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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SUMTER COUNTY

Court of General Sessions  
The Honorable R. Kirk Griffin, Circuit Court Judge

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Appellate Case No. 2021-000749

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THE STATE,

Respondent,

v.

DAVID L. HILL, JR.,

Appellant.

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**FINAL BRIEF OF RESPONDENT**

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## STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court correctly admitted a portion of a 911 call made immediately after Hill ran over the victim when it was relevant to prove the central facts of the case and to show malice and intent to kill and was not unfairly prejudicial to Hill.
- II. Whether the trial court correctly admitted a police body-worn camera video when it was relevant to prove Hill assaulted two police officers while resisting arrest and was not unfairly prejudicial to Hill.
- III. Whether the trial court correctly refused to charge the lesser-included offense of Second Degree Assault and Battery when the evidence did not support it, and whether Hill was prejudiced when the jury had the option to convict of two intermediate lesser-included offenses but convicted of the greatest offense.

## STATEMENT OF THE CASE

A Sumter County grand jury indicted Appellant David Hill for attempted murder, assault and battery in the first degree, domestic violence in the second degree, and two counts of assaulting a police officer while resisting arrest. He proceeded to jury trial on May 24, 2021, before the Honorable R. Kirk Griffin. Hill pled guilty to domestic violence on the day before trial started. He was convicted of attempted murder, assault and battery in the second degree (as a lesser included of assault and battery in the first degree), and two counts of resisting arrest (as a lesser included of assaulting a police officer while resisting arrest). He was sentenced to 12 years' incarceration for attempted murder, 3 years for assault and battery in the second degree, and 1 year for each count of resisting arrest, with the sentences to be served concurrently. This direct appeal follows.

## STATEMENT OF FACTS

On July 7, 2019, Appellant David Hill was at home with his wife. Ms. Hill noticed Hill had been drinking heavily while she was doing chores and was becoming upset talking about a friend of his that had died. (R.p.116). Fearing that she would not be able to keep him calm, Ms. Hill convinced Hill to go with her to the cemetery to pay his respects. (R.p.117). Ms. Hill drove Hill towards the cemetery, but Hill became "extremely agitated" in the car, his mood going back and forth from laughing to angry. (R.p.118). At around 9:00 p.m., Ms. Hill pulled into a gas station and asked Hill to get out of the car. Hill refused and began beating Ms. Hill.<sup>1</sup> Ms. Hill began screaming and eventually was able to run into the store and ask the clerk to call 911. (R.p.118).

Roger Goden was at the gas station that night, and heard Ms. Hill screaming and crying for help. (R.p.123–24). He approached the vehicle and tapped on the hood, allowing Ms. Hill to escape. (R.p.124). Hill then climbed into the driver's seat. Hill started mumbling and looking in the back seat of the vehicle. (R.p.126). Goden turned to walk away and Hill stated, "oh you want some too?" (R.p.127). Hill then drove the car into Goden, pinning him against another vehicle. (R.p.127). Hill continued to press the gas, pinning Goden against the other car, and Goden realized, "this dude is really trying to hurt me." (R.p.127). Hill eventually backed up and drove away. (R.p.128; State's Exhibit #35). Goden sustained serious injuries

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<sup>1</sup> The trial court refused to allow Ms. Hill to tell the jury that Hill beat her, after granting a defense motion to exclude this testimony because Hill pled guilty to the domestic violence charge that arose from Hill striking Ms. Hill. Ms. Hill testified before the jury that an "altercation" occurred. (R.p.118).

to his foot, leg, and finger. (R.p.129, 134–37, 294–95). Goden testified he believed Hill was trying to kill him. (R.p.139).

Trenton Brown was occupying the car that Hill pinned Goden against. He testified he saw Goden confront Hill, and that Hill stated, "you want some too?" before striking Goden. (R.p.168). Brown testified Hill turned sharply and accelerated to hit Goden, and that Hill could have easily avoided him. (R.p.183–85). Brown testified the collision caused him to black out, causing injuries to his head and leg. (R.p.169). Brown recorded some of the interaction on his cell phone, and this video was admitted without objection as State's Exhibit #33.

Police collected surveillance video from the gas station. (State's Exhibit #35). The video clearly shows Hill striking Goden with his car and continuing to press the gas as he pinned Goden against the other car. It is obvious from the video that Hill intentionally struck Goden with his vehicle. An officer testified that Hill accelerated so quickly that he left skid marks on the pavement. (R.p.242). After striking Goden, Hill fled the scene.

Officers located Hill lying shirtless and intoxicated in a nearby yard. (R.p.265–66). Hill refused to comply with the responding officer's instructions, so the officer held Hill at gunpoint until backup arrived. (R.p.266). Hill refused to allow officers to put him in handcuffs and began to fight with the officers. He struck an officer during this scuffle, attempted to strike another, and an officer eventually had to tase him. (R.p.267, 277). When officers finally were able to place

him in a patrol vehicle, he attempted to kick out the glass separating him from the front seat. (R.p.268).

## ARGUMENT

- I. The trial court correctly admitted a portion of a 911 call made immediately after Hill ran over the victim because it was relevant to prove the central facts of the case and to show malice and intent to kill. Conversely, it was not unfairly prejudicial to Hill.

Hill claims the trial court abused its discretion by admitting a portion of a 911 call placed at the scene of the crime immediately after Hill struck Goden with his vehicle. This argument is meritless. The call, a contemporaneous first-hand account of what happened, was relevant to prove the central facts of the case, and to show malice and intent to kill. By contrast, nothing in the call was unfairly prejudicial to Hill. This Court should affirm.

### A. Standard of Review.

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Collins, 409 S.C. 524, 530, 763 S.E.2d 22, 25 (2014). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. Id. A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. Id., 409 S.C. at 534, 736 S.E.2d at 28.

### B. Discussion.

The 911 call in question is approximately two minutes in length and contains statements from both Ms. Hill and Andrew Bauler, a gas station clerk who witnessed the event. (State's Exhibit #36). Ms. Hill speaks with the operator first

and tells her that Hill "tr[ie]d] to kill" her and begs her to send help. Bauler takes the phone around the 00:48 second mark. Bauler tells the operator that Hill pulled Ms. Hill's hair and choked her, then struck Goden with his vehicle when he intervened.

Hill argued that the "tape needs to be sufficiently redacted for any information whatsoever about the domestic violence call." (R.p.76). Hill had previously moved to exclude Jennifer Hill's testimony entirely. The trial court refused to prevent Ms. Hill from testifying, but agreed to limit her testimony to exclude evidence that Hill had struck her in the vehicle moments before Goden intervened, prompting Hill to run him over. The trial court reasoned that because Hill pled guilty to the domestic violence charge before the start of trial, evidence of Hill beating Ms. Hill was evidence of a "prior bad act" and not probative of Hill's guilt of attempted murder against Goden. The court also excluded evidence that Hill threatened to kill Ms. Hill at a nearby graveyard before the couple arrived at the gas station. (R.p.37).

Hill made this same argument to support his motion to exclude the 911 recording. He argued at trial and now argues on appeal that the tape was not relevant and that, even if relevant, should have been excluded under Rule 403. (R.p.79-80). The court ruled that the 911 call was admissible from the point where the clerk takes the phone from Ms. Hill, reasoning that the call was relevant as Bauler's "present sense impression of what occurred that evening," and to explain how law enforcement was called to the scene. (R.p.80-81). The court held that Ms.

Hill's words should be excluded because they recounted Hill beating her in the car, which the court excluded under Rule 404(b). Only the portion of the 911 call narrated by Bauler was played at trial. (R.p.225-27). Thus, the only evidence regarding Hill's violence towards Ms. Hill was that he pulled her hair and choked her in the moments immediately before he struck Goden with his vehicle.

The portion of the 911 call played to the jury was properly admitted. The court properly described the tape as Bauler's "present sense impression of what occurred that evening." (R.p.80-81). Because the same is true for Ms. Hill, the 911 call should have been admitted in its entirety. The entire 911 call was relevant as Ms. Hill and Bauler's contemporaneous eye witness accounts of the central facts of the case made "immediately after" the events occurred. See Rule 803(1), SCRE (defining an excited utterance as "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter"). Excited utterances are intrinsically reliable because "the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." See State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007). Accordingly, excited utterances have additional probative value beyond a witness's trial testimony. Because the statements in the 911 call carried intrinsic reliability and describe the central facts of the case, they were extremely probative.

Contrary to Hill's argument (and several of the trial court's rulings), evidence that Hill struck Ms. Hill in the car immediately prior to running over Goden was not evidence of a "prior" bad act. This was a contemporaneous bad act, inextricably

linked with the attempted murder charge for which Hill was on trial. See People v. Quintana, 882 P.2d 1366, 1372 (Colo. 1994) ("Other act' evidence . . . generally occurs at different times and under different circumstances from the charged offense."); United States v. Williford, 764 F.2d 1493, 1498 (11th Cir. 1985) ("Evidence of an uncharged offense arising from the same series of transactions as that charged is not an extrinsic offense within Rule 404(b)"); United States v. Aleman, 592 F.2d 881, 885 (5th Cir. 1979) ("If a person breaks into a house, murders the occupants, and steals a television set, the individual offenses do not become 'wholly separate and independent crimes' merely because they are made the subjects of separate indictments."). Rule 404(b) is not applicable to these facts. See State v. Miller, 260 S.C. 1, 5, 193 S.E.2d 802, 803 (1972) (assaults against bank employees were "part and parcel" of armed robbery and extrinsic act analysis had "no application" to case).

Evidence that Hill was maliciously beating Ms. Hill in the moments leading up to his assault of Goden was relevant to explain why Hill struck Goden with his car. Hill did not know Goden. The only reason Hill tried to kill him was that Goden intervened when he observed Hill beating Ms. Hill. Accordingly, Hill's violence towards Ms. Hill was part of the res gestae of the charge that he tried to kill Goden. As the supreme court explained in State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999):

The res gestae theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred. This evidence of other crimes is admissible when

such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context or the 'res gestae' or the uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other' [and is thus] part of the res gestae of the crime charged. And where evidence is admissible to provide this full presentation of the offense, [t]here is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae.

State v. King, 334 S.C. 504, 512–13, 514 S.E.2d 578, 582–83 (1999) (internal citation, punctuation, and quotations omitted). Under this theory, "it is important that the temporal proximity of the prior bad act be closely related to the charged crime." King, 334 S.C. at 513, 514 S.E.2d at 583. By contrast, evidence of prior bad acts is inadmissible as part of the res gestae, "where the record does not support **any relationship** between the crime and [prior bad acts]." State v. Hough, 325 S.C. 88, 480 S.E.2d 77 (1997) (emphasis added). The trial court correctly recognized that Hill's conflict with his wife and his resulting mental state was part of the res gestae of the case, yet he bent over backwards to prevent the State from giving the jury a full picture of the events leading directly to the charged crime. (R.p.60-61).

Evidence of Hill's violence towards his wife was admissible to show the res gestae of his acts towards Goden, and the trial court's rulings on this issue were on the whole extremely beneficial to Hill.

Even if this Court analyzes Hill's violence towards Ms. Hill as extrinsic bad act evidence, there is a clear logical connection between Hill's violence towards his wife and his attempt to run over Goden mere seconds later. See State v. Perry, 430

S.C. 24, 34, 842 S.E.2d 654, 659 (2020), reh'g denied (June 10, 2020) (explaining the "logical connection" standard for other bad act evidence). Hill's violence towards Ms. Hill fits squarely within several 404(b) exceptions. First, Goden's intervention was Hill's entire motive for attempting to kill him. See Rule 404(b), SCRE (providing evidence of prior bad acts is admissible to prove motive). Hill had no reason to strike Goden except for Goden's intervention in Hill's violence towards Ms. Hill.

Second, Hill's conflict with Ms. Hill was relevant to prove malice and specific intent to kill, elements of attempted murder. A person is guilty of Attempted Murder if he "with the intent to kill attempts to kill another person with Malice Aforethought either expressed or implied." S.C. Code 16-3-29. Specific intent to kill "highest possible mental state for criminal attempt," and requires the State to prove that the defendant specifically intended to bring about the death of a particular victim. State v. King, 422 S.C. 47, 64, 810 S.E.2d 18, 27 n.5 (2017). Intent is specifically listed in Rule 404(b) as a proper purpose for which to introduce evidence of other bad acts. "Intent is seldom susceptible to proof by direct evidence, and is typically proved through circumstantial evidence." State v. Brandt, 393 S.C. 526, 546, 713 S.E.2d 591, 601 (2011). "Intent is only matter of circumstance, which naturally follows and springs out of the facts." Id. (quoting State v. Murray, 72 S.C. 508, 52 S.E. 189, 191 (1905)).

Because Hill did not know Goden, the State had a high burden to show Hill specifically and maliciously intended to kill him. (R.p.140). Hill's actions towards

Ms. Hill immediately preceding his violence towards Goden were highly probative of his mens rea. As the solicitor argued at trial, once Goden intervened, Hill transferred the rage and malice he had been directing towards his wife to Goden. (R.p.48). Hill even threatened Goden with the words, "you want some too?" (R.p.184) (emphasis added). Without understanding Hill's state of mind in the moments before he struck Goden with his car, the jury would not have been able to fairly judge whether he acted out of malice and with the specific intent to kill.

By contrast, the portion of the 911 call played to the jury was not unfairly prejudicial to Hill. See Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is **substantially outweighed** by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.") (emphasis added). Unfair prejudice means "an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Sweat, 362 S.C. 117, 128, 606 S.E.2d 508, 514 (Ct. App. 2004). Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence. State v. Gray, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014). Even if evidence is "highly prejudicial" to a defendant, where the probative value is also high, the evidence should be admitted. State v. Adams, 322 S.C. 114, 119, 470 S.E.2d 366, 369 (1996) ("The evidence . . . is obviously is highly prejudicial. However, its probative value is also high because the evidence tends to establish [defendant's] intent ... The trial judge properly admitted

this evidence.") (citation omitted). Evidence of Hill's conduct immediately preceding his act of violence against Goden did not suggest guilt on an improper basis.

Rather, it was directly relevant to the central issue of the case, his mental state. Cf. Mitchell v. State, 298 S.C. 186, 189, 379 S.E.2d 123, 125 (1989) (holding evidence that defendant was a "devil worshipper" was not admissible where it had no relationship to the charged crime).

Finally, even if the 911 recording was improperly admitted, the error did not affect the result of trial. Error is harmless where it did not reasonably affect the result of the trial. State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1993). The only evidence admitted from the 911 call regarding Hill's violence towards Ms. Hill was that he pulled her hair and choked her in the moments immediately before he struck Goden with his vehicle. Given the other facts of the case, there is no danger that the jury improperly based its verdict on this basis. Details of prior bad act evidence that may not be admissible are deemed harmless where they are minimal. State v. Forney, 321 S.C. 353, 358, 468 S.E.2d 641, 644 (1996) (citation omitted). Furthermore, the contents of the 911 call were cumulative to other evidence to which Hill did not object, such as Trenton Brown's testimony that Hill hit Ms. Hill. (R.p.167).

Hill's argument is based on the false premise that his guilty plea to domestic violence rendered evidence of his violence towards Ms. Hill irrelevant. A defendant may not shield essential facts from the jury by pleading guilty to a separate charge arising from those same facts. As the solicitor argued, his plea "does not exclude

the fact that this really happened." (R.p.44). Despite the trial court's recognition that "the domestic violence is interwoven into the events of this evening," it directed the State not to elicit testimony about the fact that Hill beat and threatened Ms. Hill right up until the moment that Goden intervened and Hill ran him over. (R.p.218, lines 2–4). That the Court did not go even further by excluding this extremely probative 911 call is not cause for reversal. Hill's trial was more than fair. This Court should affirm.

**II. The trial court correctly admitted a police body-worn camera video because it was relevant to prove Hill assaulted two police officers while resisting arrest. Hill's belligerence and use of profanity did not pose a danger of unfair prejudice that substantially outweighed the video's probative value.**

Hill next contends the trial court abused its discretion by admitting a police body-worn camera recording of Hill being arrested, claiming the video was unfairly prejudicial to Hill because it "showed Appellant in a belligerent state and was riddled with profanity." While this is true, it does not rise to the level of unfair prejudice, certainly not to extent that it requires reversal of Hill's convictions. The video was relevant to prove that Hill assaulted two police officers while resisting arrest and its probative value was not substantially outweighed by the danger of unfair prejudice. This Court should affirm.

**A. Standard of review.**

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Collins,

409 S.C. 524, 530, 763 S.E.2d 22, 25 (2014). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. Id. A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. Id., 409 S.C. at 534, 736 S.E.2d at 28.

### **B. Discussion.**

The video in question portrays police officers arresting an uncooperative Hill after discovering him lying in a yard near the scene of the crime. (State's Exhibit #38). In response to a defense motion, the trial court directed the State not to show the video or elicit testimony pertaining to what Hill did once he was securely under arrest and in the police car. (R.p.273–76). The State only showed portions of the video, in compliance with the court's ruling. (R.p.279).

Videos have unique probative value because they allow the jury an unbiased, objective portrayal of what actually occurred. This video showed Hill resisting arrest and striking an officer, the elements of the charged crime. It had immense probative value. Because it corroborated officer testimony, the trial court did not abuse its discretion in admitting it. State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996) ("If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it."); see also State v. Heath, 433 S.C. 506, 515, 860 S.E.2d 673, 677 (Ct. App. 2021) (same) and State v. Benton, 435 S.C. 250, 266, 865 S.E.2d 919, 927 (Ct. App. 2021), reh'g denied (Nov. 18, 2021) (same).

Although the later part of the video depicts Hill after he had been placed in handcuffs, it was still relevant to show his demeanor. His extreme anger towards

police was relevant to show his intent to "willfully" assault the officers. See S.C. Code Ann. § 16-9-320 ("It is unlawful for a person to knowingly and wilfully . . . assault, beat, or wound an officer when the person is resisting an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer . . ."). Finally, as the trial court noted, the video depicted Hill requesting that the officers read his Miranda rights, which showed he "[knew] or reasonably should [have known] they were law enforcement officers. Id.

By contrast, the video did not carry a substantial danger of unfair prejudice. The video does not portray Hill using racial slurs or referencing prior crimes. Cf. State v. King, 422 S.C. 47, 69, 810 S.E.2d 18, 30 (2017). Mere profanity is not enough to substantially outweigh the probative value of video evidence depicting a defendant committing a crime. See State v. Salamanca, 233 Ariz. 292, 296, 311 P.3d 1105, 1109 (Ct. App. 2013) (explaining "the mere presence of coarse language in a defendant's statement does not render it inadmissible under Rule 403"). As this Court has explained, a "trial judge is not required to exclude relevant evidence merely because it is unpleasant or offensive." State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). Certainly, Hill's foul mouth did not cause him to be convicted when viewed along with the other evidence in the case.

The trial court acted within its discretion in admitting this video. It was not unfairly prejudicial to Hill, and did not affect the result of trial. This Court should affirm.

III. The trial court correctly refused to charge the lesser-included Second Degree Assault and Battery because the evidence did not support it, and Hill was not prejudiced because the jury had the option to convict of two intermediate lesser-included offenses but convicted of the greatest offense.

Lastly, Hill claims the trial court abused its discretion by refusing to charge the lesser-included Second Degree Assault and Battery. The trial court correctly refused the charge because the evidence did not support it. Even if the trial court erred, Hill was not prejudiced because the jury convicted him of the greatest charged offense, rejecting two "intermediate" lesser-included offenses. This Court should affirm.

**A. Standard of review.**

An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. Id.

**B. Discussion.**

Hill argues the trial court erroneously refused to charge the law of Second Degree Assault and Battery as lesser-included offense of the charge of Attempted Murder against Goden. He asserts there is evidence from which the jury could conclude Hill committed the lesser offense rather than the greater because the jury could have found Hill suffered moderate bodily injury. The trial court correctly refused the charge because the evidence did not support it, noting there had not been "any assertion that his injury was anything less than great bodily injury." (R.p.381).

The operative distinction between A&B 1<sup>st</sup> and A&B 2<sup>nd</sup> is the degree of injury. A&B 2<sup>nd</sup> means the victim suffered "moderate bodily injury," whereas A&B 1<sup>st</sup> means the victim suffered "great bodily injury." S.C. Code Ann. § 16-3-600 defines "great bodily injury" as "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." It defines "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. 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."

Goden was seriously injured. His foot was cut to the bone, requiring him to have two surgeries, skin grafts, and eight or nine months of wearing a "wound vac" to promote healing. (R.p.137). Trenton Brown described Goden's ankle as "just like ripped off, just hanging and the blood squirting out. You can see the bone and all that." (R.p.169). Another witness testified that "the underside of his foot was just hanging off. It looked like a banana peel." (R.p.295). His foot was "squirting" blood. (R.p.169, 258; State's Exhibits # 8-A, 8-B, 7-A, 7-B, 6-A and 6-B). He also suffered burns to his legs and a significant injury to his finger. (R.p.132-38); State's

Exhibit #32, 33 and 35). Accordingly, Goden suffered "protracted loss or impairment of the function of a bodily member or organ" and, due to loss of blood, a "substantial risk of death." His injuries do not fit the definition of "moderate bodily injury."

Even if the court erred, Hill was not prejudiced. To reverse a criminal conviction on the basis of an erroneous jury instruction, the appellate court must find the error was prejudicial, i.e. "an error that 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 26). That is not the case here because the jury convicted Hill of the greatest charged offense, Attempted Murder. The degree of injury is not an element of Attempted Murder. Accordingly, the jury could not have based its verdict on this factor. Rather, it must have found Hill "attempted to kill" Goden with malice aforethought. This is not surprising giving the uncontestable fact that Hill intentionally struck Goden with his vehicle, pinning him against another vehicle while continuing to press the gas. (State's Exhibit #38; R.p.168–69, 183). Hill accelerated so quickly that he left skid marks on the pavement. (R.p.242) .

The fact that the jury had the option of convicting Hill of ABHAN or A&B 1<sup>st</sup> but instead convicted him of the greater offense of Attempted Murder shows the jury would not have convicted him of A&B 2<sup>nd</sup>. This Court recently explained in State v. Workman, Op. No. 5922 (S.C.Ct.App. filed July 13, 2022) (Howard Adv.Sh. No.25 at 21) the rule practiced in many states which recognizes that when a jury has the option to convict of the charged offense and a lesser offense, and convicts of

the greater offense, the trial court's refusal to charge an even lesser included crime does not prejudice a defendant. State v. Workman, Op. No. 5922 (S.C.Ct.App. filed July 13, 2022) (Howard Adv.Sh. No.25 at 30–36). The Court cited to State v. Allen, 69 S.W.3d 181 (Tenn. 2002), which addressed the trial court's erroneous failure to charge a lesser-included offense beyond the immediately lower offense. In that case, the jury convicted of the only lesser-included offense that was charged. The court refused to find the error harmless. Allen, 69 S.W.3d at 191. In doing so, the court drew a distinction between that scenario and cases where the jury "necessarily rejected all the lesser-included offenses by rejecting **an intermediate offense.**" Allen, 69 S.W.3d at 190.

The Workman court also cited Mata-Medina v. People, 71 P.3d 973 (Colo. 2003). In that case, the jury received an instruction on an "intermediate" lesser-included offense but nonetheless convicted of the highest charged offense. The court found the court's failure to charge an even lesser offense harmless because the jury "received an instruction on an intermediate offense" and rejected it. Id. at 980.

In this case, the jury received instructions on not one but two lesser-included offenses. The fact that the jury nevertheless decided to convict of the greatest possible offense (and one that does not rest on the degree of injury) shows that Hill was not prejudiced by the trial court's refusal to charge an even lesser offense. This Court should affirm.

CONCLUSION

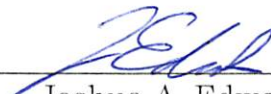
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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September 29, 2022

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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SUMTER COUNTY  
Court of General Sessions  
The Honorable R. Kirk Griffin, Circuit Court Judge

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Appellate Case No. 2021-000749

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THE STATE,

Respondent,

v.

DAVID L. HILL, JR.,

Appellant.

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**CERTIFICATE OF COMPLIANCE**

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The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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