STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of General Sessions
The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2022-000650

THE STATE,

Respondent,

v.

SAMIR KEVIN SHANK,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

AMBREE M. MULLER
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3747

W. WALTER WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 E. North Street
Greenville, SC 29601
(864) 467-8647

ATTORNEYS FOR RESPONDENT

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The trial court properly refused to charge the jury on the lesser-included offense of third-degree assault and battery because a jury could not find Appellant guilty of third-degree assault and battery rather than assault and battery of a high and aggravated nature.

STATEMENT OF THE CASE

In April 2021, a Greenville County Grand Jury indicted Appellant Samir Kevin Shank of use of vehicle without permission, failure to stop for blue lights, and assault and battery of a high and aggravated nature (ABHAN). Appellant proceeded to a jury trial before the Honorable R. Scott Sprouse on April 25, 2022. Appellant was represented by Paul Neely, Esq. and Kaitlyn Diaz, Esq. The jury found Appellant guilty as charged. Appellant was sentenced to eighteen years on ABHAN, three years on use of a vehicle without permission, and five years for failure to stop for a blue light to be served concurrently. Appellant received credit for 380 days' time served.

This appeal follows.

STATEMENT OF FACTS

Sandra L. Bullock, a friend of Appellant who had met him through a neighbor, had been loaning her car to Appellant so that he could go to and from work. Appellant was to return the car every evening with a full tank of gas. On the evening of August 19, 2020, Appellant did not return Bullock's car. After being unable to get in touch with him over the phone or otherwise, Bullock reported the car to police as stolen.[1] (Tr. 35—Tr. 36).

On August 25, 2020, Officer Andrew Elder of the Greenville Police Department observed Bullock's silver Toyota Corolla driving within the Greenville city limits after responding to an automated license plate reader in the area that picked up the stolen vehicle. (Tr. 42, ln. 11—Tr. 43, ln. 4). As Elder began to follow the vehicle, it turned onto another street and "accelerated at a high rate of speed." (Tr. 43, ll. 6-11; (State's Exhibit 7)). A brief pursuit ensued until the Corolla found itself facing a cul-de-sac on the end of a dead-end street. The vehicle came to a stop in the middle of the cul-de-sac just in front of Elder's patrol car and Elder attempted to perform a felony stop on the vehicle. (Tr. 43, ln. 21—Tr. 44, ln. 21; (State's Exhibit 7)). As Elder stepped out of his vehicle, a passenger can be seen opening the front right door on the Corolla and holding his hands up out of the car. As Elder shouts verbal commands from behind his own driver's door, Appellant begins reversing towards the cul-de-sac entrance *and* Elder's vehicle. (Tr. 44, ln. 17—Tr. 45, ln. 15; (State's Exhibit 7)).

The open passenger door collides with Elder's open door, causing Elder to be knocked to the ground "between the two vehicles" as Appellant passes. (Tr. 45, ll. 18-25; (State's Exhibit 7)).

[1] A few days later, police notified her the car was involved in a crash and was totaled. Tr. 36, ln. 17—Tr. 38, ln. 13.

Regarding the relative space between the two cars, Elder stated "I had just enough room for me to be laying there." (Tr. 46, ll. 14-15). Regarding the impact, Elder further stated:

> A. [H]is vehicle door struck mine at such a force causing me to get thrown backward that it made the gun come out of my hand and get stuck in the doorframe at the top of the vehicle and shut the door on the gun.
>
> Q. Okay. And was there any damage to the doorframe or to the firearm?
>
> A. The firearm had some scratching on the outside of the slide, and the vehicle itself had a bent door at the top where it meets the frame.

(Tr. 46, ln. 18—Tr. 47, ln. 2). Fortunately, the only injury that Elder received was a scrape on his left knee. (Tr. 47, ll. 21-25). As Appellant fled the cul-de-sac, another brief pursuit was initiated by other police units until Appellant wrecked. (Tr. 67, ln. 17—Tr. 71, ln. 25).

After the State rested their case, Defense Counsel moved for a directed verdict as to the ABHAN charge and, in the alternative, for a charge to the jury on third-degree assault and battery as a lesser-included offense of ABHAN. Defense emphasized the non-serious nature of the injury while the State rebutted by emphasizing the use of a vehicle and how close the vehicle was to running over Elder. (Tr. 83, ln. 6—Tr. 86, ln. 3). The Court denied the directed verdict motion on the grounds that there was "evidence to support his particular offense." (Tr. 87, ll. 11-19). When Defense rested, Counsel reraised the motion for the requested jury charge, arguing again based on the "nature of the injury." (Tr. 92, ln. 14—Tr. 93, ln. 18). The State countered—and the Court noted—by emphasizing that they were seeking ABHAN under the second prong of the statute, the means used was likely to produce great bodily injury (GBI) or death, rather than an injury *causing* GBI or death itself. (Tr. 93, ln. 19—Tr. 94, ln. 14). The Court subsequently denied the charge, stating:

> Based on the testimony in the case, [. . .] the State is proceeding on the second part of the statute that they're alleging 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. [. . .] So I'm going to deny that request, but your objection is noted for the record.

(Tr. 94, ln. 22—Tr. 95, ln. 9) (emphasis added).

During closing arguments, the State emphasized how close Elder was to getting seriously injured and that, despite the minor scrape, Appellant should still be convicted of ABHAN based on the "means likely to produce [GBI] or death" prong. (Tr. 100, ln. 5—Tr. 102, ln. 14). Defense responded in their closing arguments by minimizing the proximity to serious injury that Elder was in and suggesting that Appellant merely "misjudge[d] that door." (Tr. 105, ln. 15—Tr. 106, ln. 17). After the jury was charged, Defense Counsel again moved for the requested charge but was denied for the same reasons as before. (Tr. 127, ln. 12—Tr. 128, ln. 2).

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "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, 583 (2010). When reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). Further, "[t]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004) (citing State v. Hughey, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000)). "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." State v. Burkhart, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002). "No instruction should be given by the trial judge, at the request of appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975).

ARGUMENT

The trial court properly refused to charge the jury on the lesser included offense of third-degree assault and battery because a jury could not find Appellant guilty of third-degree assault and battery rather than assault and battery of a high and aggravated nature.

Appellant contends that the trial court committed reversible error by denying a requested jury charge on third-degree assault and battery as a lesser included offense of ABHAN based on the fact that Elder's injury was minimal and a seeming lack of intent of Appellant to cause GBI. Appellant argues that if the jury were charged on third-degree assault and battery, he could have been convicted of that instead of ABHAN and thus would have received a reduced sentence. Additionally, Appellant argues that he was prejudiced by the trial court's error. However, these arguments are without merit.

Section 16-3-600 of the Code of Laws of South Carolina 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.
>
> (E)(1) A person commits the offense 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.
>
> (E)(3) 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.

S.C. Code Ann. § 16-3-600 (Supp. 2019).

"The degrees of assault and battery are, in descending order of severity, assault and battery of a high and aggravated nature (ABHAN), and assault and battery in the first, second, and third degrees." State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) (citing S.C. Code Ann § 16-3-600). Assault and battery in the third degree is a lesser-included offense of attempted murder, assault and battery of a high and aggravated nature, assault and battery in the first degree, and assault and battery in the second degree. S.C. Code Ann §16-3-600(D)(3).

"The [circuit court] is to charge the jury on a lesser included offense if there is any evidence from which the jury could infer that the lesser, rather than the greater, offense was committed." Id. "To justify charging the lesser crime, the evidence presented must allow a rational inference the defendant was guilty **only** of the lesser offense." State v. Geiger, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (2006). (emphasis added). "The trial court should refuse to charge the lesser included offense where there has been no evidence tending to show the defendant may have committed solely the lesser offense." Id. In order for the defendant to commit solely the lesser offense, the wounds on the victims would have to be categorized as moderate bodily injury instead of great bodily injury and the defendant would have to show that the act was not accomplished by means likely to produce death or great bodily injury. SC Code §16-3-600(B)(1)(b). Here Appellant can show that the wound on the victim was moderate bodily injury. However, Appellant can not show that the act was not accomplished by means likely to produce death or great bodily injury.

In this case, Appellant hit an officer with his car. Hitting someone with a car is a means highly likely to produce death or great bodily injury. First, there is no dispute that Appellant was attempting to evade law enforcement. Defense counsel had conceded that from the outset as to the failure to stop for blue lights charge specifically. (Tr. 32, Tr. 104). In the moment the injury occurred, Appellant was ignoring Elder's commands to stop the vehicle and instead reversed

straight back in an attempt to flee, knocking Elder over in the process. Although the degree of injury did not rise to great bodily injury, this is of no consequence since ABHAN does not require a serious injury nor does it evaluate the degree of injury so long as the means used was likely to produce great bodily injury or death. Hitting someone with a car is likely to cause great bodily injury or death and therefore, the jury could not have found Appellant guilty of only third-degree assault and battery rather than ABHAN and therefore the trial judge did not err in refusing to charge third-degree assault and battery.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

AMBREE M. MULLER
Assistant Attorney General

W. WALTER WILKINS
Solicitor, Thirteenth Judicial Circuit

BY: _____
AMBREE M. MULLER
Bar # 104213

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 779-8477

ATTORNEYS FOR RESPONDENT

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