; or (b) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing." S.C. Code §16-3-600(D)(1) S.C. Code §16-3-600(D)(3) provides, "Assault and battery in the second degree is a lesser-included offense of assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29." S.C. Code §16-3-600(A) provides:

> For purposes of this section: (2) "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.

The judge acknowledged that the jury could find moderate bodily injury rather than great bodily injury but still refused to charge the lesser included offense of assault and battery second degree. The trial judge erred. (Tr. p. 201, line 24 – p. 202, lines 1-5). The prosecutor argued that the judge could not charge assault and battery in the second degree without charging assault and battery in the first degree. (Tr. p. 194, lines 21-24). The statute does not support the State's position. If there is evidence of moderate bodily injury, and if assault and battery in the first degree requires an absence of injury, then a judge would err in charging both first and second degree. In the present case there was evidence from which the jury could have found moderate bodily injury, as defined by the statute. The only testimony about the injury came from the paramedic. The testimony from the paramedic supports a finding of moderate bodily injury as "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." The trial judge erred in refusing to instruct the jury with the lesser included offense of assault and battery in the second degree.

In State v. Williams, 427 S.C. 148, 156, 829 S.E.2d 702, 706 (2019), the South Carolina Supreme Court wrote:

> In reviewing jury charges for error, we examine the trial court's charge as a whole in light of the evidence and issues presented at trial. State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (citation omitted). "The trial court is required to charge a jury on a lesser-included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." Suber v. State, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007) (citation omitted) (internal quotation marks omitted). In determining whether the evidence requires a charge on a lesser-included offense, we view the facts in the light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996).

Viewing the jury charge as a whole and viewing the facts in the light most favorable to Appellant, including the fact that the judge acknowledged that the jury could find moderate rather than great bodily injury, it could be inferred that Appellant committed the lesser included offenses of assault and battery first or second degree rather than the greater offenses of attempted murder and ABHAN. The judge erred in refusing to charge the lesser included offenses.

The present case is distinguished from Williams where the Court found no error in failing to charge the lesser included offense of assault and battery first degree because Williams was either guilty of the greater offense of attempted murder for shooting into the mobile home or he was not guilty. In Williams the Court wrote:

> Here, there were three distinct theories of Petitioner's involvement in the shooting. However, regardless of which version of events a jury believed, it could not have found Petitioner guilty of the lesser, rather than the greater, offense. See, e.g., State v. Drayton, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987) (holding the trial court did not err in failing to charge the lesser-included offense because, under the State's version of the facts, the defendant was guilty of the greater offense, and under the defendant's version of the facts, he was innocent of any charge). Accordingly, we find the trial court did not err in failing to charge the jury on the lesser-included offense.

State v. Williams, 427 S.C. 148, 156–57, 829 S.E.2d 702, 706 (2019)(n. 7 omitted). In contrast in the present case, based on the acknowledged question about the degree of injury, the jury could have found Appellant guilty of the lesser included offenses.

The error in the judge refusing to charge the lesser included offenses of assault and battery in the first and second degree was not harmless. The present case is distinguished on the facts from Middleton. As the South Carolina Supreme Court wrote in Middleton,

> [T]he evidence adduced at trial demonstrates that, notwithstanding the failure to charge the lesser-included offense, the only conclusion established by the evidence is that Appellant was guilty of attempted murder, given the facts that

> Appellant deliberately drove up to the passenger window and shot into the vehicle at least five times, and Stephens testified that the only reason he and Mack were not injured is because he had the wherewithal to jump into the driver's seat and run Appellant off the road. In our view, there is no other way to construe the evidence in this case but that Appellant was attempting to kill Stephens and Mack.

Middleton, 407 S.C. at 319, 755 S.E.2d at 436. Both Middleton and Williams involved shooting into an occupied area, a car and a mobile home, with no resulting injuries. The present case involved a cut by a razor blade. The evidence in the present case is capable of more than one conclusion, unlike Middleton and Williams. The jury was not given the opportunity to find moderate bodily injury, as defined by the statute. The only options for the jury in the present case were attempted murder or ABHAN, requiring great bodily injury. The judge erred in refusing to charge the lesser included offenses. The error is not harmless and requires reversal.

CONCLUSION

Based on the above argument, this Court should reverse the convictions and remand for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of September, 2022.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

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DEMETRIUS DEON THOMPSON,

APPELLANT

APPELLATE CASE NO. 2021-001254

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 26th day of September, 2022.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

From: Stock, Chris
To: SC - BROWN MELODY; "Angela Brown"
Cc: Hudgins, Kathrine
Subject: Thompson, D. - Initial Brief of Appellant - 2021-001254
Date: Monday, September 26, 2022 3:11:00 PM
Attachments: Thompson, D. - Initial Brief of Appellant - 2021-001254 - AG Cover Letter.pdf
Thompson, D. - Initial Brief of Appellant - 2021-001254.pdf

Ms. Brown,

Please find attached for service the Initial Brief of Appellant and Designation of Matter for Demetrius Deon Thompson's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock
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