STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable Alex Kinlaw, Circuit Court Judge

Opinion No. (S.C. Ct. App. Filed July 13, 2022)
Lower Court Case No. 2016-GS-23-10112

THE STATE,

PETITIONER,

V.

OLANDIO R. WORKMAN,

RESPONDENT

APPELLATE CASE NO. 2022-001263

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

A trial court should not instruct the jury on irrelevant matters. In this DVHAN case, the jury was instructed on DV 1st as a lesser included offense. Defense Counsel requested the court to define DV 2nd because it may form an element of DV 1st in some circumstances, but it was not the pertinent aggravating circumstance here. Did the trial court err by refusing to define DV 2nd ?

PETITIONER'S ARGUMENT

The Court of Appeals erroneously found Workman was prejudiced by the trial court's refusal to instruct the jury on the uncharged offense DV 2nd and moderate bodily injury because Workman's use of a gun made the degree of injury immaterial and the jury convicted Workman of the highest charged offense.

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES

1. Did the Court of Appeals correctly find that the trial judge erred in refusing to define DV 2nd and moderate bodily injury during the jury instruction on the lesser included offense of DV 1st when the evidence supported defining the terms under §16-25-20(B)(5) of the DV 1st statute?

2. Did the Court of Appeals correctly find that the trial judge's failure to define DV 2nd and moderate bodily injury during the jury instruction on the lesser included offense of DV 1st was not harmless requiring reversal and remand of the DVHAN conviction?

STATEMENT OF THE CASE

In February of 2017, the Greenville County Grand Jury indicted Respondent, Olandio R. Workman, for domestic violence of a high and aggravated nature [DVHAN], kidnapping and possession of a weapon during the commission of a violent crime, indictments #2016-GS-2310112, 10113.[1] (R. pp. 563-566). On September 17, 2018, Mr. Workman proceeded to jury trial before the Honorable Alex Kinlaw, Jr. Frank L. Eppes represented Mr. Workman at trial. Derek R. Polsinello prosecuted the case. The jury found Mr. Workman guilty as charged. Judge Kinlaw sentenced Mr. Workman to twelve (12) years for domestic violence, fifteen (15) years concurrent for kidnapping and five (5) years concurrent for the weapon charge. A timely notice of intent to appeal was served on September 26, 2018, and the direct appeal perfected.

On October 14, 2021, a three-judge panel of the South Carolina Court of Appeals heard arguments in the case. On July 13, 2022, the Court of Appeals filed a published opinion reversing the DVHAN conviction. State v. Workman, 437 S.C. 62, 876 S.E.2d 151 (Ct. App. 2022). The State filed a petition for rehearing that was denied on August 12. 2022. The State filed a petition for writ of certiorari on September 12, 2022. This return follows.

[1] The date below the witness name on the indictment is September 24, 2016. The received stamp from the clerk of court is dated November 10, 2016. The term year, typed as 2016, is scratched out and replaced with a hand written 2017. The indictment number begins with 2016.

REASONS WHY CERTIORARI SHOULD BE DENIED

The Court of Appeals correctly found that evidence was introduced from which it could be inferred that that Respondent committed the lesser offense of DV 1st under §16-25-20(B)(5), rather than the greater offense of DVHAN. The Court of Appeals correctly found that the trial judge erred in failing to fully instruct the jury on DV 1st under §16-25-20(B)(5) by defining DV 2nd and moderate bodily injury. The Court of Appeals correctly found that the error was not harmless writing:

> Because the supreme court has not opted to find the failure to give instructions harmless when the jury convicted of the higher offense, we will not find the error in failing to give a complete charge on the lesser offense harmless here. Accordingly, the trial court's error in giving an incomplete charge on first-degree CDV was not harmless despite the jury's conviction of Workman of the offense of CDVHAN.

State v. Workman, 437 S.C. 62, 81, 876 S.E.2d 151, 161 (Ct. App. 2022).

The State asserts that, "This passage indicates the Court of Appeals believed itself bound by the lack of precedent from this Court, and gives the reader the impression an error in a jury instruction on a lesser offense cannot be harmless." (Petition for Writ of Certiorari p. 10). The Court of Appeals, however, acknowledged that erroneous jury instructions are subject to a harmless error analysis writing:

> "Errors, including erroneous jury instructions, are subject to harmless error analysis." State v. Burdette, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019) (quoting State v. Belcher, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009), overruled on other grounds by Burdette, 427 S.C. at 504 n.3, 832 S.E.2d at 583 n.3). "In making a harmless error analysis, [this court's] inquiry is ... whether the erroneous charge contributed to the verdict rendered." State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting State v. Kerr, 330 S.C. 132, 145, 498 S.E.2d 212, 218 (Ct. App. 1998)). "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.' " Id. (quoting Kerr, 330 S.C. at 144-45, 498 S.E.2d at

218).

State v. Workman, 437 S.C. 62, 74, 876 S.E.2d 151, 157 (Ct. App. 2022). The Court of Appeals correctly found that the error in failing to fully charge the lesser included offense of DV 1st under §16-25-20(B)(5) was not harmless simply because the jury convicted on the greater offense of DVHAN. The Court of Appeals opinion is based on this Court's established precedent with regard to the failure to charge a lesser included offense. The present case does present a novel question of law. .

Rule 242, SCACR, provides the considerations governing the grant of certiorari as follows:

> A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:
>
> **(1)** Where there are novel questions of law.
>
> **(2)** Where there is a dissent in the decision of the Court of Appeals.
>
> **(3)** Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
>
> **(4)** Where substantial constitutional issues are directly involved.
>
> **(5)** Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

The present case does not involve any of the five reasons provided in the rule. The present case does not involve special circumstances. In this Court's wide discretion and power to grant review, in the present case, the petition for writ of certiorari should be denied.

STATEMENT OF FACTS

On August 29, 2016, officers with the Greenville County Sheriff's Office went to the home of Appellant, Olandio Workman, and his wife, Loretta Workman, for a welfare check on Loretta. The Sheriff's Office had received a call from an individual who was concerned because Loretta had not been at work for a few days. (R. p. 116, line 13 – p. 117, lines 1- 21; p. 121, lines 7-13). When the officers knocked on the door, Mr. Workman answered and told them that Loretta was not at home. (R. p. 122, lines 19-24). The officers did not believe Mr. Workman and eventually the SWAT team was called in. (R. pp. 124-129).

The SWAT team parked their armored vehicle in the drive way and began to announce over the public address system, "This is Greenville County Sheriff's Office SWAT team. We're not here to harm you. We just need to talk to you. Please come to the door or answer your phone." (R. p. 224, line 25 – p. 225, lines 1-3). This went on for over an hour before they broke down the door. (R. p. 225, line 3 – p. 226, line 1). Once inside the officers found Loretta and their two children but not Mr. Workman. (R. p. 226, lines 2-6). When asked about the condition of Loretta, an officer testified, "She was rough. She had bruises, like, all over her visible parts of her body that were visible. Her face was swollen and bruised. It was obvious that some type of altercation had occurred." (R. p. 227, lines 19-22). That night Loretta told the officers the injuries came from a bar fight. (R. p. 228, lines 3-7). Loretta was not hospitalized. (R. p. 274, lines 15-17).

When asked why she did not come to the door, Loretta told the officer she was sleeping. (R. p. 229, lines 2-7). The officer questioned Loretta and testified at trial, "And I said, you know, I find it hard to believe that anybody could sleep through that. Why aren't you coming out? Why didn't you just come to the door? I think I said – she was very irritated at everything,

and – and just seemed very angry." (R. p. 230, lines 3-7). The officer also testified that he talked to one of the children who told the officer that he heard the SWAT team but his mother would not let him come out of the room. (R. p. 230, line 23 – p. 231, lines 1-17). The child also told the officer that he heard his parents fighting but did not see the fighting. (R. p. 231, line 18 – p. 232, line 1). Loretta and the two children spent the night with Mr. Workman's sister, Tammy Green. (R. p. 234, line 16 – p. 235, lines 1-9). DSS was notified. (R. p. 235, line 10 – p. 236, line 1).

Before officers searched the house, Loretta told them that there was a gun under the bed in the master bedroom and a gun in the nightstand in the same bedroom. (R. p. 237, lines 13-20). Loretta had purchased both guns and had a concealed weapons permit. (R. p. 237, lines 7-12; p. 320, lines 14-15). The next morning Loretta took her two children and fled the State, without speaking with DSS. (R. p. 241, lines 11 –19; p. 243, line 9 – p. 244, lines 1-16). On September 6, 2016, Loretta called the investigator and provided a recorded telephone statement that was very different from the statements she made on the evening the SWAT team was at her house. (R. p. 244, line 18 – p. 245, 246, 247).

At trial Loretta testified that on Saturday night, August 27, 2016, her husband, the Appellant Mr. Workman, came home, accused her of cheating and began hitting her. (R. p. 292, line 2 – p. 293, 294, lines 1-19). According to Loretta this continued into Sunday until Monday when Mr. Workman left for work. (R. pp. 295-296). Loretta testified that Mr. Workman had the gun and hit her once in the hand while holding the gun. (R. p. 299, lines 1-13). Loretta testified that Mr. Workman broke her phone on Sunday night. (R. p. 301, lines 16-24). Loretta claimed that she did not go to work on Monday because Mr. Workman told her if she opened the door, the trailer would explode. (R. p. 300, lines 3-4). She also claimed that Mr. Workman took the

keys to the cars although she had a car key to flee the State. (R. p. 300, lines 4-5; p. 311, lines 21-25). Loretta told the investigator that Mr. Workman choked her but agreed that she never lost consciousness. (R. p. 320, lines 21-24). Loretta testified that when Mr. Workman returned from work on Monday, August 29, 2016, he continued to hit her. (R. p. 304, lines 15-25).

STANDARD OF REVIEW

"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." State v.Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014); 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)).

ARGUMENTS

1. **The Court of Appeals correctly found that the trial judge erred in refusing to define DV 2nd and moderate bodily injury during the jury instruction on the lesser included offense of DV 1st when the evidence supported defining the terms under §16-25-20(B)(5) of the DV 1st statute.**

By refusing to define DV 2nd and moderate bodily injury the trial judge failed to properly define DV 1st under §16-25-20(B)(5), as a lesser included offense of the charged offense of DVHAN. Prior to the judge instructing the jury on the law, Respondent requested a charge on the lesser included offense of DV 1st. (R. pp. 425-437; pp. 447-449). The State did not oppose the charge on the lesser included offense. (R. p. 426, lines 21-23). Evidence was presented from which it could be inferred that that Respondent committed the lesser offense, DV 1st under §16-25-20(B)(5), rather than the greater offense of DVHAN.

DV 1st is defined by S.C. Code §16-25-20 as follows:

(A) It is unlawful to:

(1) cause physical harm or injury to a person's own household member; or

(2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

(B) Except as otherwise provided in this section, a person commits the offense of domestic violence in the first degree if the person violates the provisions of subsection (A) and:

(1) great bodily injury to the person's own household member results or the act is accomplished by means likely to result in great bodily injury to the person's own household member;

(2) the person violates a protection order and in the process of violating the order commits domestic violence in the second degree;

(3) has two or more prior convictions of domestic violence within ten years of the current offense;

(4) the person uses a firearm in any manner while violating the provisions of subsection (A); or

(5) **in the process of committing domestic violence in the second degree** one of the following also results:

(a) the offense is committed in the presence of, or while being perceived by a minor;

(b) the offense is committed against a person known, or who reasonably should have been known, by the offender to be pregnant;

(c) the offense is committed during the commission of a robbery, burglary, kidnapping, or theft;

(d) the offense is committed by impeding the victim's breathing or air flow; or

(e) the offense is committed using physical force or the threatened use of force against another to block that person's access to any cell phone, telephone, or electronic communication device with the purpose of preventing, obstructing, or interfering with:

i. the report of any criminal offense, bodily injury, or property damage to a law enforcement agency; or

ii. a request for an ambulance or emergency medical assistance to any law enforcement agency or emergency medical provider.

A person who violates this subsection is guilty of a felony and, upon conviction, must be imprisoned for not more than ten years. (emphasis added).

Pursuant to S.C. Code §16-25-20(B)(5), DV 1st includes DV 2nd with aggravating factors, as defined by the statute. Because DV 2nd becomes DV 1st when there are specific statutory aggravating factors, Respondent specifically requested that the judge define DV 2nd. (R. p. 426, lines 2-10; p. 427, lines 8-14; p. 428, line 21 – p. 429, 430, lines 1-2; p. 432, lines 7-22; p. 435, lines 14-20). Defense counsel told the judge:

> I don't want the jury to think for some reason that choking somebody automatically rises to high and aggravated, or that blocking somebody from using the telephone automatically rises to high and aggravated. And – and so I think it's appropriate to fashion some way to say criminal domestic violence – and you can say it like this.

> You can say criminal domestic violence in the first degree, also, may include **moderate injury** accompanied by choking, blocking somebody from the telephone, or being perceived by a minor. I – I think that would be an appropriate way to do it.

(R. p. 429, lines 12-23)(emphasis added). The State did not object to the judge explaining to the jury what DV 2nd is but objected to charging as a lesser included offense. (R. p. 431, lines 17-22). Respondent did not request DV 2nd as a lesser included offense. (R. p. 431, lines 17-24; p. 436, lines 8-21). Instead, Respondent requested a definition of DV 2nd when the judge instructed the jury on the lesser included offense of DV 1st pursuant to subsection (B)(5). The judge failed to define DV 2nd or moderate bodily injury.

During the instruction the judge defined great bodily injury pursuant to S.C. Code §16-25-10(2). The judge told the jury, "Great bodily injury is defined and means bodily injury which causes a substantial risk of death, or which causes serious permanent disfigurement, or protracted loss of impairment of the function of a bodily member or organ." (R. p. 500, lines 13-16). The judge, however, did not define moderate bodily injury. The judge charged the jury with the law on domestic violence of a high and aggravated nature. (R. p. 500, line 17 – p. 501, lines 1-23).

The judge then charged the jury with the law on domestic violence first degree. (R. p. 501, line 24 – p. 502, 503, lines 1-22). The judge included the following language in the charge on domestic violence first degree:

> Five, in the process of committing domestic – the violence in the second degree, one of the following, also, results, A, the offense is committed in the presence of or while being perceived by a minor. B, the offense is committed against a person known, or reasonably known, or -- or should have been known by the Defendant to be pregnant.
>
> And, C, the offense is committed during the commission of a robbery, burglary, kidnapping, or theft. D, the offense is committed by impeding the victim's breathing or air flow. E, the offense is committed using physical force or threatened use of force against another to block that person's access to any cell

> phone, telephone, or electronic communication device with the purpose of preventing, obstructing, or interfering with the report of a criminal offense, bodily injury, or property damage, a request for an ambulance or emergency medical assistance to any law enforcement officer.
>
> Domestic violence in the first degree here, as I said earlier, is a lesser included offense of domestic violence of a high and aggravated nature as defined in the previous code section, the code section that I outlined

(R. p. 503, lines 1-22). The judge, however, did not define domestic violence second degree.

After the charge Respondent objected to the failure to explain domestic violence second degree and the failure to define moderate bodily injury. (R. p. 508, lines 5-16). The judge declined to instruct the jury on the definitions of domestic violence second degree and moderate bodily injury. The jury then had several questions. The jury first asked how the witness fled from the State and in what car. (R. p. 522, lines 16-25; Court's Exhibit #4, R. p. 570). The jury then asked the difference between domestic violence of a high and aggravated nature and domestic violence first degree. (R. p. 523, lines 1-3; Court's Exhibit #3, R. p. 570). The judge agreed to re-charge the jury and display the statutes on a screen so that the jury could follow along as the judge read the charge. (R. p. 523, line 4 – p. 524, lines 1-6). Counsel for Respondent asked that the judge explain domestic violence second degree. The judge denied the request. (R. p. 524, lines 7-11). After the re-charge counsel for Respondent stated, "I need to renew my objection as to not putting in the definition of moderate bodily injury or domestic violence second in the charge for domestic violence first degree." (R. p. 531, lines 14-19).

The jury then asked for a copy of the "laws." (R. p. 532, lines 1-4; Court's Exhibit #5, R. p. 571). Respondent objected to providing the jury with a written copy of the statutes and renewed the request to define domestic violence second degree and moderate bodily injury. (R. p. 535, lines 21-24). The judge decided, over objection by Respondent, to provide the jury with a written copy of the statutes addressing domestic violence of a high and aggravated nature and

domestic violence first degree. (R. p. 537, lines 14-23). Before the judge could provide the written statutes the jury asked the judge to explain kidnapping and asked, "Can the judge read what is bodily harm? Can he state that fear of what?" (R. p. 539, lines 19-21; Court's Exhibits #6 and #7, R. pp. 571-572). The judge provided the jury with written copies of the statutes addressing domestic violence of a high and aggravated nature, domestic violence first degree and kidnapping. (R. p. 544, lines 7-20; Court's Exhibits #8, 10 and 11, R. pp. 574, 577-578). The judge also provided the jury with the written definition of great bodily harm, as he instructed earlier. (R. p. 544, lines 21-25; Court's Exhibit #9, R. p. 576). Counsel for Respondent renewed the objection stating, "I renew my objection as far as second degree, the definition being a necessary part, and the moderate bodily injury definition, as well as I renew my objection about giving them the paper." (R. p. 545, lines 17-20).

The jury then asked, "What is the difference between peril or fear of great bodily injury?" (R. p. 546, lines 3-4; Court's Exhibit #12, R. p. 573). The judge answered:

> And what I – what I will tell you is that you have to use your common sense, your judgment, your – your dissemination – your determination of what that means. Just use your common sense, your – your – what you—what you believe that those terms mean to you. And I know that's not what you wanted to come out and hear. But that's, basically, what I can tell you. So – and you remember at the outset, I said life experience, common sense, your judgment. You're the judge of the facts. So that's – that's within your purview. So to the best of your ability, you – you have to make a determination to the applicability of these terms.

(R. p. 547, line 25 -p. 548, lines 1-11).

The jury returned with one final question, "Domestic violence high and aggravated, if one point is met, can you not look at domestic violence first degree?" (R. p. 549, lines 17-19; Court's Exhibit #13, R. p. 573). The judge noted, "I think the answer is yes. Are both sides in agreement? Because I think what – the way I interpret this is since you've got domestic violence

first degree as a lesser included – and that's what they're asking – can they consider it? I think the answer is yes." (R. p. 550, lines 7-12). The judge then told the jury, "We've got another question from the jury panel. And it says – and I'm going to read it, it says, Domestic violence high and aggravated nature, if one point is met, can you not look at domestic violence first degree? And I've consulted with Counsel from both sides and the answer to that is yes." (R. p. 551, lines 1-6).

After the jury returned for deliberations, counsel for Respondent said, "Well, Judge, now, I'm concerned. Can you not look – you couldn't look – I think it was meant colloquial as, can we still look at it? But now that I've heard it, it confuses me." (R. p. 551, lines 16-19). Seven minutes after the judge answered the final question with, "Yes" the jury returned with a verdict of guilty of domestic violence of a high and aggravated nature. (R. p. 551, line 9 – p. 552, lines 1-16). The jury's numerous questions reflect that they did not understand the difference between domestic violence of a high and aggravated nature and domestic violence first degree. The judge's charge on domestic violence first degree was incomplete without defining domestic violence second degree and moderate bodily injury. The trial judge erred in refusing to define DV 2nd and moderate bodily injury as part of the instruction on the lesser included offense of DV 1st pursuant to subsection (B)(5).

The applicable section of S.C. Code §16-25-20(C), the DV 2nd statute, provides:

> (C) A person commits the offense of domestic violence in the second degree if the person violates subsection (A) and:
>
> (1) **moderate bodily injury** to the person's own household member results or the act is accomplished by means likely to result in **moderate bodily** injury to the person's own household member;

Moderate bodily injury is defined by S.C. Code §16-25-10(4) as:

> [P]hysical 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's charge on DV 1st was incomplete because it failed to explain domestic violence second degree and moderate bodily injury pursuant to section (B)(5) of the DV 1st statute. As a result, and as evidenced by the numerous questions and under the facts of this particular case, the jury understandably struggled with the difference between domestic violence of a high and aggravated nature and domestic violence first offense. The judge's refusal to define domestic violence second degree and moderate bodily injury effectively omitted section (B)(5) from the DV 1st statute and prevented the jury from properly considering the lesser included offense of a DV 1st offense pursuant to S.C. Code §16-25-20(B)(5). The charge on DV 1st was incomplete. The incomplete charge confused the jury, as evidenced by their questions about the difference between the two statutes. The trial judge abused his discretion in refusing to define DV 2nd and moderate bodily injury. The record supports a finding of moderate bodily injury with aggravating factors.

The Court of Appeals correctly found the trial judge erred writing:

> The trial court erred in its jury instruction on first-degree CDV by not defining second-degree CDV. Although the trial court's instruction was a correct statement of law, the jury likely would not have known what the trial court meant when it referenced second-degree CDV during the instruction. Because the trial court did not define second-degree CDV nor moderate bodily injury, the jury could not have understood subpart (B)(5) of the first-degree CDV statute. The evidence supported a jury instruction on the *definition* of second-degree CDV under section 16-25-20(B)(5) of the first-degree CDV statute. Additionally, because second-degree CDV uses the term moderate bodily injury, the court also should have given the statutorily provided definition of that term. Accordingly, the trial court erred in failing to give the definition of second-degree CDV.

State v. Workman, 437 S.C. 62, 72–73, 876 S.E.2d 151, 156 (Ct. App. 2022) (n. #1 omitted).

The error is not harmless.

2. **The Court of Appeals correctly found that the trial judge's failure to define DV 2nd and moderate bodily injury during the jury instruction on the lesser included offense of DV 1st was not harmless requiring reversal and remand of the DVHAN conviction.**

The jury in the present case had to determine if Respondent was guilty of DVHAN or DV 1st. Domestic violence of a high and aggravated nature is defined by S.C. Code §16-25-65 as follows:

> (A) A person who violates Section 16-25-20(A) is guilty of the offense of domestic violence of a high and aggravated nature when one of the following occurs. The person:
>
> (1) commits the offense under circumstances manifesting extreme indifference to the value of human life and great bodily injury to the victim results;
>
> (2) commits the offense, with or without an accompanying battery and under circumstances manifesting extreme indifference to the value of human life, and would reasonably cause a person to fear imminent great bodily injury or death; or
>
> (3) violates a protection order and, in the process of violating the order, commits domestic violence in the first degree.
>
> (B) A person who violates subsection (A) is guilty of a felony and, upon conviction, must be imprisoned for not more than twenty years.

Section (D) provides examples of circumstances manifesting extreme indifference to the value of human life as follows:

> (1) using a deadly weapon;
>
> (2) knowingly and intentionally impeding the normal breathing or circulation of the blood of a household member by applying pressure to the throat or neck or by obstructing the nose or mouth of a household member and thereby causing stupor or loss of consciousness for any period of time;
>
> (3) committing the offense in the presence of a minor;
>
> (4) committing the offense against a person he knew, or should have known, to be pregnant;
>
> (5) committing the offense during the commission of a robbery, burglary, kidnapping, or theft; or

(6) using physical force against another to block that person's access to any cell phone, telephone, or electronic communication device with the purpose of preventing, obstructing, or interfering with:

a. the report of any criminal offense, bodily injury, or property damage to a law enforcement agency; or

b. a request for an ambulance or emergency medical assistance to any law enforcement agency or emergency medical provider.

Five of these examples are very similar to the aggravating factors found in subsection (B)(5) of the DV 1st statute.

The indictment alleges physical harm without providing a degree. The indictment does not allege a specific circumstance manifesting extreme indifference to the value of human life under the DVHAN statute. The degree of bodily injury and a finding of circumstances manifesting extreme indifference, including the use of a gun, were factual determinations to be made by the jury. The judge's failure, however, to fully instruct the jury on subsection (B)(5) of DV 1st statute by defining DV 2nd and moderate bodily injury effectively omitted section (B)(5) from the DV 1st statute. The error prevented the jury from considering moderate bodily injury[2]. The error prevented the jury from properly considering the lesser included offense of domestic violence first offense pursuant to S.C. Code §16-25-20(B)(5).

The State argues that moderate bodily injury was not an issue in the case because, "The State did not rely on the degree of injury as a circumstance of aggravation. Instead, the case was based primarily on Appellant's use of a gun, an aggravating circumstance that stands apart from the degree of injury." (Petition for Writ of Certiorari p. 9). The determination of a

[2] The State argues Loretta Workman's injuries did not rise to the level of moderate bodily injury. (Petition for Writ of Certiorari p. 12). This, however, was a factual determination to be made by the jury, like the use of a gun.

"circumstance of aggravation," whether it was degree of bodily injury or use of a gun or another statutorily provided circumstance, were facts to be determined by the jury. The State then argues, "Appellant [Respondent] suffered no prejudice because the requested charge was not pertinent to the jury's determination of guilt, evidenced by the fact that the jury found him guilty of DVHAN and never reached DV 1st." (Petition for Writ of Certiorari p. 9). The jury never reached DV 1st because the judge failed to fully instruct the jury on the law of DV 1st.

The judge's failure to fully instruct the jury on the law of DV 1st, specifically the failure to define DV 2nd and moderate bodily injury pursuant to subsection (B)(5), in this case is the equivalent of a complete failure to instruct the jury on the lesser included offense. As discussed above in issue one and not challenged in the petition, presumably because at trial the State did not object to the charge on the lesser included offense of DV 1st, there is evidence presented from which it could be inferred that that Respondent committed the lesser offense, DV 1st under §16-25-20(B)(5), rather than the greater offense of DVHAN. The error is not harmless when the jury was prevented from considering the lesser included offense under subsection (B)(5).

In finding that the error was not harmless, the Court of Appeals wrote:

> Although, the jury had the options of finding Workman guilty of CDVHAN, guilty of the lesser included offense of first-degree CDV, or finding him not guilty, the instruction for first-degree CDV was incomplete. In the Lowry and Casey cases, if the supreme court had agreed with the harmless error theory expressed by the State, it could have found the error in giving the lesser jury instruction harmless and affirmed the convictions instead of reversing them. See also State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003) (reversing a voluntary manslaughter conviction when the trial court denied the defendant's request to charge involuntary manslaughter); State v. Knoten, 347 S.C. 296, 309, 555 S.E.2d 391, 398 (2001) ("Because there was evidence ... supporting a conviction for the lesser included offense of voluntary manslaughter, we reverse Appellant's conviction [of murder]."). Because the supreme court has not opted to find the failure to give instructions harmless when the jury convicted of the higher offense, we will not find the error in failing to give a complete charge on the lesser offense harmless here. Accordingly, the trial court's error in giving an

incomplete charge on first-degree CDV was not harmless despite the jury's conviction of Workman of the offense of CDVHAN.

State v. Workman, 437 S.C. 62, 81, 876 S.E.2d 151, 161 (Ct. App. 2022). The Court of Appeals correctly found that the error was not harmless because there was evidence from which the jury could infer guilt of the lesser included offense pursuant to S.C. Code §16-25-20(B)(5) .

The present case is distinguished from State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014), where this Court found, under the specific facts of that case, that the trial court's error in refusing to charge assault and battery first degree as a lesser included offense of attempted murder was harmless. As the Court noted in Middleton, ". . . [T]he 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." 407 S.C. at 319, 755 S.E.2d at 436.

In contrast, in the present case the jury could have determined that Respondent was guilty of DV 1st pursuant to subsection (B)(5). The jury could have determined that Respondent committed DV 2nd by causing moderate bodily injury accompanied by one of the aggravating factors included in subsection (B)(5). The jury, however, was not given the opportunity to make that determination. In the State's closing argument the prosecutor references the lesser included offense of DV 1st pursuant to S.C. Code §16-25-20. He first addresses S.C. Code §16-25-20 (B)(4) addressing the use of a firearm. (R. p. 458, lines 2-11). The prosecutor goes on to discuss S.C. Code §16-25-20(B)(5)(a) dealing with an offense committed while being perceived by a minor and S.C. Code §16-25-20(B)(5)(c) dealing with an offense committed during the

commission of a kidnapping. (R. p. 458, lines 12-16). The error in failing to fully charge subsection (B)(5) by refusing to define DV 2nd and moderate bodily injury is not harmless in this case.

CONCLUSION

Based on the above arguments, this Court should deny the petition for writ of certiorari.

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Appellate Defender

ATTORNEY FOR RESPONDENT

This 12th day of October, 2022.