STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAMIR KEVIN SHANK,

APPELLANT

APPELLATE CASE NO. 2022-000650

INITIAL BRIEF OF APPELLANT

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court commit reversible error when it refused to charge the jury on the lesser included offense of assault and battery third degree where the evidence in the record was such that the jury could have found Appellant guilty of the lesser included offense instead of the crime charged?

STATEMENT OF THE CASE

Appellant was indicted during the April 2021 term of the Greenville County grand jury for one count of failure to stop for a blue light, one count of use of a vehicle without permission, and one count of assault and battery of a high and aggravated nature[1] (ABHAN). R. (Indictments). The State, represented by Andrew Miller, Sylvia Harrison, and John Waelde called the case to trial on April 25, 2022, before the Honorable R. Scott Sprouse and a jury. Appellant was represented by Paul Neely and Kaitlyn Diaz. Tr. 1-2.

After a one-day trial, Appellant was found guilty as indicted. Tr. 132-133. Judge Sprouse sentenced Appellant to concurrent terms of imprisonment for eighteen years on ABHAN, three years on use of vehicle without permission, and five years on the failure to stop for a blue light, with credit for 380 days' time served. Tr. 151, l. 8-Tr. 152, l. 9; R. (Sentencing Sheets)

This appeal follows.

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[1] On appeal, Appellant does not challenge his convictions and sentencing on the failure to stop for blue lights charge and the use of a vehicle without a permission charge.

STANDARD OF REVIEW

"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). "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." State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007). "[I]n the context of a trial court's decision not to charge a requested lesser-included offense, we review the trial court's decision de novo. We must reverse and remand for a new trial if the evidence in the record is such that the jury could have found the defendant guilty of the lesser offense instead of the crime charged." State v. Gilmore, 396 S.C. 72, 77, 719 S.E.2d 688, 690–91 (Ct. App. 2011).

ARGUMENT

The trial court commit reversible error when it refused to charge the jury on the lesser included offense of assault and battery third degree where the evidence in the record was such that the jury could have found Appellant guilty of the lesser included offense instead of the crime charged.

Relevant Facts

Sandra L. Bullock met Appellant through a neighbor, and the two became close friends. Appellant was working on getting his life back together. Bullock had been loaning her car to Appellant so that he could get to and from work. Appellant was supposed to return the car to her every evening with a full tank of gas. Tr. 35, l. 15-Tr. 36, l. 6. On August 19, 2020, Bullock loaned Appellant her car, but he did not return it that evening. After a few days had passed, Bullock reported the car stolen. Tr. 36, ll. 1-10.

On August 25, 2020, an automated license plate reader notified law enforcement of a stolen vehicle, a silver Toyota Corolla, in the vicinity of Ackley Road in Greenville County. Officer Andrew Elder with the Greenville Police Department responded to the notification from the license plate reader in his marked patrol car. Tr. 42, l. 11- Tr. 43, l. 4. Elder was wearing a body-worn camera[2] that captured his encountered with the stolen vehicle. Tr. 50, l. 24-Tr. 51, l. 14.

While en route to the location of the automated license plate reader, Elder observed the vehicle in question at the intersection of Rebecca Street and Clark Street. Tr. 42, ll. 19-22. Elder pulled behind the stolen vehicle and turned on his blue lights, however the driver of the vehicle did not stop. State's Ex. 7 at 2:57. A brief pursuit ended on a dead-end street where Elder

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2 This footage was entered at trial as State's Exhibit 7. A copy of this exhibit is on file with this Court.

attempted to perform a felony stop on the occupants of the vehicle. State's Ex. 7 at 3:55. In the video, the brake lights of the stolen vehicle are illuminated while Elder is standing behind his open driver-side door with his service weapon drawn issuing commands. The passenger in the stolen vehicle is seen opening the passenger side door and holding up his hands. State's Ex. 7 at 3:57. Elder continued to issue commands from behind his patrol vehicle's open driver-side door. The driver of the stolen vehicle begins to reverse out of the dead-end street with the passenger door still open. State's Ex. 7 at 3:58-4:02. The stolen vehicle travels straight back at a slow speed, with its brake lights illuminated. As the stolen vehicle passes Elder, the open passenger door strikes the open driver-side door of Elder's patrol vehicle which in turn strikes Elder knocking him to the ground. The video shows that the brake lights of the stolen vehicle remained illuminated through the incident. State's Ex. 7 at 4:02-4:05. The passenger is seen exiting the stolen vehicle as Elder's falls to the ground, just after the impact occurs. State's Ex. 7 at 4:07-4:08. Tr. 43, l. 5-Tr. 45, l. 25; Tr. 51, ll. 15-21; Tr. 64, l. 25-Tr. 65, l. 5.

The impact of the collision dislodged Elder's service weapon from his hands. The weapon became closed in the door of the patrol vehicle which caused a dent in the door frame. The driver-side door of the patrol vehicle was dented, and there was some damage to the rear driver-side area of the patrol vehicle from the collision. Elder received a small scrape on his left knee which he treated with an alcohol swab. Tr. 46, l. 16-Tr. 49, l. 14; Tr. 60, ll. 7-13; Tr. 63, l. 23-Tr. 64, l. 4. Other officers with the Greenville Police Department continued the pursuit of the stolen vehicle. The entire pursuit lasted between six and seven minutes. The stolen vehicle continued to flee until it was involved in a single-car accident where it rolled numerous times, totaling the vehicle. The driver of the stolen vehicle was identified as Appellant, Samir Shank. Tr. 67, l. 12-Tr. 71, l. 7.

The focus of the trial was the ABHAN charge. During opening statements, defense Counsel Diaz conceded that Appellant was guilty of failure to stop for a blue light. She emphasized to the jury that Appellant's sole intent that day was to evade law enforcement, and that the collision occurred not because Appellant sought to injury Elder but because the passenger in the vehicle opened his door as Appellant tried to flee. Tr. 31-33.

The State's main witness at trial was Officer Elder. He testified to the events as they were depicted on his body-worn camera. Elder testified he was close enough to touch the stolen vehicle as it passed him and that after he had been knocked down his head was towards the back of his vehicle between the two cars. Tr. 45, ll. 18-22; Tr. 46, ll. 9-15. On cross examination, Elder admitted that the passenger, not Appellant, opened the door that ultimately hit his open vehicle door. Tr. 58, ll. 2-6. When questioned if Appellant swerved to get around him, Elder responded that "he put it reverse towards my vehicle, yes, ma'am." Tr. 59, ll. 8-10. On recross-examination, Elder conceded that when the doors struck each other Appellant was reversing straight back. He further testified "I can't say he [Appellant] turned the wheel to strike me. However, I was struck by my door – by his door." Tr. 65, ll. 1-6.

Counsel Neely requested that the trial court charge the jury on the lesser included offense of assault and battery third degree. He argued that the testimony about the specific injury that Elder incurred, a scraped knee, supported a charge on the lesser included offense. Tr. 92, ll. 14-19. The State objected to the lesser included offense being charged to the jury, arguing that while there was an injury, the evidence it had presented went toward whether there was an offer or attempt to commit a great bodily injury. Tr. 93, ll. 3-9. The trial court noted that the State was proceeding under the second prong from the ABHAN statute, the "means likely to produce" portion. Tr. 93, ll. 19-21. Counsel Neely highlighted that the ABHAN indictment in Appellant's

case included both subsection A, the injury specific provision, and subsection B, the "means likely to produce" provision. He argued " [t]hey [the State] didn't pick a horse and ride it all the way to the finish line; they kind of done both. And so, because they've done both, I do believe that the A&B third is appropriate." Tr. 93, l. 22-Tr. 94, l. 21. The trial court ruled

> Based on the testimony in the case, and the State is producing – is – **the State is proceeding on the – the second part of the statute that they're alleging that this was accomplished by means likely to produce death or great bodily injury, the State is not proceeding on the injury itself. So, I believe that this is an either/or. This is going to be a question of – of whether the State has proven beyond a reasonable doubt of criminal intent in – in the matter.** So, I'm going to deny that request, but your objection is noted for the record.

Tr. 94, l. 22-Tr. 95, l. 9 (emphasis added).

Both parties spent most of their closing arguments discussing the ABHAN charge. The State placed the entire ABHAN statute on a projector for the jury to view during its closing argument. Tr. 100, ll. 3-10. The State argued that it was unclear what hit Elder and knocked him to the ground – his door or the door of the stolen vehicle – despite the testimony from Elder that he was struck by his door. It further argued that it was "sheer luck" that Elder did not lose the use of his fingers and that his head and upper body avoided devastating injury in the collision. The State contended that Appellant did not have to intend to harm Elder that day, that he only had to intend the act that caused the injury, that of reversing the car. Tr. 101-103.

In closing argument, Counsel Diaz reiterated that the case was not about the failure to stop for blue lights charge or the use of a vehicle without permission charge. Tr. 104, ll. 11-14. She conceded that Appellant was guilty of those charges and focused on the fact that Appellant's goal that day was to flee law enforcement. She noted that Appellant had attempted to swerve around Elder but misjudged the open passenger door. She emphasized that Appellant lacked the intent to harm Elder. Tr. 104-106. She further argued that the injury received, a scraped knee,

was minor and common, and that the jury did not have to imagine what injuries could have occurred because it knew what injury had occurred. Tr. 107, ll. 6-19; Tr. 110, ll. 1-12. She argued it was not luck that spared Elder further injury but the fact that Appellant did not intend to harm him. Tr. 110, ll. 13-20.

During the jury charge, the trial court charged the entire ABHAN statute as well as the definition of "great bodily injury." Tr. 122, l. 25-Tr. 123, l. 12. After the jury was excused, Counsel Neely renewed the objection and request to charge the lesser included offense, emphasizing to the court that it had charged the jury on both subsections of ABHAN. Tr. 127, ll. 13-20. The trial court noted Counsel Neely's renewal for the record but again denied the request to charge the lesser included offense. Tr. 127, l. 21-Tr. 128, l. 2. Approximately thirty-five minutes into deliberations, the jury sent out a note requesting that the court define ABHAN again. The court, for a second time, charged the jury with the entire ABHAN statute and the definition of "great bodily injury." Tr. 130, l. 8-Tr. 131, l. 7. A short time later the jury returned with the verdicts finding Appellant guilty as indicted. Tr. 131, l. 20-Tr. 133, l. 8.

Discussion

The trial court committed reversible error when it declined to charge the jury on the lesser included offense of assault and battery third degree. The trial court did not apply the well settled law that the evidence submitted at trial determines the law to be charged to the jury. Instead, the trial court determined that it would not charge the lesser included offense because the State was proceeding under the second portion of the ABHAN statute, that the injury was accomplished by means likely to produce death or great bodily injury, and not on the injury actually incurred by Elder. This was an error of law.

"[T]he purpose of jury instructions is to enlighten the jury as to what law is applicable to a certain state of facts in order that a just, fair[,] and proper verdict can be reached." State v. Peer, 320 S.C. 546, 554, 466 S.E.2d 375, 380 (Ct. App. 1996). "The trial court is required to charge only the current and correct law of South Carolina." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). "The **evidence presented at trial determines the law to be charged** to the jury." State v. Gilliland, 402 S.C. 389, 400, 741 S.E.2d 521, 527 (Ct. App. 2012) (emphasis added).

"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 (Ct. App. 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). "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." Id. 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)) (emphasis added).

Assault and battery third degree is a statutorily defined lesser included offense of ABHAN. S.C. Code Ann. § 16-3-600 defines the various degrees of assault and battery charges in South Carolina. Section (B)(1) states "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." Section (E)(1) states "A person commits the offense of assault and battery in the third degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so." Section (E)(3) states "Assault and battery in the third degree is a lesser-included offense of assault and battery in the second degree, as defined in subsection (D)(1), 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."

The evidence in the case supported a charge on the lesser included offense of assault and battery third degree. The video of the incident showed that Appellant did not back the car at or towards Elders but backed the vehicle straight back. The collision that injured Elder only occurred because of the open passenger door colliding with Elder's open driver door which knocked Elder down, not because Appellant was targeting Elder with the stolen vehicle. Had one of the two open vehicle doors been closed, an impact would not have occurred, and Elder's would not have sustained any injury. Further, the evidence showed that the actual injury Elder's suffered was extremely minor, a scraped knee. Stated plainly, there was evidence from which the jury could have inferred that Appellant did not intend to injury Elder by means likely to produce death or great bodily injury but merely caused an unlawful minor injury to Elder.

Additionally, the trial court based its ruling on improper considerations. The appellate courts of this state have repeatedly made it clear that the law to be charged to the jury is based on the evidence presented at trial. The theory of the State's case has absolutely no bearing on what law is charged to the jury. That the State was arguing that the injury occurred by means likely to produce great bodily injury or death would not preclude the jury from finding that Appellant was only guilty of assault and battery third degree based on the evidence adduced at trial.

That the jury could have found Appellant guilty of the lesser included offense is further supported by the fac that the jury requested to be recharged on the law of ABHAN. It is apparent that jury grappled with applying the law that it had been given with the facts it had determined to be true. Considering the record in the light most favorable to Appellant, with such a minor injury and the video from the incident clearly showing Appellant did not drive at Elder, it is logical to conclude the jury could have found Appellant guilty of the lesser included offense if the court had instructed the jury on the law of assault and battery third degree.

CONCLUSION

Based on the forgoing argument, Appellant respectfully requests that this Court reverse his conviction for assault and battery of a high and aggravated nature and remand his case to the Court of General Sessions of Greenville County for a new trial.

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of February, 2023

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

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Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

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V.

SAMIR KEVIN SHANK,

APPELLANT

APPELLATE CASE NO. 2022-000650

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 William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 12th day of February, 2023.

Jessica M. Saxon
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT