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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Horry County
Hon. Benjamin H. Culbertson, Circuit Court Judge
Appellate Case No. 2023-000633

The State, Respondent,

v.

Philip David Guderyon, Petitioner.

Opinion No. 5955 (S.C. Ct. App. filed December 7, 2022)

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

STATEMENT OF QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

ARGUMENT 3

I. The Court of Appeals properly affirmed the trial court's denial of Petitioner's motion for a directed verdict on the assault and battery of a high and aggravated nature charge. 3

II. The Court of Appeals properly found Petitioner was not entitled to a self-defense charge and that the trial court correctly tailored the charge based on existing law. 6

III. The Court of Appeals properly found that the trial court did not err in the instructions provided to the jury on the assault and battery of a high and aggravated nature charge as well as the lesser-included offenses. 10

CONCLUSION 14

STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals properly affirmed the trial court's denial of Petitioner's motion for a directed verdict on the assault and battery of a high and aggravated nature charge.

II. The Court of Appeals properly found Petitioner was not entitled to a self-defense charge and that the trial court correctly tailored the charge based on existing law.

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STATEMENT OF THE CASE

Procedural History

On January 21, 2016, the Horry County Grand Jury indicted Petitioner for assault and battery of a high and aggravated nature (ABHAN). On October 9-12, 2017, he proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. The jury found him guilty of ABHAN and the trial judge sentenced him to ten years' incarceration.

Petitioner served and filed a timely Notice of Appeal. After briefing and oral argument, the Court of Appeals affirmed Petitioner's conviction and sentence. See State v. Guderyon, 438 S.C. 476, 884 S.E.2d 202 (Ct. App. 2022). Petitioner served and filed a Petition for Writ of Certiorari and this Return follows.

ARGUMENT

I. The Court of Appeals properly affirmed the trial court's denial of Petitioner's motion for a directed verdict on the assault and battery of a high and aggravated nature charge.

The Court of Appeals correctly determined there was sufficient evidence to warrant sending the charge of assault and battery of a high and aggravated nature (ABHAN) to the jury. There was evidence Petitioner punched the victim and either the punch or the subsequent collision of the victim's head with the ground resulting from the punch caused victim's severe head trauma and ultimately his death.

Standard of Review

"On appeal from the denial of a directed verdict, [the Appellate] Court views the evidence and all reasonable inferences in the light most favorable to the State." State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). As the South Carolina Supreme Court recently reiterated: "[W]hen ruling on a directed verdict motion, the trial court views the evidence in the light most favorable to the State and must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'" State v. Bennett, 415 S.C. 232, 236-37, 781 S.E.2d 352, 354 (2016) (quoting State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955)).

"Therefore, although the jury must consider alternative hypotheses, the court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." Id. "Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." Id.

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. See State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding "any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt" in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)).

Merits

In the instant case, the State presented sufficient evidence supporting sending the charge of ABHAN to the jury. Section 16-3-600 provides:

> (B)(1)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 Ann. § 16-3-600 (B) (Supp. 2011). Further, the statute 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." S.C. Code Ann. § 16-3-600 (A)(1) (Supp. 2011). As a result, in order to submit the case to the jury, the State had to demonstrate Petitioner committed a volitional act, that act injured another person, and the resulting injury constituted bodily injury which caused a substantial risk of death, permanent disfigurement, or protracted loss or impairment of a bodily member or organ.

There was no question in the evidence that Petitioner struck the victim. James Petrocine, known as Jimer, testified he was shaking hands with he victim after their verbal argument when he "felt some wind come over [his] shoulder and that's when I heard like a hit, and then [the victim] was on the ground." (R.120). He testified he found out Petitioner struck the victim, and

he may have learned that from Petitioner with whom he left the bar. (R.120). Additionally, Petitioner's own statement indicated he struck the victim as did two witnesses presented by the defense. Both of Petitioner's witnesses presented in his defense testified the victim "went down" or fell "like a sack of potatoes." (R.206, 230).

Dr. Cheatle testified the victim had a "very large subdural hematoma" which in turn caused his brain to swell. (R.63-64) According to Dr. Cheatle, the rear of the victim's head, near the base of his skull, was the site of impact for the force which caused his brain to collide with the front of his skull, causing the hematoma near his frontal lobe. (R.66-67). To treat the victim's severe condition, Dr. Cheatle performed an emergency craniotomy to open up a "skull flap" and relieve pressure on the brain. However, after several days, the victim's brain began swelling again and Dr. Cheatle removed his frontal lobe in a last-ditch effort to save his life. (R.p.67, line 13–R.p.70, line 22). Given the testimony by Dr. Cheatle, there is no possibility to resulting injury would not constitute a great bodily injury, especially given the fact the victim ultimately died as a result of the injury.

Dr. Cheatle testified the blow to the back of the head could have been a punch or could have been "a hard surface." (R.74; 75). As the prior testimony indicated the victim was struck by Petitioner and "went down" and never moved again except by being dragged out of the bar by bouncers. Accordingly, there is certainly evidence, whether from a single punch to the back of the head or from a punch to the front of the victim's head resulting in him falling and striking the back of his head on the floor, Petitioner's act of punching the victim was the proximate cause of the injury to the victim and resulted in great bodily injury; thus it warranted sending the case to the jury on the charge of ABHAN. The Court of Appeals properly affirmed the denial of Petitioner's motion for a directed verdict and this Court should deny the Petition on this issue.

II. The Court of Appeals properly found Petitioner was not entitled to a self-defense charge and that the trial court correctly tailored the charge based on existing law.

The Court of Appeals properly found Petitioner was not entitled to a charge on self-defense so any possible error in the charge given would be entirely harmless. Petitioner's own testimony indicated he inserted himself into a situation unnecessarily and so he cannot meet the first element of self-defense that he was without fault in bringing on the difficulty.

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) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "In general, 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 request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused.'" State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989)).

"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "'In reviewing jury charges for error, [the Court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.'" Brandt, 393 S.C. at 549, 713 S.E.2d at 603 (quoting State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2013)). "Jury

instructions should be designed to enlighten the jury and aid it in arriving at a correct verdict." State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) (citing State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987)).

Merits

The Court of Appeals properly found Petitioner was not entitled to a charge on self-defense. Generally speaking, South Carolina Courts have recognized that there are four elements to establish self-defense:

> **First, the defendant must be without fault in bringing on the difficulty.** Second, the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger.

State v. Bryant, 336 S.C. 340, 344–45, 520 S.E.2d 319, 321–22 (1999) (emphasis added). While South Carolina has not directly accepted the concept of "non-deadly self-defense" as requested by Petitioner, it has been explained:

> [T]here must be however, in all cases, some proportion between the battery given, and the first assault. . . . So that the degree of resistance, ought to be in proportion to the nature of the injury offered; that is, that it be sufficient to war off such injury, and no more.

State v. Wood, 1 S.C.L. 351, 346 (1794). Because no case law has specifically adopted the non-deadly self-defense standard in South Carolina, the circuit court should not be found to have abused its discretion because it charged what is the current and correct law in South Carolina.

However, significantly, even if South Carolina adopted the concept of non-deadly self-defense, one of the required elements would still be that Petitioner be without fault and not the initial aggressor. For example, the elements as explained by the North Carolina Supreme Court:

> **If one is without fault in provoking, or engaging in, or continuing a difficulty with another**, [s]he is privileged by the law of self-defense to use such force against the other as is actually or reasonably necessary under the circumstances to protect [her]self from bodily injury or offensive physical contact at the hands of the other, even though [s]he is not thereby put in actual or apparent danger of death or great bodily harm.

State v. Anderson, 51 S.E.2d 895, 897 (N.C. 1949) (emphasis added).

In this particular case, the victim and Jimer were involved in a verbal argument that did not involve Petitioner. Based on his own statement, Petitioner **inserted** himself into the middle of the two without any provocation or need to protect either party. His primary witnesses both testified Petitioner got in between the victim and Jimer and that Petitioner attempted to separate them. Accordingly, Petitioner cannot contend to be without fault in provoking any response by the victim when he placed his hands on him in an attempt to separate him from his argument with Jimer.

Because he would not be entitled to a charge of self-defense under either the current law in South Carolina, or even under an adopted version of non-deadly self-defense, any error in the charge on self-defense provided by the court was entirely harmless. This Court has explained:

> Errors, including erroneous jury instructions, are subject to harmless error analysis. 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. In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.

State v. Burdette, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019) (internal citations and quotation marks omitted). Because he was not entitled to a charge on self-defense or a finding of self-defense because he initiated the difficulty between himself and the victim, any possible error in not providing Petitioner with his requested self-defense charge would be entirely harmless.

III. The Court of Appeals properly found that the trial court did not err in the instructions provided to the jury on the assault and battery of a high and aggravated nature charge as well as the lesser-included offenses.

The Court of Appeals correctly found the trial court's instruction regarding ABHAN and the lesser included assault and battery charges did not warrant reversal. The trial court properly recognized Petitioner did not have to intend the ultimate degree of resulting injury. The trial court required an even higher standard of proof by the State regarding what Petitioner intended than is required for a general intent assault and battery crime. As a result, the Court of Appeals properly found the instruction was not reversible error.

Standard of Review

"[T]he trial court is required to charge only the current and correct law of South Carolina." State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). "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). " 'In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.' " Brandt, 393 S.C. at 549, 713 S.E.2d at 603 (quoting State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2013)). "The substance of the law is what must be instructed to the jury, not any particular verbiage." State v. Smith, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994) (citing State v. Rabon, 275 S.C. 459, 462, 272 S.E.2d 634, 636 (1980)). Moreover, " '[t]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.' " Brandt, 393 S.C. at 550, 713 S.E.2d at 603 (quoting Mattison, 388 S.C. at 479, 697 S.E.2d at 583).

Merits[1]

The trial court charged the jury on the statutory definition of ABHAN as well as lesser-included offenses. For example, the charge on ABHAN provided: "To convict the Defendant of this crime, the State must prove beyond a reasonable doubt that the Defendant unlawfully injured another person and either great bodily injury to that person resulted or the act was accomplished by means likely to produce death or great bodily injury." (R.294). It also provided an instruction regarding criminal intent. After the jury began deliberations, it sent out a note seeking further explanation regarding the differences between ABHAN and the lesser-included offenses. Specifically, the jury asked: "Are we to consider 'intent' as to which level of assault this is or is the resulting harm the deciding factor?" (R.325). The trial court provided an updated jury instruction:

> To convict the Defendant of assault and battery of a high and aggravated nature, the State must prove beyond a reasonable doubt that the Defendant intended to unlawfully injure another person, and either great bodily injury to that person resulted or the act was accomplished by means likely to produce death or great bodily injury.

(R.319). Similar instructions were provided for each of the lesser-included offenses. The significant difference from the original charge was adding the requirement the State prove the defendant "intended to unlawfully injury another person."

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[1] It is highly questionable whether any issue is properly preserved for review on appeal. After the jury sent its note, the trial court indicated the proposed charge to be given. Defense counsel stated: "I would object to adding the word intent to the Court's previous charge. That was not in the original charge on assault and battery of a high and aggravated nature." (R.316). He essentially asked the trial court to simply repeat the prior charge. This is very different than the issue argued to the Court of Appeals and to this Court. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

The trial court's instruction actually went beyond what the State is required to prove in order to establish Petitioner guilty of ABHAN. The trial court required the State to prove Petitioner intended to injure the victim, when the correct charge would have only required the State to prove that Petitioner intended the act that proximately caused the injury. The State was not required to prove Petitioner actually intended an injury and certainly was not required to prove he intended the level of injury which resulted as argued now by Petitioner.

ABHAN, as well as the lesser included offenses because they are not based on an attempt, are all general intent crimes and not specific intent crimes. See, e.g., State v. Smith, 430 S.C. 226, 234 n.9, 845 S.E.2d 495, 499 n.9 (2020). General intent has been defined as "[t]he intent to perform an act even though the actor does not desire the consequences that result." General Intent, Black's Law Dictionary (11th ed. 2019).

Because it is a general intent crime, ABHAN and the lesser-included assault and battery offenses[2] can be committed willfully, purposefully, or recklessly. See, e.g., State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957) (concluding evidence establishing Mouzon struck and killed a pedestrian while intoxicated and driving a vehicle at a speed of seventy to eighty miles per hour in an area with a posted speed limit of thirty-five miles per hour supported a conviction for murder); State v. Sussewell, 149 S.C. 128, __, 146 S.E. 697, 703 (1929) (affirming Sussewell's common law assault and battery of a high and aggravated nature conviction after concluding his act of striking a pedestrian with his car while driving at a "rapid rate of speed" could support findings of gross negligence, recklessness, or willfulness and could not support a conclusion he was only guilty of simple assault and battery); William Shepard McAninch et al., The Criminal Law of South Carolina 212 (5th ed. 2007) (expressing the view

[2] Again, not including when the lesser-included is based on an attempt which is a specific intent crime.

there is no reason why both simple battery and aggravated battery should not be capable of being committed via criminal negligence in South Carolina and explaining that "appears to be the rule in the majority of jurisdictions"); William Shepard McAninch et al., The Criminal Law of South Carolina 243 (6th ed. 2013) (expressing the same view for the same reasons *after* the enactment of the Omnibus Crime Reduction and Sentencing Reform Act of 2010).

The jury instruction, to be completely accurate should have indicated the jury was only required to find that Petitioner intended to commit the act that ultimately resulted in the injury to the victim. Once that intent was found, then the level of assault and battery would be determined solely based on the level of injury—a level not required to be intended by Petitioner. People v. Davis, 896 P.2d 119, 148 n.15 (Cal. 1995)(A crime is characterized as a "general intent" crime when the required mental state entails only an intent to do the act that causes the harm.). Accordingly, the trial court did not commit reversible error in its jury instruction regarding ABHAN and the other assault and battery offenses and the Court of Appeals properly affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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