STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Honorable Bentley Price, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DIMITRI TARION DICKENS,

APPELLANT.

APPELLATE CASE NO. 2024-000878

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in refusing to charge the lesser-included offense of assault and battery second degree in connection with a shooting victim who sustained only moderate bodily injury thereby depriving the jury of the ability to consider the extent of the injury as an element of the crime charged rather than simply the mechanism of its infliction?

STATEMENT OF THE CASE

Appellant was indicted for armed robbery, assault and battery of a high and aggravated nature and possession of a weapon during the commission of a violent crime by a Berkley County grand jury. R. * (indictments). Isaiah Canales was charged with the same offenses and tried with appellant as a co-defendant. The case was tried before the Honorable Bentley Price and a jury on September 25 – 27, 2023. R. *. During trial, appellant was represented by Melissa Gay and Steve Davis represented Canales with Alexander Myers and Olivia Lynch appearing on behalf of the state. R. *. The jury acquitted both defendants of armed robbery, but convicted both on the charges of assault and battery of a high and aggravated nature and possession of a weapon during the commission of a violent crime. Tr. 366, l. 13 – 367, l. 13. Following the jury's verdict, Judge Price sentenced appellant to fifteen years suspended on the service of ten for the ABHAN conviction and five years for the possession offense, concurrent. R. * (sentence sheets). Appellant's counsel moved for reconsideration of the sentence. Following a hearing on March 28, 2024, Judge Price denied the motion. R. * Order.

This appeal follows.

STANDARD OF REVIEW

"The purpose of [jury] instructions is to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). "In reviewing jury charges for error, [the court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). The trial judge is to charge the jury on defenses, including any lesser-included offense, if there is any evidence from which the jury could infer that the defense or lesser-included offense applies. *See* State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); *see also* State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003) (requested charge must be given if there is any evidence to support it; trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence). "A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused." State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (*quoting* State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989)). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010).

ARGUMENT

The trial court erred in refusing to charge the lesser-included offense of assault and battery second degree in connection with a shooting victim who sustained only moderate bodily injury thereby depriving the jury of the ability to consider the extent of the injury as an element of the crime charged rather than simply the mechanism of its infliction.

Relevant Facts.

On April 25, 2021, Brayden Ward and Daniel Varner along with other friends left the Royal Lanes bowling alley in Goose Creek just after closing time. Tr. 123, l. 10 – 124, l. 5. As the group approached their vehicle, appellant and Isaiah Canales allegedly came upon them with guns already drawn. Tr. 124, ll. 7 – 14. Varner claimed to have been hit in the head with a pistol by Canales.[1] Tr. 169, ll. 9 - 13. As Varner ran away from the vehicle, shots were fired. There was a dispute about who fired the first shot, with Varner admitting he may have been the one to fire first. Tr. 173, l. 4 – 174, l. 8. Varner used a concealed handgun which he had carried with him inside the bowling alley, claiming he was "standing" his ground and acting in self-defense. Tr. 186, l. 9 – 187, l. 8. Ward's account indicated that when the interaction with Canales and Varner began, appellant threatened Ward with a handgun. Tr. 127, ll. 12 – 128, 20. While Ward was lying on the pavement, he claimed appellant searched through his pockets and stole his wallet. Ward then observed appellant fire the weapon towards Varner. Tr. 127, ll. 12 – 128, 20. The state introduced a surveillance video of the altercation. State's Exhibits 16 & 17. While the

[1] The emergency room doctor, Daniel Regino, contradicted the claim regarding a scalp wound allegedly caused by the pistol, indicating no such wound was located on Varner. Tr. 250, ll. 10 – 15.

video does not clearly show the incidents as described by Ward and Varner, it does show numerous weapons being fired in a tight time period.

While Daniel Varner was struck with three bullets, his injuries were not life-threatening as acknowledged by his treating physician, Dr. Daniel Regino. Tr. 249, ll. 1 – 6. The wounds did not injure any major organs or vessels. Tr. 249, l. 7 – 250, l. 6. Varner was ambulatory after the shooting and communicated with responding officers on scene. Tr. 201, l. 24 – 202, l. 19. The lack of "impact" from the wounds was a source of pride for Varner: "I'm not most people, and most people die from one bullet, it doesn't matter where you're shot at." Tr. 203, ll. 9 – 10. Varner stated that he "didn't really realize I was shot" and thought "it was, like, just one bullet, but then I realized I got shot three times because my whole left side was bleeding from top to bottom." Tr. 176, ll. 11 – 15. There was no testimony presented about any protracted or permanent loss of function of any part of Varner's body.

During the charge conference, appellant's counsel asked for the lesser-included offenses of assault and batter first and second be charged in light of the evidence of the injuries Varner actually sustained. Tr. 297, l. 22 – 298, l. 3. The state argued that "[t]here's no -- the lesser-included is not necessary here; it's just giving the jury an out." Tr. 298, ll. 10 – 11.

The trial court initially denied charging either assault and battery first or second as lesser-included offenses.

> THE COURT: All right. For the record, I have read I have the assault and battery, first degree, charge here. It indicates a person commits the offense of assault and battery in the first degree if the person unlawfully injures another person, and the act occurred during the commission of a robbery, burglary, kidnapping, or theft.
>
> A person may also commit the offense of assault and battery in the first degree if the person unlawfully offers or attempts to injure another person with the present ability to do so, and the act either is accomplished by means likely to produce death or great bodily

> injury, or occurred during the commission of a robbery, burglary, kidnapping, or theft.
>
> I think assault and battery of a high and aggravated nature mirrors that charge as well. So, I don't see any reason to confuse the jury with a lesser-included offense as to assault and battery, first degree. So, I'll allow the assault and battery of a high and aggravated nature to stand.

Tr. 299, ll. 5 – 24.

During the charge, the trial judge changed his mind and charged assault and battery first, but that decision was made was *after closing arguments*. The trial court noted this unilateral change on the record:

> THE COURT: All right. For the record, in the back, I took an opportunity to read and apply some of the facts to the assault and battery in the first degree, and over the State's objection, I chose to go ahead and charge it, so it's noted for the record.

Tr. 360, ll. 19 – 23.

Since the trial judge had already ruled before closing arguments that no lesser-included offenses would be charged, appellant's counsel did not argue the statutory differences between ABHAN or assault and battery first or second. Appellant's counsel did not argue or refer to the statutory definitions of great and moderate bodily injury.

Discussion.

Appellant was charged in the indictment with offense of assault and battery of a high and aggravated nature (ABHAN) for the injuries sustained by Varner during a shootout in Berkeley County. A person commits ABHAN "if the person unlawfully injures another person, and: (a) great bodily injury to another person results; or (b) the act is accomplished by *means likely to produce* death or great bodily injury." S.C. Code Ann. § 16-3-600 (B)(1) (2015) (emphasis

added). In contrast, S.C. Code Ann. § 16-3-600 (D)(1) (2015) declares a person "commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and (a) *moderate bodily injury to another person results* or moderate bodily injury to another person could have resulted" (emphasis added).

The statute defines great bodily injury as "bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ." S.C. Code Ann. § 16-3-600 (A)(1) (2015). In contrast, 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." S.C. Code Ann. § 16-3-600 (B)(1) (2015).

"The Legislature uses inconsistent language throughout Title 16, Chapter 3 of the South Carolina Code to define specific elements required to constitute an offense against an individual's person, especially when the element requires an 'injury.'" State v. Robinson, 437 S.C. 226, 232, 878 S.E.2d 8, 11 (Ct. App. 2022). "[T]he terms under the assault and battery statute are inconsistent." Id.

The Legislature has thus crafted a statutory scheme that focuses on the nature and extent of the injury caused by the assault, as well as the overt act or mechanism of the assault itself. In the present case, the statutory scheme surrounding "great bodily injury" versus "moderate bodily injury" outlined by S.C. Code Ann. § 16-3-600 (B)(1) and (D)(1) are factual issues that should have been resolved by the jury. This is particularly true when the nature of the injury arguably

falls squarely within the moderate bodily injury category, but the means of inflicting such injury may *potentially* cause a greater injury in other instances. Due to this ambiguity, under the rule of lenity, the trial court should have strictly construed the ambiguous statutory terms in favor of appellant and charged the jury with the lesser-included offense. *See* State v. Samuels, 403 S.C. 551, 558, 743 S.E.2d 773, 777 (2013) (noting the rule of lenity is a rule of statutory construction).

The statutory scheme focuses on the nature of the resulting injury to differentiate the degrees of assault and battery. The statutory scheme's ambiguity centers on the added language of *means likely to produce* phrasing. Here, the use of the word "likely" creates ambiguity. When an action creates "moderate bodily" injury as that term is defined under the statute, an ambiguity exists between the specific, statutorily defined injury and the "means likely to produce" provision of ABHAN. Any such ambiguity must be strictly construed against foreclosing assault and battery second as a lesser-included offense when the mechanism of the injury (the use of a gun) provides support for ABHAN while the actual injury inflicted supports either assault and battery first or second. *See* State v. Miles, 421 S.C. 154, 164, 805 S.E.2d 204, 210 (Ct. App. 2107) (requiring "any doubt about a statute's scope be resolved in the defendant's favor").

This dual approach to punishing crimes of assault and battery has been recognized by the appellate courts of this state:

> The Act also provides that ABHAN is a lesser-included offense of attempted murder; assault and battery in the first degree is a lesser-included offense of ABHAN and attempted murder; assault and battery in the second degree is a lesser-included offense of first degree assault and battery, ABHAN, and attempted murder; and assault and battery in the third degree is a lesser-included offense of second degree assault and battery, first degree assault and battery, ABHAN, and attempted murder.

State v. Hernandez, 428 S.C. 257, 260, 834 S.E.2d 462, 463 (2019). Under our Supreme Court's clear directive in Hernandez, appellant was entitled to a charge on the lesser-included offense of assault and battery second. The trial court committed an error of law in refusing the requested charge. *See* State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011).

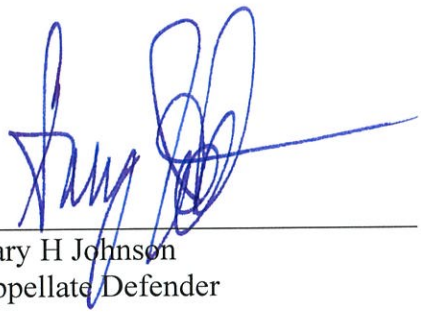
Prejudice.

Appellant's defense was prejudiced by the trial court's original decision to refuse to charge with assault and battery first or second as lesser-included offenses. As noted, the trial judge changed his mind and charged assault and battery first only after closing argument. Appellant's counsel did not argue the statutory differences between ABHAN or assault and battery first or second. Appellant's counsel did not argue or refer to the statutory definition of moderate bodily injury as they were not to be part of the charge. The facts of this case do not support a foreclosure of the jury reaching a determination of moderate bodily injury as a matter of law. There is an indication in the jury's verdict that several aspects of the state's theory of the case was rejected by the jury. Despite Varner and Ward claiming they were initially approached by appellant and Caneles in a robbery, the jury acquitted both defendants of that charge. Tr. 366, ll. 24 -25, 367, ll. 11 – 12. This portion of the jury's verdict was supported by the numerous inconsistencies, particularly related to the alleged pistol whipping of Varner before the first shots were fired. Tr. 169, ll. 9 - 13. While Varner claimed Canales hit him in the head with a handgun, this claim was clearly contradicted by his treating physician. Tr. 250, ll. 10 – 15. Likewise, Ward claimed to have been robbed at gun point of his wallet, but the jury rejected the armed robbery charge. Tr. 127, ll. 12 – 128, 20.

Appellant was entitled to present the extent of the injuries sustained by Varner as part of the inconsistencies presented during trial. Had the trial judge properly ruled that he would charge both assault and battery first and second as required by Hernandez, counsel for appellant would have been able to guide the jury towards yet another inconsistency between the charge covering "great bodily injury" and the resulting "moderate bodily injury" actually suffered by Varner. Depriving the jury of the guidance on assault and battery second and thus preventing appellant's counsel from arguing the extent of the injury as an element of consideration for the lesser-included offense was prejudicial.

CONCLUSION

Based upon the foregoing argument, appellant requests that this Court reverse appellant's convictions and remand this matter for a new trial.



Gary H Johnson
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of February, 2025.

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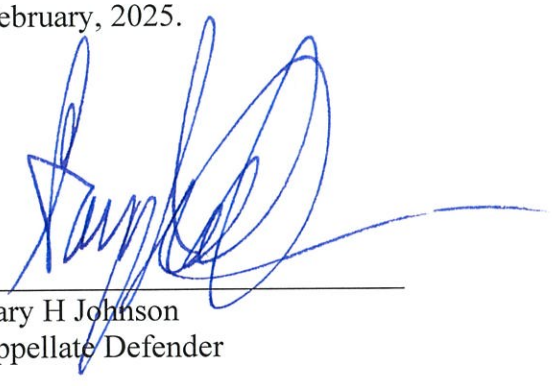
CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 14th day of February, 2025.



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