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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Honorable Alex Kinlaw Jr., Circuit Court Judge

Appellate Case No. 2022-001263

THE STATE,

Petitioner,

v.

OLANDIO R. WORKMAN,

Respondent.

BRIEF OF PETITIONER

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STATEMENT OF THE ISSUE

An erroneous instruction concerning a lesser-included offense is harmless when it does not affect the jury's deliberations. In this DVHAN case, DV 1st was charged as a lesser-included offense. The trial court gave an incomplete definition of §(B)(5) of the DV 1st statute. The jury convicted Workman of DVHAN even though its verdict shows it determined Workman's conduct met the elements of DV 1st under §(B)(4). Was Workman prejudiced?

STATEMENT OF THE CASE

In February 2017, a 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. Workman proceeded to jury trial before the Honorable Alex Kinlaw, Jr., Circuit Court Judge, on September 17–20, 2018. The State alleged Workman confined and beat his wife, Loretta Workman, over a period of three days and used two guns to intimidate, and at one point strike, Mrs. Workman.

The court instructed the jury on the lesser-included offense of Domestic Violence in the First Degree (DV 1st). The parties agreed a charge on Domestic Violence in the Second Degree (DV 2nd) was not warranted by the evidence as a lesser-included offense. However, Workman argued it was necessary for the court to define DV 2nd because the presence of DV 2nd along with other aggravating factors it is one of several alternative bases for guilt of DV 1st. Workman was convicted as charged of each offense and sentenced to 12 years' incarceration for DVHAN, 15 years for Kidnapping, and 5 years for Possession of a Weapon during the Commission of a Violent Crime, with the sentences to be served concurrently.

Workman appealed his DVHAN conviction. After briefing and oral argument, the South Carolina Court of Appeals issued a published opinion reversing Workman's conviction for DVHAN. State v. Workman, 437 S.C. 62, 876 S.E.2d 151 (Ct.App. 2022). The State filed a petition for rehearing, which was denied on August 12, 2022. The State filed petition for a writ of certiorari with this Court on September 12, 2022, and Workman filed a return on October 12, 2022. This Court granted certiorari on October 27, 2023. This Brief of Petitioner follows.

STATEMENT OF FACTS

On August 29, 2016, Deputy Shannon McHale was dispatched to a residence in Greenville County regarding a welfare check on Loretta Workman. (App.121, lines 7–9). One of Mrs. Workman's coworkers had called 911 because Mrs. Workman had not shown up for work. (App.121, lines 9–12). Deputy McHale arrived just before 7:00 p.m. and Respondent Workman answered the front door. (App.122).

Deputy McHale informed Workman she was there to speak to Mrs. Workman, but Workman replied his wife was not home. (App.122, lines 22–24). Workman told Deputy McHale she could not search the residence and that Mrs. Workman was with her mother and would be back in an hour. (App.123). Workman claimed Mrs. Workman's cell phone was broken and that he did not know her mother's phone number. (App.124, lines 14–21).

Deputy McHale spoke with neighbors who said they had not seen Mrs. Workman in a few days, but if Mrs. Workman's vehicle was in the driveway and the children were home, then Mrs. Workman was there. (App.124–25). Deputy McHale had dispatch contact local hospitals and learned none of them had admitted Mrs. Workman as a patient. (App.125, lines 16–19). Police contacted Mrs. Workman's boss who stated she had not been at work and that this was unlike her. (App.125, lines 20–24). Mrs. Workman's boss further informed police that Mrs. Workman left her a voicemail on Saturday but it was "garbled" and she had been unsuccessful at reaching Mrs. Workman since then. (App.125–26). Police also made contact with the original complainant, Mrs. Workman's co-worker. (App.206, lines 6–15). She told police she had noticed scratches on Mrs. Workman a few weeks earlier and it was enough to "raise an eyebrow." (App.206, lines 17–22). Deputy McHale testified Mrs. Workman's cell phone provider informed them Mrs. Workman's cell phone had been off for at least 27 hours but the

last known location was the Workmans' residence. (App.126, lines 11–20). At this point, Deputy McHale believed Mrs. Workman was inside the home and obtained a search warrant and the assistance of the SWAT team. (App.127, lines 7–13).

SWAT officers responded to the scene and attempted to get the occupants of the home to come out, calling over a loudspeaker for over an hour. (App.225). Around this time, police received a 911 call from a male caller stating he had been stabbed at an address adjacent to the Workmans' home through the woods. Police were unable to locate any stabbing victim. (App.130–31). The phone number that called to report the stabbing belonged to Workman. (App.131, lines 1–16).

Eventually, SWAT entered the home and located a battered Mrs. Workman and her two children in a bedroom. Workman was no longer there. (App.129, lines 15–21). When asked why she refused to come out, Mrs. Workman originally told officers she was asleep and did not hear them calling. (App.229, lines 6–7). However, the Workmans' 6-year-old son told police he heard them calling but his mother refused to let him leave the bedroom. (App.231, lines 14–17). He said his parents had been "fighting" and "his daddy" caused the injuries to Mrs. Workman. (App.280, lines 16–23).

Police searched the home and located two guns in the master bedroom. They found an AK-47-style rifle under the mattress of the bed and a 9mm handgun in a nightstand. (App.163–64). Each gun was loaded with a bullet in the chamber. (App.238, lines 18–21). Mrs. Workman told officers about a third gun that was never located. (App.237, lines 13–18).

Deputy McHale testified Mrs. Workman "had bruising to her face" and two black eyes that were "really badly swollen. . . . I'd assumed she could barely see out of them as to how swollen they were." (App.130, lines 5–9). Sergeant Ramon Rivera testified Mrs. Workman

"had two black eyes" and "swelling around her [cheek] bone area" and "finger marks" on her arms and neck. (App.212–13). She seemed disoriented and confused. (App.212–13).

Sergeant Robert Perry attempted to interview Mrs. Workman, but she appeared "traumatized . . . irritable, irritated at us for being there." (App.226, lines 15–24). Mrs. Workman originally told him her injuries occurred during a bar fight. (App.228, lines 6–8). Sergeant Perry testified he wanted to get Mrs. Workman into a shelter for battered women, but Mrs. Workman and her children left to stay with her sister-in-law. (App.232–35). Sergeant Perry set up a meeting with DSS for Mrs. Workman the following morning, but learned Mrs. Workman had left the state with her children. (App.240–41).

Days later, Mrs. Workman contacted Sergeant Perry. (App.244–46). Sergeant Perry testified Mrs. Workman was "very apologetic . . . for not cooperating more [on the] night of the incident." (App.246, lines 11–17). Sergeant Perry recounted Mrs. Workman's "story of a continual cycle of domestic violence, control, abuse, fear, intimidation" at the hands of Workman. (App.247, lines 15–18). Mrs. Workman told him the last incident began after Workman accused her of cheating and this was not the first time she and Workman had issues. (App.247–48).

Mrs. Workman testified and explained that on Saturday the 27th, Workman arrived home and immediately began asking: "Where's your phone? Who have you been talking to? I know you've been cheating on me, you cheating, lying bitch . . . ." (App.293, lines 8–24). Mrs. Workman testified this was common behavior for Workman and she gave him her phone to search. (App.294, lines 1–5). Workman then began "constantly" and "repeatedly" punching Mrs. Workman about her face and body. Mrs. Workman testified the children were present and were "running in and out, watching TV, playing." (App.294, lines 20–25). The abuse

"continued the whole three days." Mrs. Workman testified Workman kept accusing her of cheating: "Every time I even opened my mouth, 'you're lying.' And he'd smack me again, or he'd punch me again, or choke me, and throw me to the floor." (App.295, lines 5–14).

Mrs. Workman did not go to work on Monday because Workman told her the trailer would blow up if she attempted to open any of the doors or windows. (App.299–300). She testified, "I don't know what he's capable of. You see what he did to my face." (App.300, lines 10–11). She explained Workman "wasn't allowing me to go anywhere. He took the keys to the cars, everything." (App.300, lines 4–5). Mrs. Workman no longer had access to a phone because Workman "broke it." (App.301, lines 18–19).

Mrs. Workman testified that Workman at various times held a gun as he beat her. When asked why he was holding the guns, Mrs. Workman responded: "I guess for intimidation. And he was threatening me with them." (App.298, lines 14–15). She testified that at one point Workman struck her with the pistol as she raised her hands to defend herself. (App.299, lines 1–13). She testified Workman was "holding [the gun], carrying it around the house" in front of the children. (App.299, lines 13–20).

On Monday when the police arrived, Mrs. Workman did not hear the initial knock on the door because she was in the shower. (App.305, lines 2–4). Workman told her the police were at the door and ordered her to put makeup on to "cover up the bruises on [her] face" and "lay down in the bedroom with the kids and not to make a sound." (App.305, lines 10-20). Mrs. Workman testified she was unaware the guns were in the bedroom at that time because she thought Workman had kept them in the living room with him. (App.305–06). Mrs. Workman could hear the police asking them to exit the home, but she did not leave because she thought Workman was

still there and would hurt her. (App.306, lines 4–18). She testified she wanted the police to "rescue" her. (App.306, lines 22).

Charge conference

Before closing arguments, the court held a charge conference. The attorneys agreed DV 1st should be charged as a lesser included offense of DVHAN. (App.426, lines 21–23). The attorneys also agreed DV 2nd should not appear on the verdict form as a lesser-included offense. (App.436, lines 8–21). However, defense counsel argued the court should nevertheless define the offense of DV 2nd and moderate bodily injury "as it relates to" DV 1st because the presence of moderate bodily injury forms a potential basis of guilt for DV 1st when combined with other aggravating factors. (App. pp. 426–36). Defense counsel seemed to argue moderate bodily injury was essential to DV 2nd, and asked in the alternative for the court to charge the jury that DV 1st "may include moderate bodily injury accompanied by choking, blocking somebody from the telephone, or being perceived by a minor." (App.426, lines 2–10; App.429, lines 19–23). Defense counsel argued, "my fear is that we're going to get a question from the jury about what is criminal domestic violence second degree." (App.434, lines 15–17). The trial court declined to charge the jury on DV 2nd, reasoning it would confuse the jury to instruct them on an uncharged offense. (App.433). However, the court agreed to define DV 2nd for the jury "if they have that question." (App.435–36).

STANDARD OF REVIEW

For trial errors affecting some federal constitutional right, the appellate court must determine whether the error is "harmless beyond a reasonable doubt." Arnold v. State, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992) (citing Chapman v. California, 386 U.S. 18 (1967)). In Beck v. Alabama, 447 U.S. 625 (1980), the United States Supreme Court held due process is violated when states forbid lesser-included instructions in capital cases, but declined to extend that holding to non-capital cases. Id. at 638 n.14 (1980). The majority view of the federal circuit courts is that there is no federal constitutional right to a lesser-offense instruction in a non-capital case. See McMullan v. Booker, 761 F.3d 662, 667 (6th Cir. 2014); Windham v. Merkle, 163 F.3d 1092, 1106 (9th Cir. 1998) (holding "the failure of a state trial court to instruct on lesser included offenses in a non-capital case does not present a federal constitutional question"); Trujillo v. Sullivan, 815 F.2d 597, 602 (10th Cir. 1987) (explaining "widely held view that failure of a state court to instruct on a lesser offense fails to present a federal constitutional question"); Alexander v. McCotter, 775 F.2d 595, 601 (5th Cir. 1985).

State and federal courts have noted the "beyond a reasonable doubt" standard is more stringent than their standard of review for nonconstitutional errors. United States v. Lane, 474 U.S. 438, 446 n.9 (1986) (noting "the standard for harmless-error analysis adopted in Chapman concerning constitutional errors is considerably more onerous than the standard for nonconstitutional errors"); People v. Schuller, 533 P.3d 908, 916 (Cal. 2023) (explaining "harmless beyond a reasonable doubt" standard for federal constitutional errors is "stricter" than "reasonably probable the outcome would have been different" standard which applies to "incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error"); State v. Ward, 256 P.3d 801, 817 (Kan. 2011) (explaining the "Chapman

'harmless beyond a reasonable doubt' threshold requires the highest level of certainty that the error did not affect the outcome"); California v. Roy, 519 U.S. 2, 4 (1996).

This Court has at times recognized that the "harmless beyond a reasonable doubt" standard applies specifically to constitutional errors. Arnold, 309 S.C. at 165, 420 S.E.2d at 838; State v. Clark, 315 S.C. 478, 484, 445 S.E.2d 633, 636 (1994) (Toal, J. dissenting) ("In order for a constitutional error to be harmless, the error must have been harmless beyond a reasonable doubt."). However, the Court has increasingly applied the "harmless beyond a reasonable doubt" standard to trial errors not alleged to have violated a federal constitutional right. See, e.g., State v. Heyward, Op. No. 28182 (S.C. Sup. Ct. filed October 5, 2023) (Howard Adv.Sh. No. 40 at 27) (finding error in admitting expert testimony "harmless beyond a reasonable doubt"). On other occasions, this Court has asked whether the error reasonably affected the result of trial. State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("Error is harmless where it could not reasonably have affected the result of the trial."); State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)). In State v. Tapp, this Court cited both standards within the same paragraph addressing a nonconstitutional error. State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012). See also State v. Duncan, 86 S.C. 370, 68 S.E. 684, 685 (1910) (in the context of improper argument, explaining new trial should be granted where "it appears probable that the verdict was thereby affected"); State v. Evans, 202 S.C. 463, 25 S.E.2d 492, 494 (1943) (assessing whether "it is probable that the minds of the jury were influenced" by erroneously-admitted evidence).

The State is not aware of any instance where this Court has recognized as deliberate its shift to the "harmless beyond a reasonable doubt" standard for trial errors that do not violate a

constitutional right. Likewise, the State is not aware that this Court has ever noted a distinction between the two standards.

ARGUMENT

Workman was not prejudiced by the trial court's incomplete instruction on subsection (B)(5) of the DV 1st statute because the jury had the viable option to convict under (B)(4), but found Workman guilty of the greater offense of DVHAN.

The court of appeals erred by reversing Workman's conviction for DVHAN on the basis that the trial court provided an "incomplete" definition of the lesser-included offense of DV 1st. At trial, the parties agreed DV 2nd should not be charged as a lesser-included offense. But Workman requested that the court define DV 2nd anyway because a defendant's commission of DV 2nd, combined with aggravating factors, may support guilt for DV 1st under §16-25-20 (B)(5). The trial court thought this would be confusing, but agreed to define DV 2nd if the jury asked. The court of appeals reversed on this basis.

The court of appeals failed to conduct a proper harmless error analysis. The court reversed based on the incompleteness of the charge without analyzing whether the incompleteness had any effect on the jury's deliberations in this case. Even if the jury *could* have found Workman guilty under §(B)(5), any defect in the charge did not make a difference because the jury had the clear option to convict under §(B)(4) based on Workman's use of a firearm "in any manner" while committing domestic violence. The jury's verdict indicates it found Workman met the elements of this subsection, but it nonetheless chose to convict him of the greater offense. Thus, the verdict was reliable and Workman was not prejudiced. This Court should reverse the court of appeals and reinstate Workman's conviction for DVHAN.

A. The trial court's DV 1st charge was incomplete.

DV 1st has five versions with distinct elements listed in the disjunctive. S.C. Code §16-25-20 (B). The defendant can thus be convicted under alternate theories depending on the facts of the case. See United States v. Jackson, 32 F.4th 278, 285 (4th Cir. 2022). The court of

appeals held the trial court erred by providing an incomplete definition of subsection (B)(5). This subsection provides for guilt when "in the process of committing domestic violence in the second degree," one of five aggravating factors is present. Even though §(B)(5) is based on an underlying commission of DV 2nd, at trial the parties agreed a charge on DV 2nd as a lesser-included offense was not supported by the evidence.

At the court of appeals, the State argued the evidence did not support a finding of guilt under §(B)(5) because there was no evidence of moderate bodily injury. After further consideration, the State believes this reading of the statute is too narrow. §(B)(5) is not predicated exclusively on a finding of moderate bodily injury, though this is the unique element of DV 2nd and this was the theory advanced by Workman at trial and at the court of appeals. Rather, §(B)(5) can be satisfied by evidence the defendant committed domestic violence accompanied by more than one of the aggravating factors listed in §(B)(5). Because domestic violence accompanied by any of the aggravating factors constitutes DV 2nd, the presence of an additional aggravating factor will elevate the crime to DV 1st. See S.C. Code §16-25-20 (C)(4).

Accordingly, the State agrees the trial court's charge was "incomplete" because it did not define DV 2nd. It was thus not possible for the jury to make an informed decision whether Workman was guilty under §(B)(5) by virtue of the presence of multiple aggravating factors. The evidence supported guilt under §(B)(5) because, as defense counsel argued, there was evidence Workman committed domestic violence 1) in the presence of a minor, 2) by restricting his wife's access to a telephone, 3) by choking, and, as the jury found, 4) during the commission of a kidnapping. (App.428–29).

B. Erroneous jury instructions on lesser-included offenses are subject to a harmless error analysis.

Even though the charge was incomplete as to §(B)(5), Workman was not prejudiced. Erroneous jury instructions are subject to a harmless error analysis. In order to merit reversal, "a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Patterson, 367 S.C. 219, 232 (Ct. App. 2006).

The court of appeals acknowledged early in its discussion of harmless error that "erroneous jury instructions . . . are subject to harmless error analysis." Workman, 437 S.C. at 81, 876 S.E.2d at 161 (citing State v. Burdette, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019)). Yet the concluding paragraph of the court of appeals' opinion seems to suggest an erroneous charge on a lesser-included offense cannot be harmless. The court wrote: "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." Workman, 437 S.C. at 81, 876 S.E.2d at 161. But this Court *has* found the failure to charge a lesser-included offense harmless, even when the instruction was supported by the evidence and was omitted completely. State v. Middleton, 407 S.C. 312, 319, 755 S.E.2d 432, 436 n.2 (2014) (explaining "it is elemental that the failure to charge the lesser-included offense is subject to a harmless error analysis").

C. The jury was presented with a viable "third option" beyond conviction of the charged offense and acquittal.

Perhaps the court of appeals was merely stating that conviction of the greater offense does not *in itself* render an error in a lesser-included charge harmless. This is a correct statement of law, though this Court embraced that rule in the past. See Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991), overruling State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986) (citing State v. Mulwee, 94 S.C. 323, 77 S.E. 1027 (1913)).

Even though there is no per se rule that conviction of the greater offense renders an erroneous instruction on a lesser-included offense harmless, this is a major factor for the court to consider. See State v. Young, 380 S.E.2d 94, 96 (N.C. 1989) (finding harmless error in failure to charge lesser-included offense, emphasizing jury was properly charged on greater offense and voted unanimously to convict beyond a reasonable doubt). The proper analysis is fact-intensive and case-specific, and asks whether the error affected the verdict in light of the evidence presented, arguments of counsel, and the jury's verdicts. See Middleton, 407 S.C. at 317, 755 S.E.2d at 435 (finding harmless trial court's failure to charge Assault and Battery 1st Degree as lesser-included of Attempted Murder where evidence conclusively showed intent to kill).

A major factor is whether the jury had the option to convict of an alternate lesser-included offense. When a trial court fails to charge a lesser-included offense, the theory of prejudice is that when the jury is limited to the binary choice to convict of the greater offense or acquit, there is a danger the jury will feel pressured to convict rather than acquit altogether. See Beck v. Alabama, 447 U.S. 625, 634 (1980) (quoting Keeble v. United States, 412 U.S. 205, 208 (1973)) ("Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.").

The Beck Court held that, in capital cases, states may not forbid instructions on viable lesser-included offenses. However, the Beck court did not hold trial courts are required to charge *all* lesser-included offenses. The United States Supreme Court made clear in Schad v. Arizona that the Beck court was concerned with the availability of a "third option" beyond conviction and acquittal. The Court explained in Schad that Beck "repeatedly stressed the all-or-nothing nature of the decision with which the jury was presented." Schad v. Arizona, 501 U.S. 624, 646 (1991).

In Schad, the defendant was charged with first-degree murder, defined as a killing committed "in the perpetration of . . . a robbery." Id. at 628. The jury was charged with the lesser-included second-degree murder, but nonetheless convicted Schad of first-degree murder. Id. Schad argued on appeal that the trial court erred by failing to instruct the jury on the lesser-included offense of robbery. Id. at 646. The Supreme Court rejected the argument, explaining:

> This central concern of Beck simply is not implicated in the present case, for petitioner's jury was not faced with an all-or-nothing choice between the offense of conviction (capital murder) and innocence. . . . the fact that the jury's "third option" was second-degree murder rather than robbery does not diminish the reliability of the jury's capital murder verdict. To accept the contention advanced by petitioner and the dissent, we would have to assume that a jury unconvinced that petitioner was guilty of either capital or second-degree murder, but loath to acquit him completely (because it was convinced he was guilty of robbery), might choose capital murder rather than second-degree murder as its means of keeping him off the streets. Because we can see no basis to assume such irrationality, we are satisfied that the second-degree murder instruction in this case sufficed to ensure the verdict's reliability.

Id. at 647–48. The Court further noted the evidence would have supported a verdict on second-degree murder, so the jury's "third option" was viable. Id.

This case is the same. Here, the jury had the viable "third option" to convict of DV 1st under §(B)(4) based on Workman's use of a firearm "in any manner." As will be discussed further below, this theory was supported by the evidence, was the focus of the State's argument related to DV 1st, and the jury's verdicts demonstrate it found Workman's conduct met the elements of that subsection. It is not reasonable to believe the jury felt compelled to convict of the greater offense when it had the clear option to convict of DV 1st under §(B)(4). See State v. Bunnell, 455 S.E.2d 426, 430–31 (N.C. 1995) (explaining "verdict of murder in the first degree shows clearly that the jurors were not coerced, for they had the right to convict in the second degree. That they did not indicates their certainty of [defendant's] guilt of the greater offense. The failure to instruct them that they could convict of manslaughter therefore could not have

harmed the defendant") (quoting State v. Shoemaker, 432 S.E.2d. 314, 324 (N.C. 1993)); Mata-Medina v. People, 71 P.3d 973, 977 (Colo. 2003) (collecting cases and holding failure to charge lesser-included offense of criminally negligent homicide was harmless "because the jury was given the opportunity to consider but rejected the lesser included offense of reckless manslaughter, thereby finding the presence of all the elements of second-degree murder").

The fact that §(B)(5) is not a lesser-included of §(B)(4) is not important. The rule applied in these cases is sometimes referred to as the "skip rule." See Geschwendt v. Ryan, 967 F.2d 877, 884 (3d Cir. 1992) (explaining "in cases involving offenses on a ladder, if the trial court wrongfully refuses to charge the offense at the bottom rung, that error is harmless provided the jury returns a guilty verdict for an offense higher up rather than for an intermediate offense which was also charged."); State v. Jones, 74 S.C. 456, 54 S.E. 1017, 1018 (1906) (in prosecution for ABWIK, no prejudice from trial court instructions related to simple assault where jury rejected intermediate offense of ABHAN). The fact that the jury rejected the viable option to convict of DV 1st under §(B)(4) shows that it did not feel pressured to convict of the greatest offense. This is the rationale of Schad, and guarantees reliability of the verdict. See State v. Daniels, 40 P.3d 611, 620 (Utah 2002) ("Where a jury is instructed on, and has the opportunity to convict a defendant of, a lesser included offense, but refuses to do so and instead convicts the defendant of a greater offense, failure to instruct the jury on *another lesser included offense*, particularly an offense that constitutes a lesser included offense of the lesser included offense that the jury was instructed on, is harmless error.") (emphasis added). The "skip rule" cases support the State's argument that, given a viable third option, a jury's vote to convict on the greatest offense demonstrates the reliability of the verdict.

This case is thus distinguishable from State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993). There, Lowry was convicted of murder and the trial court erroneously refused an instruction on voluntary manslaughter, and this Court reversed. There was no "third option" in Lowry; the jury was left to choose between conviction of murder and acquittal. Thus, the jury was denied the opportunity to convict of a lesser-included offense under a viable alternate theory of liability, and the fact that the jury convicted of the greater offense was not sufficient in itself to find the error harmless.

The court of appeals cited State v. Wallace, 305 S.E.2d 548 (N.C. 1983), a case where the North Carolina Supreme Court held a trial court's failure to charge involuntary manslaughter was not rendered harmless by the jury's conviction for second-degree murder, even though the trial court charged the additional lesser offense of voluntary manslaughter. That case is distinguishable because the Wallace court further explained the evidence did not support a charge on voluntary manslaughter. Id. at 553. Thus, the alternate lesser-included charge was not a viable third option. See Schad, 501 U.S. at 648 ("That is not to suggest that Beck would be satisfied by instructing the jury on just any lesser included offense, even one without any support in the evidence.").

The only case cited by the court of appeals where this Court reversed based on the failure to give a lesser-included charge where the jury also rejected a separate lesser-included offense is Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991). There, this Court reversed based on the trial court's failure to charge involuntary manslaughter, even though the jury convicted of murder and had the additional option to convict of voluntary manslaughter. Casey did not discuss harmless error, and thus provides little guidance in this matter. Furthermore, the facts are not recounted in detail. The opinion discusses a struggle over a gun but does not recount

whether there was evidence Casey intentionally shot the victim. Accordingly, it is not clear whether the State had a strong case, or whether voluntary manslaughter was even a viable third option. Casey was a repudiation of the per se rule of Patrick, that a verdict of guilty on the greatest offense always renders the omission of a lesser-included charge harmless. See Casey, 305 S.C. at 447 n.2. Beyond that, its precedential value is limited.

Casey is further distinguishable because charges on lesser-included offenses are uniquely important in homicide cases. Manslaughter is not a true lesser-included of murder in that the elements of manslaughter are not contained within murder. Rather, it is a separate crime with drastically different elements, and is considered a lesser-included offense by virtue of tradition. See State v. Elliott, 346 S.C. 603, 610, 552 S.E.2d 727, 731 (2001) (Pleicones, J., dissenting). In many of these cases, the jury is presented with alternate versions of the facts and asked to choose between alternate, mutually exclusive crimes. In cases like Casey, where the jury is inclined to believe a defense theory of an unintentional killing, voluntary manslaughter does not present the jury with a viable third option. An omitted charge is more prone to cause prejudice in these cases. State v. Burdette, 427 S.C. 490, 498, 832 S.E.2d 575, 580 (2019) ("Because voluntary and involuntary manslaughter are lesser offenses of murder under the more cumbersome 'traditional' test, it was particularly important for the trial court to clearly explain the elements of all three offenses in this case."); but see State v. Young, 380 S.E.2d 94, 97 (N.C. 1989) (finding harmless error in first-degree murder conviction where jury was charged with second-degree murder and voluntary manslaughter, but trial court refused to instruct on involuntary manslaughter even though defendant testified shooting was unintentional). Finally, homicide cases more strongly implicate the danger that a jury may skew its verdict in favor of conviction due to the gravity of the offense.

In this case, the jury was not presented with alternate versions of the facts. Workman did nothing to refute the State's evidence showing the presence of multiple aggravating factors, including his use of a firearm. The jury was tasked with deciding whether Workman's conduct showed "extreme indifference to the value of human life, and would reasonably cause a person to fear imminent great bodily injury or death . . . ." S.C. Code Ann. §16-25-65(A)(2). A definition of DV 2nd would not have aided their determination of this issue.

Subsection (B)(4) was a clearly viable "third option." It is not reasonable to believe the jury convicted Workman of DVHAN because it felt pressured to convict him of *some* offense. See Schad, 501 U.S. at 647–48. This strongly favors a finding of harmlessness in this case.

D. The record demonstrates the jury deliberately rejected DV 1st in favor of the greater offense.

Not only was the jury presented with a viable "third option" to convict Workman under §(B)(4), the record demonstrates it deliberately rejected this option. The jury's verdict, viewed in context with the evidence and arguments of counsel, shows it found Workman's conduct met the elements of §(B)(4), but chose instead to convict Workman of DVHAN. The court of appeals failed to meaningfully analyze the facts of this case in its harmless error analysis.

"Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining issues." Patterson, 367 S.C. at 232. The question is "whether the erroneous jury charge affected the jury's deliberations" and, thus, contributed to the verdict. State v. Bowers, 436 S.C. 640, 646, 875 S.E.2d 608, 611 (2022). The significance of the erroneous charge must be judged based on its probable impact on "reasonable jurors, when measured against other evidence considered by those jurors . . . ." Arnold v. State, 309 S.C. 157, 166, 420 S.E.2d 834, 839 (1992). "Harmless error review looks to the basis on which the jury actually rested its verdict." Lowry v. State, 376 S.C. 499, 508, 657 S.E.2d 760, 765 (2008).

The evidence clearly supported Workman's guilt under subsection (B)(4) of the DV 1st statute. Ms. Workman testified extensively to the fact that Workman threatened and struck her with a gun, guns were recovered from the home, and there was no evidence to the contrary. (App.298–99; App.163–64; App.138). This was the focus of the State's argument related to DV 1st. (App.458, lines 2–11). Workman was clearly guilty of DV 1st under subsection (B)(4).

The jury's verdicts prove it found Workman used a firearm "in any manner" while committing domestic violence. See State v. Solomon, 245 S.C. 550, 578, 141 S.E.2d 818, 833 (1965) (assessing harmlessness based on the factual predicates of the verdict rendered). The jury convicted Workman of Possession of a Weapon during the Commission of a Violent Crime. The trial court's instructions made clear that guilt of this crime must be premised on possession of a firearm or a knife during the commission of a violent crime. (App.504, lines 10–21). There was no allegation Workman used a knife. The jury must have found Workman used a gun.

The jury also convicted Workman of Kidnapping. The facts underlying Workman's guilt for Kidnapping were the same as those underlying his conviction for domestic violence: he confined his wife to their home with violence and threats of violence. This conduct establishes the crime of domestic violence as harm or an "offer" to harm a household member. S.C. Code § 16-25-20(A). There is not a reasonable probability the jury rejected the State's argument that Workman used a firearm while committing domestic violence while also convicting him of Possession of a Weapon during the Commission of a Violent Crime and Kidnapping. All of this shows the jury must have viewed §(B)(4) as a viable third option to DVHAN. Yet the jury chose to convict of the greater offense.

That the jury was convinced of Workman's guilt of DVHAN is evidenced by their note asking whether "if one point is met" for DVHAN, "can you not look at domestic violence first degree?" (App.549, lines 4–7). The parties agreed that the answer to this question was "yes," i.e. the jury could still consider DV 1st. (App.550, lines 5–13). After the trial court answered the jury's question affirmatively, defense counsel brought the matter up again, saying he now found the jury's question confusing. (App.551, lines 16–19). The court responded that the parties had just discussed it and both sides agreed the answer would be a simple "yes." (App.552, lines 2–3). Defense counsel responded "Okay." Defense counsel did not object or ask for further clarification, and did not raise the issue as an independent ground for appeal.

This question shows the jury found the elements for DVHAN were "met." This is not a situation where "one of the elements of the offense charged remains in doubt." Beck, 447 U.S. at 634. Accordingly, the rationale of prejudice explained in Beck is absent. See People v. Gonzalez, 418 P.3d 841, 844 (Cal. 2018) (finding refusal to charge lesser-included offense harmless where conviction of greater offense included special finding conclusively showing jury found all elements of the greater offense met).

Workman advances an alternate theory of prejudice: that simply because the jury *could* have convicted him under §(B)(5), this Court must reverse. That the jury could have convicted of an omitted or erroneously-defined lesser offense does not justify reversal of a conviction for the greater offense when the other facts and circumstances of the case demonstrate the verdict is reliable. Juries are not even entitled to instructions on lesser included offenses unless there is evidence the defendant is guilty of the lesser offense *rather than* the greater. The proper harmless error analysis in a case such as this one should focus on the reliability of the verdict rendered, not merely whether the jury could have convicted of a lesser offense. See Schad, 501

U.S. at 647 (explaining "the fact that the jury's 'third option' was second-degree murder rather than robbery does not diminish the reliability of the jury's capital murder verdict"); see also Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (in context of confrontation clause violation, asking whether error "affected the reliability of the factfinding process at trial").

Workman argues the jury could have convicted him under §(B)(5) by finding the Ms. Workman suffered moderate bodily injury. However, Ms. Workman's injuries did not meet the statutory definition of moderate bodily injury. S.C. Code Ann. §16-25-10 provides: "'Moderate bodily injury' means physical injury that involves prolonged loss of consciousness or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ or injury that requires medical treatment when the treatment requires the use of regional or general anesthesia or injury that results in a fracture or dislocation. *Moderate bodily injury does not include one-time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that do not ordinarily require extensive medical care.*" (emphasis added). Ms. Workman's injuries consisted of bruises and facial swelling, for which she was seen at her home by first responders. She did not go to the hospital or receive any follow-up treatment. (App.274; 305; 311). It is thus unlikely the jury would have convicted under a theory of moderate bodily injury, especially when it rejected the clear option to convict under §(B)(4).

Finally, juries are presumed to follow instructions. The jury was properly instructed on DVHAN, and the trial court instructed the jury it could convict Workman only if it was convinced of his guilt beyond a reasonable doubt. The verdict alone carries great weight.

The only rational conclusion is that the jury chose to convict Workman of DVHAN rather than DV 1st because it was convinced Workman was guilty of the greater offense. There is not a

reasonable probability the jury would have chosen to convict under §(B)(5), rather than DVHAN, if the trial court had defined DV 2nd. Workman was not prejudiced.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Court reverse the Court of Appeals and reinstate Workman's conviction for DVHAN.

Respectfully submitted,

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