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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable Alex Kinlaw, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JASON EDWIN STOOTS,

PETITIONER

APPELLATE CASE NO. 2023-000601

BRIEF OF PETITIONER

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1. Did the Court of Appeals err in finding that the trial judge properly refused to charge the jury with the law on self-defense when there was evidence presented that Petitioner acted in self-defense?

2. Did the Court of Appeals err in finding that the trial judge properly refused to charge the jury with the law on the defense of accident when there was evidence presented that while acting in self-defense, Petitioner accidentally struck his wife causing injury?

STATEMENT

In January of 2020, the Greenville County Grand Jury indicted Petitioner, Jason Edwin Stoots, for domestic violence first degree, indictment #2019-GS-23-4604. (R. p. 252). On March 3, 2020, Petitioner proceeded to jury trial before the Honorable Alex Kinlaw. Christopher Shipman represented Petitioner at trial. Brittany Scott prosecuted the case. The jury found Petitioner guilty of the lesser included offense of domestic violence second degree. Judge Kinlaw sentenced Petitioner to three (3) years suspended with eighteen months of probation. A timely notice of intent to appeal was served on March 5, 2020, and the direct appeal perfected. On February 8, 2023, in an unpublished *per curiam* opinion, a three-judge panel of the South Carolina Court of Appeals affirmed the conviction. A timely petition for rehearing was filed on February 22, 2023. The petition for rehearing was denied on March 23, 2023. The petition for writ of certiorari was filed on April 17, 2023. The return was filed on May 16, 2023. On December 12, 2023, this Court granted the petition for writ of certiorari and requested additional briefs. This brief of Petitioner follows.

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 court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id. "It is well-settled the law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given." State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). "The trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." Id.

ARGUMENTS

1. **The Court of Appeals erred in finding that the trial judge properly refused to charge the jury with the law on self-defense when there was evidence presented that Petitioner acted in self-defense.**

The jury found Petitioner guilty of domestic violence second-degree against his wife, Kimberly Stoots. At the time of the incident, Petitioner and his wife were separated and living apart. (R. p. 62, lines 5-24). Petitioner testified, "Later that evening, I want to say between 9:00 and ten o' clock, I received a text that said, Kim wants you to come here now." (R. p. 105, lines 5-7). Petitioner picked up his wife and they went to Taco Bell. (R. p. 106, lines 4-13; p. 62, lines 16-18). Petitioner testified that his wife was upset and while they were in the Taco Bell drive thru she claimed that a female was tracking Petitioner's radio signals. (R. p. 106, lines 16-23). The wife admitted to methamphetamine use and testified, "And I'm not the only one who's ever lost teeth as a result of that." (R. p. 74, lines 18-21). Petitioner then testified that his wife attacked him in the car. (R. p. 107, line 18 – p. 108, lines 1-11). Petitioner testified that, "She just got irate and upset about this person that was tracking the radio signals. I have a vision problem. I couldn't see from a distance, just maybe 100 yards. And she was just upset, throwing arms. And she hit me, and I just grabbed both her arms, so, you know, it was like push and pull. And then the next thing I know, it was just – I felt my hand – the back side of my hand hit her right there." (R. p. 107, line 21 – p. 108, lines 1-4). Petitioner testified that he did not mean to hit her in the mouth and when asked if he struck her hard in the mouth he testified, "No. I mean, I was just holding her wrist and all that and it was going back and forth. It was accidental." (R. p. 108, lines 7-11).

The wife testified that the line at the drive thru was backed up and she did not want to wait. (R. p. 63, lines 1-9). The wife testified, "And he said, why are you in such a hurry? Who

are you in a hurry to go – the f-word." (R. p. 63, lines 11-13). She testified, "And then I said, nobody. I said, why are you not in a hurry? Who you had already (indicating), and then I straightened him out." (R. p. 63, lines 16-18). The wife claimed that Petitioner punched her. (R. p. 64, line 10). The wife denied attacking Petitioner. (R. p. 68, lines 6-10). She testified that Petitioner stopped at several convenience stores before taking her back to her uncle's house where she was staying. (R. p. 65, line 11 – p. 66, lines 1-19). Petitioner left and the wife drove to her parents' house four or five miles away where an ambulance was called to take her to the hospital. (R. p. 69, line 15 – p. 70, lines 1-16).

The emergency room doctor testified at trial that the wife had swelling and bruising to her face, a cut to her inner lip and an upper tooth was displaced. (R. p. 51, lines 8-13). The doctor testified that a CT scan of her brain, face and neck were ordered and she was treated for the bleeding from her mouth. (R. p. 51, line 13 – p. 52, lines 1-11). The CT scans were negative for fractures or dislocations. (R. p. 52, lines 12-15).

At the close of testimony counsel for Petitioner requested charges on both self-defense and accident. (R. p. 141, line 17 – p. 161, lines 1-14). Prior to discussing the self-defense charge, the judge asked counsel for Petitioner, "If, in fact, you take the facts as you outline them, why didn't your client just get out of the car and leave?" (R. p. 145, lines 19-22). Counsel, citing McAninch, Fairey, and Coggiola, THE CRIMINAL LAW OF SOUTH CAROLINA (6th Ed. 2013), argued that because deadly force was not used that there was no duty to retreat. (R. p. 146, line 7 – p. 151, lines 1-5). Counsel additionally argued that one does not need to anticipate serious bodily injury to use non-deadly force in self-defense. (R. p. 148, line 11 – p. 149, 150, lines 1-24). Instead, counsel argued that proportionality was the key when non-deadly force is

used in self-defense. (R. p. 148, line 11 – p. 151, lines 1-5). The State objected to the self-defense charge. (R. p. 151, line 9 – p. 153, lines 1-8).

The judge refused to charge self-defense stating:

> I'm not inclined to charge self-defense. Let me just put on the record where my thought process is. I'm familiar with those cases that you cited, Mr. Shipman, and I think a lot of those cases, particularly the cases involving deadly force, obviously, weren't cases like this.
>
> But in domestic violence cases, when you try to define proportionality, I think you still got to consider several things. One is – and this is something that's come up time and time again in domestic violence cases, is the difference in sizes of the individuals that you're talking about. And even though that's not reflected in a lot of the case law, but the cases that are tried now and cases that come before the Court, when you look at the totality of the circumstances, you must give some consideration to what was the size, weight, ability of the defendant versus the size, weight, ability of the victim, which is one of the reasons that I asked you earlier regarding Mr. Stoots's reaction, why didn't he just leave, and I understand what you just told me regarding the case law. I know about that.
>
> But, we've got a difference in size of the prospective parties. And you've got to take that into consideration. I think when you talk about proportionality of the response, you also got to take into the consideration the totality of the circumstances. Who was in a better position to leave the altercation?
>
> And I think that those factors when you look at those factors, coupled with what I heard, I'm not inclined to charge self-defense. Of course, I'll note your objection, not only to that, on the record, but I'll also note your objection to the Court's failure to charge criminal domestic violence 3rd degree.

(R. p. 155, line 8 – p. 156, lines 1-21). After the jury reached a verdict, Petitioner renewed the objection to the trial judge's refusal to instruct the jury on the law of self-defense. (R. p. 239, lines 1-5). The trial judge erred in refusing to instruct the jury on the law of self-defense. The error requires reversal.

In State v. Williams, 400 S.C. 308, 314–15, 733 S.E.2d 605, 608–09 (Ct. App. 2012), the South Carolina Court of Appeals wrote:

> "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." State v. Mattison, 388 S.C. 469,

> 478, 697 S.E.2d 578, 583 (2010) (internal citations omitted). "The law to be charged must be determined from the evidence presented at trial." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000) (internal citations omitted); see also Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (stating appellate courts should "consider the court's jury charge as a whole in light of the evidence and issues presented at trial"). When reviewing the circuit court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant. Cole, 338 S.C. at 101, 525 S.E.2d at 512–13.
>
> "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the [circuit court's] refusal to do so is reversible error." State v. Day, 341 S.C. 410, 416–17, 535 S.E.2d 431, 434 (2000).

Viewing the evidence in the light most favorable to the Petitioner, there is evidence in the record from which it could be reasonably inferred that Petitioner acted in self-defense when he used non-deadly force and grabbed his wife's arms when she attacked him while sitting in his car at the Taco Bell drive thru. The trial judge's refusal to instruct the jury on self-defense constitutes reversible error.

In State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011), the South Carolina Supreme Court, discussing the use of **deadly** force in self-defense, wrote:

> A person is justified in using deadly force in self-defense when:
> (1) The defendant was without fault in bringing on the difficulty;
> (2) The defendant ... actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
> (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief ...; and
> (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

Belief in imminent danger of losing life or sustaining serious bodily injury and a duty to retreat, however, should not apply when deciding if **non-deadly** force in self-defense is justified.

In McAninch, Fairey, and Coggiola, THE CRIMINAL LAW OF SOUTH CAROLINA (6th Ed. 2013) p. 620, the authors wrote:

> The defense of self-defense is much less readily available when a person asserting the defense responds with deadly force than when he responds with non-deadly force. Most reported decisions in this jurisdiction deal with deadly force but read as though they are laying down blanket rules for the defense of self-defense generally. Yet thoughtful analysis reveals that the two situations differ in two significant respects: first, one need not anticipate *serious* bodily harm before responding with non-deadly force; and, second, one need not retreat before responding with non-deadly force.

The authors acknowledge that there are no reported South Carolina cases directly on point holding that the duty to retreat does not arise or that *serious* bodily injury need not be anticipated when self-defense is attempted with non-deadly force but note substantial authority in other jurisdictions and cite to State v. Abbott, 174 A.2d 881, 885 (N.J. 1961) and the Model Penal Code § 3.04 (1962). The authors additionally cite State v. Wood, 1 S.C. L. (1 Bay) 351 (1794), writing, "As the Court observed, for every assault it was not 'reasonable that a man should be banged with a cudgel. That a small blow will not justify an enormous beating . . . .' Id. Nonetheless the clear implication of the case is that one need not submit to every assault either. A person is entitled to defend against reasonably anticipated unlawful bodily harm even though it would not be serious, but in defending, he must respond proportionally."

In the present case Petitioner was without fault in bringing on the difficulty. Petitioner was entitled to defend against the attack by his wife in his car by grabbing her arms to try and block the blows. His non-deadly force used in self-defense was proportional to the wife's attack. The trial judge seemed to find that Petitioner had a duty to abandon his car in the Taco Bell drive thru in order to be entitled to assert self-defense. Under the facts of this case Petitioner should not be required to abandon his car or leave the altercation in order to assert self-defense. By analogy, if deadly force had been warranted and used in self-defense, pursuant to S.C. Code §16-

11-440(C), Petitioner would have had no duty to retreat. It follows that there is no duty to retreat and abandon your car before using non-deadly force in self-defense.

In State v. Abbott, 36 N.J. 63, 71–72, 174 A.2d 881, 885 (1961), cited above by the authors of The Criminal Law of South Carolina, the Supreme Court of New Jersey wrote:

> The issue of retreat arises only if the defendant resorted to a deadly force. It is deadly force which is not justifiable when an opportunity to retreat is at hand. Model Penal Code s 3.04(2)(b)(iii). As defined in s 3.12(2) a deadly force means 'force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm.'
>
> Hence it is not the nature of the force defended against which raises the issue of retreat, but rather the nature of the force which the accused employed in his defense. If he does not resort to a deadly force, one who is assailed may hold his ground whether the attack upon him be of a deadly or some lessor character. Although it might be argued that a safe retreat should be taken if thereby the use of Any force could be avoided, yet, as the comment in the Model Penal Code observes (at p. 23), 'The logic of this position never has been accepted when moderate force is used in self-defense; here all agree that the actor may stand his ground and estimate necessity upon that basis.' Cf. Prosser, Torts s 19, at p. 90 (2d ed. 1955); Restatement, Torts s 63 (1934). Hence, in a case like the present one, the jury should be instructed that Abbott could hold his ground when Nicholas came at him with his fists, and also when Michael and Mary came at him with the several instruments mentioned, and that the question of retreat could arise only if Abbott intended to use a deadly force.

Petitioner used moderate proportional force in self-defense against the attack by his wife by grabbing her wrists to prevent blows. Under these circumstances Petitioner had no duty to retreat from his car in the Taco Bell drive thru and was not required to believe that he was in imminent danger of losing life or sustaining serious bodily injury before using moderate force in self-defense. Petitioner was entitled to a jury instruction on self-defense.

The trial judge's refusal to instruct the jury on the law of self-defense deprived the jury of the opportunity to decide if Petitioner should be found not guilty based on self-defense. The trial judge erred in refusing to give the requested self-defense charge. The error requires reversal.

In affirming the trial judge's refusal to charge self-defense the Court of Appeals wrote:

> We hold the trial court did not abuse its discretion by refusing to charge the jury on self-defense. See State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) ("An appellate court will not reverse the trial [court]'s decision regarding a jury charge absent an abuse of discretion."); id. at 479, 697 S.E.2d at 583 ("To warrant reversal, a trial [court]'s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant."). Stoots claimed the strike to the victim's (Victim) mouth was an accident; therefore, Stoots did not intentionally strike Victim in self-defense. See State v. Owens, 427 S.C. 325, 330, 831 S.E.2d 126, 128 (Ct. App. 2019) ("It is precisely [the] lack of intent that separates accident from self-defense . . . .") (aff'd, 433 S.C. 482, 860 S.E.2d 357 (2021)). Furthermore, Stoots did not satisfy all four elements of self-defense, and Stoots used excessive force towards Victim. See State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) (stating one of the elements of self-defense is "[t]he defendant . . . actually believed he was in imminent danger of . . . sustaining serious bodily injury, or he actually was in such imminent danger"); Golden v. State, 1 S.C. 292, 296 (1870) (explaining that when resisting a non-lethal assault, "the degree of resistance ought to be in proportion to the nature of the injury offered").

State v. Stoots, No. 2020-000430, 2023 WL 1814653, at *1 (S.C. Ct. App. Feb. 8, 2023).

The Court of Appeals overlooked the fact that Stoots testified that he **intentionally** grabbed his wife's arms in self-defense as she was hitting him then, as the wife continued to move her held arms, Petitioner's hand accidentally struck the wife in the mouth. Petitioner acted both intentionally in grabbing the wife's arms in self-defense and unintentionally when his hand struck her in the mouth. Petitioner met the elements of self-defense as to non-deadly force. To hold that serious bodily injury must be anticipated before one can act in self-defense against non-deadly blows would, in essence, eliminate self-defense when non-deadly force is used. Petitioner had a right to defend against the non-deadly blows from his wife without anticipating great bodily injury. He had no duty to retreat as he was driving his own car in the Taco Bell drive thru.

When attacked with non-deadly force, as here, the attacked person "need not anticipate serious bodily harm before responding with non-deadly force." William S. McAninch, et al., The Criminal Law of South Carolina 620 (6th ed. 2013). Additionally, the person "need not retreat before responding with non-deadly force." Id. To support this proposition, the authors explained that "the key to self-defense is proportionality of the response." Id. (citing State v. Wood, 1 S.C.L. (1 Bay) 351 (1794)). After recounting the facts of the case, the authors explained "that one need not submit to every assault." Id. Rather, "[a] person is entitled to defend against reasonably anticipated unlawful bodily harm even though it would not be serious, but in defending, he must respond proportionally." Id.

As persuasive authority, courts from other jurisdictions find that one who acts in self-defense against non-deadly force need not anticipate serious bodily harm before responding with non-deadly force with no duty to retreat. The cases, instead, focus on proportionality. "The general rule is that where a person reasonably believes he is threatened with bodily harm he may use whatever force appears to be reasonably necessary to protect himself." Byrd v. Isgitt, 338 So.2d 374, 375 (La. Ct. App. 1976). "The general rule at common law is that a person may use reasonable force to protect himself against one who threatens him with physical injury." Note, Justification for the Use of Force in the Criminal Law, 13 Stan. L. Rev. 566, 566-567 (1961). "For the purposes of self-defense which stops short of killing or attempting to kill, there is no duty to retreat, and no need for the apprehension of serious bodily harm." Beyer v. Birmingham Ry., Light & Power, Co., 64 So. 609, 611 (Ala. 1914); see also Adams v. State, 75 So. 641, 641 (Ala. Ct. App. 1917); Hartley v. Oldtman, 410 S.W.2d 537, 543 (Mo. Ct. App. 1966) (explaining that "[w]here a person has reasonable grounds to believe, and does believe that another is about to assault him, or do bodily harm to one to whom he owes a duty to protect, he need not wait until the other person actually

strikes or makes an assault before resorting to the application of reasonable force to repel the attack" and that "where the person does not use a deadly weapon, fear of bodily harm only is sufficient to support a justification by self-defense); Silfast v. Matheny, 136 P.2d 260, 262 (Ore. 1943) (approving a jury charge that the intentional infliction of bodily harm by a means not intended or likely to cause death or serious bodily harm is privileged for the purpose of preventing the other from inflicting bodily harm upon the actor in certain circumstances); Anders v. Clover, 165 N.W. 640, 641 (Mich. 1917) (explaining "[t]here can be no doubt that one assaulted may justly exercise such reasonable force as may be, or as appears to him at the time to be, necessary to protect himself from bodily harm in repelling said assault."); Shires v. Bogges, 77 S.E. 542, 545 (W. Va. 1913) (holding the law did not limit self-defense to situations in which the person feared some great bodily harm); Michel v. State, 989 So.2d 679, 681 (Fla. Dist. Ct. App. 2008); Commonwealth v. Nobel, 707 N.E.2d 819, 821 (Mass. 1999) (explaining that an individual may use nondeadly force in self-defense when he has a reasonable concern over his personal safety); State v. Ouellette, 37 A.3d 921, 927 (Me. 2012) (providing for the elements of justified use of non-deadly force); State v. Rost, 429 S.W.3d 444 (Mo. Ct. App. 2014) (discussing the use of non-deadly force in self-defense).

Petitioner acted in self-defense when he intentionally grabbed his wife's arms as she was hitting him. Petitioner's actions were proportional to the non-deadly force used by the wife. Petitioner met the elements required for self-defense when defending against non-deadly force. Petitioner in the present case was without fault in bringing on the difficulty. Neither the belief of serious bodily injury nor the duty to retreat should be required when non-deadly force is used, as here. When determining what is required in order to respond with non-deadly force in self-defense this Court should simply require that the response be reasonable and in proportion to the threat. As the Court noted in State v. Wood, 1 S.C.L. 351, 346–47 (1794):

> The general rule of law "that wherever the assault or battery proceeds from the plaintiff or prosecutor's own fault; as where he gives the first blow &c. there it is sufficient justification to the defendant." But there must be however, in all cases, some proportion between the battery given, and the first assault. For Lord Holt lays it down as a rule, that the meaning of the plea *son assault* is, that the defendant struck *in his own defence Esp.* 389. 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. For the moment a man disarms or puts it out of the power of the aggressor from doing him further injury, he ought to desist from using further violence; and if he does commit any further outrage, he, in his turn, then becomes the aggressor. In *Salk.* 642, a question was, what assault was sufficient to maintain such plea? Lord Holt said, that Wyndham, J. would not allow such plea, if it was an *unequal return*. His lordship then says, that for every assault, he did not think it reasonable that a man should be *banged with a cudgel*. That a small blow will not justify an enormous beating, &c. That the meaning of the plea was, that the *defendant struck in his own defence*.

In the present case it was reasonable for Petitioner to grab his wife's arms in response to her attack. Petitioner's response was in proportion to the wife's attack. Petitioner did not have to anticipate serious bodily harm before responding with non-deadly force. Petitioner was entitled to use non-deadly force in self-defense.

While a person has a duty to retreat before using **deadly force** when in his or her own car on a public highway, State v. McGee, 185 S.C. 184, 193 S.E. 303 (1937), the duty to retreat should not apply when non-deadly force is used. Again, this Court should simply require that when acting in self-defense using non-deadly force, the response must be reasonable. In this case it would not have been reasonable to require Petitioner to retreat by getting out of his car at the Taco Bell drive thru before grabbing his wife's arms in self-defense.

In State v. Hill, 315 S.C. 260, 261–62, 433 S.E.2d 848, 849 (1993), the South Carolina Supreme Court wrote:

> If there is evidence of self-defense, the issue should be submitted to the jury upon request. State v. Lee, 293 S.C. 536, 362 S.E.2d 24 (1987); State v. Muller, 282 S.C. 10, 316 S.E.2d 409 (1984). The law to be charged to the jury is determined by the evidence presented at trial. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991). Conversely, a trial court commits reversible error if it fails to give a

requested charge on an issue raised by the evidence. Id.; State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989).

In the present case there is evidence in the record that Petitioner acted in self-defense, using non-deadly force. The trial court committed reversible error in refusing to charge self-defense, as requested.

2. The Court of Appeals erred in finding that the trial judge properly refused to charge the jury with the law on the defense of accident when there was evidence presented that while acting in self-defense, Petitioner accidentally struck his wife causing injury.

As discussed above, at trial Petitioner testified that, "She [the wife] just got irate and upset about this person that was tracking the radio signals. I have a vision problem. I couldn't see from a distance, just maybe 100 yards. And she was just upset, throwing arms. And she hit me, and I just grabbed both her arms, so, you know, it was like push and pull. And then the next thing I know, it was just – I felt my hand – the back side of my hand hit her right there." (R. p. 107, line 21 – p. 108, lines 1-4). Petitioner testified that he did not mean to hit her in the mouth and when asked if he struck her hard in the mouth he testified, "No. I mean, I was just holding her wrist and all that and it was going back and forth. It was accidental." (R. p. 108, lines 7-11).

At the close of testimony counsel for Petitioner requested charges on both self-defense and accident. (R. p. 141, line 17 – p. 161, lines 1-14). Specifically, with regard to the defense of accident, counsel for Petitioner cited State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945) and State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994). (R. p. 141, lines 17-24). Trial counsel argued that Petitioner was entitled to an accident charge because the harm or degree of harm was unintentional, Petitioner was acting lawfully and the injury was not the result of negligence. (R. p. 142, lines 9-25). The State objected to the accident charge. (R. p. 144, line 15 – p. 145, lines

1-12). The judge refused to charge accident stating, "I'm not inclined to charge the accident. I'm not going to charge accident." (R. p. 146, lines 4-5). After the jury reached a verdict, Petitioner renewed the objection to the trial judge's refusal to instruct the jury on the law of the defense of accident. (R. p. 239, lines 1-5). The trial judge erred in refusing to instruct the jury on the law of the defense of accident. The error requires reversal.

In State v. White, 425 S.C. 304, 311, 821 S.E.2d 523, 527 (Ct. App. 2018) the South Carolina Court of Appeals wrote:

> "[An appellate court] will not reverse a trial court's decision regarding a jury instruction absent an abuse of discretion." State v. Stanko, 402 S.C. 252, 264, 741 S.E.2d 708, 714 (2013). "When reviewing the [trial] court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant." State v. Williams, 400 S.C. 308, 314, 733 S.E.2d 605, 608–09 (Ct. App. 2012). "The law to be charged to the jury is determined by the evidence presented at trial." State v. Gaines, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008). "If there is any evidence to support a jury charge, the trial [court] should grant the request." State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004).

Viewing the evidence in the light most favorable to the Petitioner, there is evidence to support a jury charge on the defense of accident.

In State v. Brown, 205 S.C. 514, 32 S.E.2d 825, 828 (1945), the South Carolina Supreme Court wrote:

> Where the death of a human being is the result of accident or misadventure, in the true meaning of the term, no criminal responsibility attaches to the act of the slayer. If it be shown that the killing was unintentional; that it was done while the perpetrator was engaged in a lawful enterprise, and was not the result of negligence, the homicide will be excused on the score of accident. 26 Am.Jur., Sec. 220, Page 305. It is not such matter of defense as throws upon or shifts to the accused the burden of proving that the homicide occurred by accident or misadventure; the burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide.

While the Brown case cited above involved an involuntary manslaughter conviction that was the result of a head on car accident and involved a directed verdict issue rather than a failure to charge accident, the discussion of the accident defense is applicable to the present case.

In State v. Owens, 427 S.C. 325, 330-31, 831 S.E.2d 126, 128-129 (Ct. App. 2019), the South Carolina Court of Appeals wrote:

> The defense of accident (sometimes called misadventure) protects a defendant who, while acting lawfully and with due care, unintentionally causes harm to another. The defense has three elements: (1) the harm was unintentional, (2) the defendant was acting lawfully, and (3) due care was used in the handling of the weapon. See State v. Commander, 396 S.C. 254, 271, 721 S.E.2d 413, 422 (2011); see also State v. Brown, 205 S.C. 514, 521, 32 S.E.2d 825, 828 (1945) ("If it be shown that the killing was unintentional; that it was done while the perpetrator was engaged in a lawful enterprise, and was not the result of negligence, the homicide will be excused on the score of accident."). If the harm was caused by accident, the defendant is not criminally responsible because of the absence of criminal intent. It is precisely this lack of intent that separates accident from self-defense, for self-defense "admits an intentional killing, and sets up as justification a necessity to kill in order to save the accused from death or serious bodily harm, whereas a defense of homicide by accident denies that the killing was intentional." State v. McDaniel, 68 S.C. 304, 317, 47 S.E. 384, 389 (1904). The defense of accident sometimes surfaces in homicide cases, often alongside self-defense. Despite their varying levels of intent, accident and self-defense are not always mutually exclusive defenses. See State v. White, 425 S.C. 304, 311, 821 S.E.2d 523, 527 (Ct. App. 2018); State v. Williams, 400 S.C. 308, 317, 733 S.E.2d 605, 610 (Ct. App. 2012). Of course, accident may appear in contexts far removed from self-defense. Blackstone gives the example of a man lawfully working with a hatchet when the head flies off and kills a bystander. 4 W. BLACKSTONE, COMMENTARIES *182.
>
> The confusion in explaining the defense of accident crops up when no distinction is made between a defendant who has lawfully armed himself with a weapon in self-defense and then accidentally harms the victim (e.g., he stumbles and his finger slips and pulls the trigger) and a defendant who has lawfully armed himself with a weapon in self-defense and then intentionally harms the victim. Only the defendant in the former situation is entitled to the defense of accident, and he is also entitled to have the jury charged that his conduct in arming himself in self-defense was lawful.

The present case does not involve Petitioner lawfully arming himself in self-defense and then accidentally harming his wife. Instead, Petitioner lawfully acted in self-defense by grabbing

his wife's hands as she was striking him and then accidentally harmed his wife. As discussed above, the trial judge erred in refusing to instruct the jury on self-defense. "While it is true accident and self-defense 'are often mutually exclusive,' a trial court should charge both when there is evidence in the record to support both charges. See Williams, 400 S.C. at 317, 733 S.E.2d at 610." State v. White, 425 S.C. 304, 312, 821 S.E.2d 523, 528 (Ct. App. 2018). There is evidence in the record to support both charges. Under the specific facts of this case, accident and self-defense are not mutually exclusive. There is evidence in the record that Petitioner was acting lawfully in self-defense when he grabbed his wife's arms after she attacked him in his car in the Taco Bell drive thru. While Petitioner was using non-deadly force in self-defense and holding the arms of his wife to block her blows, during the push and pull she was accidentally hit in the mouth. The harm to the wife was unintentional and Petitioner was not negligent. The trial judge erred in refusing to charge the jury with the law on the defense of accident. The error requires reversal.

In affirming the trial judge's refusal to charge the defense of accident the Court of Appeals wrote:

> We hold the trial court did not abuse its discretion by refusing to charge the jury on the defense of accident. See Mattison, 388 S.C. at 479, 697 S.E.2d at 584 ("An appellate court will not reverse the trial [court]'s decision regarding a jury charge absent an abuse of discretion."); id. at 479, 697 S.E.2d at 583 ("To warrant reversal, a trial [court]'s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant."). The jury charge the trial court gave sufficiently covered Stoots's requested jury charge. See State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989) ("[I]f the trial [court] refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request."). Additionally, Stoots failed to act with due care toward Victim when he used excessive force in defending himself. See Owens, 427 S.C. at 330, 831 S.E.2d at 128 ("The defense of accident (sometimes called misadventure) protects a defendant who, while acting lawfully and with due care, unintentionally causes harm to another.").

State v. Stoots, No. 2020-000430, 2023 WL 1814653, at *1 (S.C. Ct. App. Feb. 8, 2023).

First, as discussed above, Petitioner acted with due care when he defended himself by intentionally grabbing his wife's arms while she was striking him. As the wife continued to move her held arms, Petitioner's hand accidentally struck the wife in the mouth.

Second, the jury charge the trial court gave did not sufficiently cover the defense of accident. The trial judge instructed the jury:

> Now, in order to establish criminal liability in a case, a criminal case, the State must prove criminal intent. And criminal intent is a matter that must be determined by you from the facts as you heard the facts. There is no way to prove criminal intent in a mathematical certainty, so the law says that criminal intent may be inferred from the circumstances. It is not necessary to establish intent by direct evidence. Intent may be established by circumstantial evidence taken into account the circumstances that are at issue. Criminal intent is a mental state of conscious wrongdoing. It is up to you to determine what the defendant intended to do based on the circumstances shown to have existed.

(R. p. 226, lines 11-25).

The general instruction on criminal intent was not sufficient to explain the defense of accident. The general instruction on criminal intent simply addressed the mental state the prosecution was required to prove but failed to explain the elements of the defense of accident. In State v. Best, 31 N.C. App. 389, 390, 229 S.E.2d 202, 203 (1976), the Court of Appeals of North Carolina wrote:

> In a case where the evidence offered by one party tends to show accident, it is not enough for the trial judge to charge that the State must prove intent beyond a reasonable doubt. The judge must also clearly explain that accident is the antithesis of intent. This was not done here. Two recent opinions by this Court have made clear this duty with respect to the law of accident in appropriate cases, and we see no reason to elaborate on their wisdom. State v. Wright, 28 N.C.App. 481, 221 S.E.2d 745 (1976); State v. Moore, 26 N.C.App. 193, 215 S.E.2d 171 (1975).

The judge in the present case erred in refusing to charge the jury on the law of accident and the charge on intent did not cure the prejudicial error.

In State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302–03 (2002), the South Carolina Supreme Court wrote:

> In general, the trial judge is required to charge only the current and correct law of South Carolina. Cohens v. Atkins, 333 S.C. 345, 509 S.E.2d 286 (Ct.App.1998). A jury charge is correct if it contains the correct definition of the law when read as a whole. Keaton v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999). The substance of the law must be charged to the jury, not particular verbiage. Keaton.

The jury instruction in the present case entirely omitted a correct definition of the defense of accident. Petitioner was entitled to an instruction on the defense of accident. The substance of the defense of accident was not adequately covered by the criminal intent instruction.

CONCLUSION

Based on the above arguments this Court should reverse Petitioner's conviction and remand for a new trial.

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This 10th day of January, 2024.