RECEIVED
Jun 30 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Bentley Price, Circuit Court Judge

Appellate Case No. 2024-000878

The State, ...Respondent,

v.

Dimitri Tarion Dickens, ...Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General
S.C. Bar No. 8729
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit
O.T. Wallace Building
101 Meeting Street
Charleston, South Carolina 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

State Cases:

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court properly denied Appellant's request to charge the jury on the lesser included offense of second-degree assault and battery where, even when viewed in the light most favorable to Appellant, the evidence presented at trial regarding the use of a gun to shoot the victim three times did not support the lesser charge.

STATEMENT OF THE CASE

Dimitri Tarion Dickens (Appellant) was indicted at the April, 2023 term of the Berkeley County Grand Jury for assault and battery of a high and aggravated nature (ABHAN) 2023-GS-08-01118); armed robbery (2023-GS-08-1119); and possession of a weapon during the commission of a violent crime (2023-GS-08-01120). On September 25-27, 2023, Appellant and his co-defendant, Isaiah Canales, proceeded to a joint trial by jury before the Honorable Bentley Price. Appellant was represented by Melissa White Gay, Esquire, and Canales was represented by Steve C. Davis, Esquire, both of the Berkeley County Bar. Respondent (the State) was represented by Assistant Solicitors F. Alexander Myers and Olivia Lynch of the Ninth Circuit Solicitor's Office. (Tr.p.1). At the conclusion of trial, the jury found both Appellant and Canales guilty of ABHAN and possession of a weapon during a violent crime but found them not guilty of armed robbery. Judge Price sentenced Appellant to fifteen (15) years' imprisonment suspended upon the service of ten (10) years' imprisonment for ABHAN and five (5) years' concurrent imprisonment for possession of a weapon during the commission of a violent crime. (Indictments; Sentencing Sheets; Tr.p.378-p.379).

Appellant made a motion to reconsider his sentence and on March 28, 2024, the trial court held a hearing on that motion; however, in an Order dated and filed May 9, 2024, the trial court denied the motion to reconsider and let the sentence stand. (Order filed May 9, 2024). Appellant timely filed a notice of intent to appeal his convictions and sentence, and a brief was submitted in support of his appeal by Appellate Defender Gary H. Johnson of the South Carolina Commission on Indigent Defense. This Brief of Respondent on behalf of the State now follows.

STATEMENT OF FACTS

Trial

On September 25, 2023, after the trial court addressed some pretrial matters, the jury was sworn, and the trial began. (Tr.p.1-p.10). The State and each defendant gave an opening statement. The State explained that the charges against Appellant and Canales stemmed from an incident that occurred on April 25, 2021, in the parking lot of the Royal Lanes bowling alley in Goose Creek. The solicitor contended the evidence would show that Appellant, Canales, and three unknown individuals armed themselves with guns and waited in a car until the two victims, Mr. Ward and Mr. Varner, exited the bowling alley to leave. As soon as Ward and Varner reached their car, the five men got out and ambushed them. Appellant approached Ward, held a gun to his head, rummaged through his pockets, and took some cash. At the same time, Canales approached Varner and told him not to move or try anything. Varner, who was also armed, decided to defend himself rather than follow Canales' instructions. He took out his gun and began shooting at the attackers, while several of the men started shooting back. Varner was ultimately shot three times as he continued firing his own gun while lying on the pavement bleeding. Appellant, Canales, and the others retreated to their cars and sped away. Varner was rushed to the hospital to be treated for his injuries. Canales, who had also been shot, ended up at the same hospital and was arrested that night. Appellant was not arrested until several months later. The solicitor proceeded to describe the State's burden of proof, the elements of the charged offenses, and the types of evidence the State intended to present during trial. (Tr.p.10-p.16).

In his opening statement, Appellant focused on the role of the jurors as fact finders, the presumption of innocence, the State's high burden of proof, the unclear video evidence, the fact

that Canales was also shot, and the contention that Varner shot first, to argue that neither he nor Canales started the altercation and therefore the jury should find them not guilty of the charged crimes. Appellant did not make any comments about the extent of Varner's injuries. (Tr.p.17-p.21). Next, Canales' opening statement focused on the purpose of the trial—to seek justice. He asked the jurors not to believe the State's hype and suggested the incident likely erupted when "a bunch of young people at the bowling alley . . . probably got some wrong intention about drugs, and things didn't go right." Canales argued neither the video evidence from the scene nor the medical records would support the State's theory of the case and that his client had the right to defend himself. He said he was confident the jury would not believe the hype. During his open, Canales claimed the medical records would show Varner was merely shot in the thigh, that all his vital signs were normal, and that he was speaking full sentences at the hospital. (Tr.p.21-p.25-p.42).

After opening statements, the State presented its case-in-chief, calling a series of police officers, foundational and fact witnesses, and medical personnel to describe the incident, the ensuing investigation, and Varner's injuries. Chimere Myers, the 911 communications manager for the Goose Creek Police Department (GCPD), authenticated an audio recording of a 911 call following the incident and it was admitted into evidence as State's Exhibit #1. (Tr.p.25-p.29). GCPD patrol officer Mindy Waites was the first officer on scene after responding to a call from dispatch. Upon arrival, she found one person [Varner] who was shot and described him as initially in shock and not talking. She said Varner then started speaking but kept repeating things. When other police units arrived, Waites helped secure the scene before being told she could go home. As she was driving away, she discovered broken glass in the roadway that had come from a car window or windshield that appeared to have a bullet hole in it. Waites

authenticated her body camera recording from the incident date and it was admitted as State's Exhibit #2. (Tr.p.29-p.36; p.41-p.42).

GCPD Sergeant Douglass Galluccio was the on-call investigator the evening of the incident and was dispatched to the scene. Upon arrival he was briefed by Sergeant Moree and then began processing the scene, which involved talking to victims and witnesses, taking notes, gathering evidence, marking the location of gun casings, taking photographs, and searching relevant vehicles at the scene. Galluccio said the police found a .380 pistol in the glove box of a Toyota Tacoma at the scene. He did not talk to Varner because Varner had already been transported to Trident Hospital; however, he did talk to Ward and developed Appellant as a suspect even though he had already fled the scene. Galluccio said Canales was a second suspect and he was arrested that night. (Tr.p.42-p.52; p.61-p.68).

Goose Creek Fire Department Lieutenant Andrew McAllister was working as a firefighter/EMT on the night of the incident. He responded to a call for service, rendered aid to Varner, and transported him to Trident Hospital. McAllister said the scene was categorized as "high priority" because the victim "needed advanced life support" from the paramedic on scene. He noted the gunshot wounds to Varner's left arm and left leg, reassessed and tightened a tourniquet that had already been applied, did additional "bleeding control" with bandages, placed Varner in the ambulance, started an IV, and took him to the hospital. McAllister noted there were two bullet holes in Varner's leg, one in his ankle and one in his upper leg and that the tourniquet had been applied to stop "gross bleeding." He explained that with a thigh wound, "there can be multiple liters of blood [being] lost." (Tr.p.68-p.71; p.74-p.75).

GCPD officer Christopher Dowling was a field training officer on the night of the incident and assisted in responding to the scene. Although an officer from GCPD and two

Berkeley County deputies were already present, EMS had not yet arrived. Dowling observed a man with a bloody leg who was complaining of a gunshot wound. He began taking verbal statements from witnesses and bystanders and created a crime scene log before returning to the station. There, Dowling saw Canales in custody and transported him to the Berkeley County Detention Center. He authenticated his body camera footage from that night and it was admitted as State's Exhibit #3. (Tr.p.75-p.82; p.90-p.91).

GCPD Corporal Miranda Nation also participated in the investigation of the incident. Upon arrival, she met with Galluccio and was instructed to go to the hospital to talk to two different gunshot victims who were being treated there. Nation first talked to Varner and got his version of the incident, which included identifying one suspect as someone he already knew by first name and who he described as a short Hispanic male wearing all black clothing. Nation then went to talk to the other gunshot victim and observed he matched the name and description given by Varner, including the black clothing that was then in a bag after being removed during his treatment. Nation took photographs of Varner's injuries but was unable to photograph all of them due to certain bandages that could not be removed and what Varner reported as "extreme pain." She also collected the bag of Canales' clothing and transported it to the GCPD, and then identified Canales in the courtroom. (Tr.p.92-p.105).

On the second day of trial, the State called the two victims to the stand. Ward described leaving the bowling alley with Varner, when a group of people got out of a car and threatened them with guns. He said "Meech," who he identified in the courtroom as Appellant, put a gun to his head, went through his pockets, and took his wallet when he heard gunfire erupt between Varner and the group of attackers. Ward authenticated video recordings of the incident from the

bowling alley security cameras and those videos were admitted as State's Exhibits #16 & #17. (Tr.p.122-p.137; p.160-p.163).

Next, Varner described the incident, identifying both Appellant and Canales as two of the five attackers. He said that after he, Ward, and a girl named Destiny walked out to the parking lot, he saw Canales approach with a handgun in his hand where he told Varner not to move, or scream, or touch anything. Varner said he turned around and reached in his pocket to grab his own gun when he was hit in the back of the head and started running. He heard a shot and returned fire and then heard "all kinds of gunshots while running away." Varner testified he thought he and Ward were being robbed and that the incident was not "any sort of drug deal." He further testified his whole left side was bleeding from top to bottom and he thought he was going to die. (Tr.p.166-p.176; p.204-p.205). On cross-examination, when Varner was asked why he was afraid he was going to die, he noted that he had been shot three times and that most people die from one bullet regardless of where they are shot. He explained that while he was at the hospital he felt like he was going to pass out. (Tr.p.203).

GCPD crime scene investigator Sandra Favero was dispatched to process the crime scene on the night of the incident. She first went to the location where Waites had found the tinted window with the bullet hole, photographed it, and collected the window tinting as evidence. Favero then went to the bowling alley parking lot and took hundreds of photos at the scene. She also prepared a sketch of the crime scene which was admitted into evidence without objection as State's Exhibit #18. Favero described the items she collected and then proceeded to identify those items which were now in a box labeled State's Exhibit #19, which was admitted into evidence. (Tr.p.208-p.224). GCPD evidence custodian Taveres Liggons described how

evidence is received and securely stored in the GCPD evidence room and then identified the evidence actually received and stored in this case. (Tr.p.240-p.245).

Next, Dr. Daniel Regino described his extensive medical training and experience, noting he was board certified in emergency medicine by the American Board of Medical Examiners and had treated patients with injuries "tens of thousands" of times. He was admitted, without objection, as an expert in emergency medicine. Dr. Regino testified he was the emergency physician working at Trident Health Systems on April 25, 2021, where he treated Varner for his injuries after Varner came into the trauma unit with multiple gunshot wounds to the left upper and lower extremities. Dr. Regino gave his expert opinion that shooting a person three times with a firearm is likely to injure the person in a manner that causes: (1) substantial risk of death; (2) serious permanent disfigurement; and (3) protracted loss or impairment of the function of a bodily organ. (Tr.p.245-p.248). On cross-examination, Dr. Regino testified the injuries Varner sustained were not life threatening. He said that thankfully, despite suffering three gunshot wounds, Varner did not "bleed out very quickly." (Tr.p.248-p.250).

Finally, SLED forensic scientist and firearms examiner Chad Smith was admitted as an expert in firearms analysis, without objection. He explained how he conducts firearms analysis in general and then described the testing he did on the various shell casings or fired bullets he examined in this case. Smith was able to conclude that five of the .380 cartridge casings discovered were fired from the Ruger firearm collected from the scene, but had no conclusions about the others, because he had no firearm to compare to the .357 Sig caliber cartridge cases or the .45 auto caliber cartridge cases that were discovered. (Tr.p.252-p.257).

At the conclusion of Smith's testimony, the State rested. (Tr.p.271). Appellant and Canales moved for directed verdicts as to all charges and those motions were denied. (Tr.p.271-

p.273). After advising the defendants on the record regarding their rights to testify, they each elected not to testify or present a defense and instead rested. Appellant and Canales renewed their motions for directed verdicts and those motions were again denied. (Tr.p.274-p.284; p.301-p.302).

Charge Conference

The trial court held a charge conference which spanned the end of day two and the start of day three of trial. (Tr.p.284-p.301). During the charge conference, Canales asked the trial court to charge first-degree assault and battery and second-degree assault and battery as lesser-included offenses of ABHAN. Appellant joined in the request and argued, in regard to second-degree assault and battery, the evidence demonstrated Varner's injuries were not life threatening. The solicitor responded that the State's theory of the case did not require actual life-threatening injuries and that Dr. Regino's testimony directly supported the elements of the ABHAN charge. He argued that a charge on the lesser-included offenses would just give the jury an out, and that lesser included offenses were not appropriate charges where Varner was shot three times. (Tr.p.297, line 16-p.299, line 4).

The trial court ruled that it had reviewed the first-degree assault and battery statute, thought "assault and battery of a high and aggravated nature mirrors that charge" and therefore, decided first-degree assault and battery would not be charged. Canales noted the trial court had not referenced second-degree assault and battery in its ruling but that "we'll honor your decision." Appellant continued to argue that first-degree assault and battery should be charged, claiming it was not redundant and that the jury should be given the option of what charges for which to convict. He asked the court to focus on what elements *might* satisfy the statute rather

than what elements of the statute the State was trying to prove. The trial court did not alter its ruling. (Tr.p.299, line 5-p.301, line 16).

Conclusion of Trial

The parties proceeded to make closing arguments. During its close, the State highlighted the testimony from Dr. Regino that Varner's gunshot wounds were the kinds of wounds likely to produce death and great bodily injury, serious permanent disfigurement, or a protracted loss or impairment of the function of the body or an organ. (Tr.p.305, lines 9-15; p.308, line 25-p.309, line 7). In response, Appellant argued that while the doctor said being shot could potentially cause a person to die, he also specifically said Varner's injuries were not life threatening. (Tr.p.323, lines 9-14). Canales made no mention of Varner's injuries during his close. (Tr.p.330-p.340).

The trial judge then charged the jury on the roles of the judge and jury, including: the judge's duty to charge the law applicable to the case; the obligation to treat the two defendants separately and individually; the burden of proof; the presumption of innocence; direct and circumstantial evidence; reasonable doubt; credibility of witnesses; expert witnesses; criminal intent; the elements of each offense; accomplice liability; identification testimony; the defendants' rights not to testify; and the verdict forms. (Tr.p.340-p.360). In regard to the assault, the trial court charged common law ABHAN[1] as well as the statutory elements of first-degree assault and battery; however, it did not charge the statutory elements of second-degree assault and battery. (Tr.p.351, line 7-p.352, line 7).

[1] The Omnibus Crime Act of 2010 abolished the common law crime of assault and battery of a high and aggravated nature and adopted a new crime with the same name. *See* S.C. Code Ann. § 16-3-600(B)(1). Common law ABHAN was described as an unlawful act of violent injury to another accompanied by circumstances of aggravation; however, serious injury was not in fact required. *State v. Patterson*, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). The offense was punishable under Section 17-25-30 with imprisonment for a maximum of ten years and was classified as a misdemeanor. *State v. Hill*, 254 S.C. 321, 331, 175 S.E.2d 227, 232 (1970).

After the jury was excused but before they began deliberations, the trial judge commented as follows:

> 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.p.360, lines 19-23). Neither Appellant nor Canales raised any objection to the jury charge as a whole. They also did not specifically object to the trial court's decision to charge common law ABHAN, its decision to charge first-degree assault and battery, or its failure to give a charge on second-degree assault and battery.

The jury began deliberating and after several questions were asked, including "Can we get a definition of the charges?" (Court's Exhibit #4), it ultimately reached a unanimous verdict, finding Appellant and Canales guilty of ABHAN and possession of a weapon during a violent crime, but finding them not guilty of armed robbery. Judge Price sentenced Appellant to fifteen (15) years' imprisonment suspended upon the service of ten (10) years' imprisonment for ABHAN and five (5) years' concurrent imprisonment for possession of a weapon during the commission of a violent crime. (Indictments; Sentencing Sheets; Tr.p.378-p.379).

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012); *State v. Wharton*, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). "The evidence presented at trial determines the law to be charged to the jury." *State v. Gilliland*, 402 S.C. 389, 400, 741 S.E.2d 521, 527 (Ct. App. 2012). On appeal, an appellate court reviewing a trial judge's jury charge must view the charge as a whole and in light of the evidence and issues presented at trial. *State v. Dent*, 440 S.C. 449, 453, 892 S.E.2d 294, 296

(2023); *State v. Simmons*, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); *see Todd v. State*, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation[.]"). The appellate court will only reverse a trial judge's decision regarding jury instructions when that decision constituted a prejudicial abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000); *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985). 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. *Brown* at 87, 736 S.E.2d at 265; *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011); *State v. Morris*, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008). If the jury instructions presented were substantially correct and covered the applicable law, the trial judge's decision will not be reversed on appeal. *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016); *State v. Ezell*, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996). Indeed, the substance of the law is what must be charged to the jury. *Marin*, 415 S.C. at 482, 783 S.E.2d at 812-13.

ARGUMENT

I.

The trial court properly denied Appellant's request to charge the jury on the lesser included offense of second-degree assault and battery because, even when viewed in the light most favorable to Appellant, the evidence presented at trial regarding the use of a gun to shoot the victim three times did not support the lesser charge.

Appellant argues the trial judge erred by refusing to instruct the jury on the lesser included offense of second-degree assault and battery because the shooting victim "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." He contends that because the Legislature: (1) uses inconsistent language to define specific elements required to constitute an offense against an individual's person and (2) crafted a statutory scheme that focuses on the nature and extent of an injury caused by the assault, as well as the over act or mechanism of the assault itself, section 16-3-600 is ambiguous and therefore, under the rule of lenity, the trial court should have strictly construed the ambiguous statutory terms in his favor and charged the jury with the lesser included offense of second-degree assault and battery. Appellant specifically argues the term "likely" in the phrase "means likely to produce death or great bodily injury" in 16-3-600(B)(1) creates ambiguity. The State disagrees and submits Appellant's argument should be denied and dismissed for a number of reasons.

Issue Not Preserved for Appeal

First, the argument raised in Appellant's brief is not preserved for appellate review because the trial court never charged the jury on the statutory elements of ABHAN, including the complained-of term "likely" in the statutory phrase "means likely to produce death or great bodily injury." The State acknowledges the trial court's decision to charge common law

ABHAN rather than statutory ABHAN as indicted creates its own significant problems; however, where our appellate courts do not apply a plain error standard when sitting in review of a trial court's decision, *see State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) and *Moses v. State*, 442 S.C. 263, 268–69, 898 S.E.2d 174, 177 (Ct. App. 2024), those problems must be addressed, if at all, in the post-conviction relief context. S.C. Code Ann. § 17-27-10 through -160 (Supp. 2025).

Additionally, even if the trial court *had* charged statutory ABHAN, this issue would still arguably be unpreserved because Appellant raised no objection to the trial court's post-charge conference modification of its overall charge on lesser-included offenses. In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the Petitioner; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004). In addition to the general requirements of our issue preservation rules, the South Carolina Rules of Criminal Procedure provide specific guidance in regard to raising and preserving an objection to a jury charge. *See* Rule 20, SCRCrimP (outlining the requirements for requesting jury instructions and objecting to a jury charge). Pursuant to Rule 20, a defendant must object to the jury charge as given or request an additional charge when afforded the opportunity to do so in order to properly preserve an objection to a charge. *State v. Stone*, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985).

In interpreting Rule 20, our courts have recognized that it is "the long-standing rule that where a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at conclusion of the court's instruction." *See State v. Johnson*, 439 S.C. 331, 340-41, 887 S.E.2d 127, 131-32

(2023) (quoting *State v. Johnson*, 333 S.C. 62, 64 n.1, 508 S.E.2d 29, 30 n.1 (1998)); *State v. Bowers*, 428 S.C. 21, 30-32, 832 S.E.2d 623, 628-29 (Ct. App. 2019); *State v. Bryant*, 391 S.C. 225, 231, 705 S.E.2d 465, 469 (Ct. App. 2010). Thus typically, if there was an on-the-record discussion regarding a requested charge and an on-the-record ruling as to whether the court would give that charge, the defendant would not need to again object to the charge once given to preserve the issue for appeal. The typical rule does *not* hold, however, when a defendant abandons a request to charge after the on-the-record ruling denying his request. *State v. Rios*, 388 S.C. 335, 340-41, 696 S.E.2d 608, 611-12 (Ct. App. 2010).

In *Rios*, the defendant argued the trial court erred in failing to charge the jury on involuntary manslaughter and self-defense. *Rios*, 388 S.C. at 340, 696 S.E.2d at 611. This Court found Rios's argument was not properly before it for review because he abandoned his request for jury charges on involuntary manslaughter and self-defense *when he acquiesced* to the trial court's charge decision on those issues, and asked the trial court to charge voluntary manslaughter, accident, and murder. *Rios*, 388 S.C. at 341, 696 S.E.2d at 612 (emphasis added). The Court found Rios waived appellate review of the issue because an issue conceded in the trial court cannot be argued on appeal. *Id.*

Here, as in *Rios*, Appellant arguably waived or abandoned his challenge to the trial court's refusal to charge second-degree assault and battery because he made no objection or additional request for the charge when the trial judge deviated from the prior ruling, and effectively acquiesced in the trial court's modification. Although Appellant appears to have joined in his codefendant's request for a jury charge on both first-degree and second-degree assault and battery, and those requests were initially rejected, when the trial court relented, charged first-degree assault and battery, and explained its reasoning for doing so at the end of the

jury charge, Appellant did not object or otherwise question why a similar decision wasn't made by the trial court in regard to second-degree assault and battery. Thus, this Court could conclude Appellant's argument about the jury charge is not preserved for consideration in this appeal. *Rogers* at 183, 603 S.E.2d at 912-13; Rule 20, SCRCrimP.

Law / Analysis

Even if this Court determines Appellant's argument is preserved for appellate review, it is without merit. Shooting a person with a gun is always "likely to produce death or great bodily injury." Accordingly, such conduct constitutes ABHAN regardless of whether great bodily injury actually occurs. Indeed, there is no ambiguity in the statute simply because there are two ways an assault can rise to the level of ABHAN, particularly where, as here, the evidence unequivocally satisfied one of those two ways by proving Appellant acted in a manner likely to produce death or great bodily injury.

Section 16-3-600 of the Code of Laws of South Carolina provides:

> (A) For purposes of this section
>
> (1): "Great Bodily Injury" means bodily injury which causes a substantial risk of death or which causes serious permanent disfigurement or protracted loss of impairment of the function of a bodily member or organ.
>
> (2): "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.

(B)(1) A person commits the offense of **assault and battery of a high and aggravated nature** if the person *unlawfully injures another person, and*:

(a) Great bodily injury to another person results; *or*

(b) *The act is accomplished by means likely to produce death or great bodily injury.*

(C)(1) A person commits the offense of **assault and battery in the first degree** if the person *unlawfully*:

(a) *injures another person, and the act*:

(i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or

(ii) *occurred during the commission of a robbery*, burglary, kidnapping, or theft; or

(b) offers or attempts to injure another person with the present ability to do so, and the act:

(i) is accomplished by means likely to produce death or great bodily injury; or

(ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.

(D)(1) 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; or

(b) The act involves the nonconsensual touching of the private parts of a person, either under or above clothing.

S.C. Code Ann. § 16-3-600 (Supp. 2021) (emphasis added)."The degrees of assault and battery are, in descending order of severity, assault and battery of a high and aggravated nature (ABHAN), and assault and battery in the first, second, and third degrees." *State v. Middleton*,

407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) (citing S.C. Code Ann § 16-3-600). Assault and battery in the second degree is a lesser-included offense of attempted murder, assault and battery of a high and aggravated nature, and assault and battery in the first degree. S.C. Code Ann §16-3-600(D)(3) (Supp. 2021).

The trial court is required to charge the jury on a lesser-included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed. *State v. Williams*, 427 S.C. 148, 156, 829 S.E.2d 702, 706 (2019); *Middleton*, 407 S.C. at 317, 755 S.E.2d at 435; *State v. Payne*, 434 S.C. 121, 135, 862 S.E.2d 81, 88 (Ct. App. 2021). To justify charging the lesser crime, the evidence presented must allow a rational inference the defendant was guilty ***only*** of the lesser offense. *State v. Geiger*, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (2006); *State v. Sims*, 426 S.C. 115, 130, 825 S.E.2d 731, 738 (Ct. App. 2019). As such, the court looks to the totality of evidence in evaluating whether such an inference has been created. *Geiger*, 370 S.C. at 607, 635 S.E.2d at 673; *Sims*, 426 S.C. at 130, 825 S.E.2d at 738. In determining whether the evidence requires a charge on a lesser included offense, the court views the facts in a light most favorable to the defendant. *Sims*, 426 S.C. at 130, 825 S.E.2d at 738; *State v. Brayboy*, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010). The trial court should refuse to charge the lesser included offense where there has been no evidence tending to show the defendant may have committed solely the lesser offense." *Geiger*, 370 S.C. at 607, 635 S.E.2d at 673.

Here, where Varner was shot three times in the course of an alleged robbery, the jury would have been properly charged with ABHAN and the lesser-included offense of first-degree assault and battery. But in order for Appellant to commit *solely* the lesser-included offense of second-degree assault and battery, the wounds on Varner would have to be categorized as

moderate bodily injury instead of great bodily injury ***and*** the evidence would have to support a rational inference that the act was *not* accomplished by means likely to produce death or great bodily injury. S.C. Code Ann. § 16-3-600(B)(1) (Supp. 2021). No such rational inference can possibly exist in this case.

Under the statute, a great bodily injury is described as an injury that causes a substantial risk of death. S.C. Code Ann. § 16-3-600(A)(1) (Supp. 2021). "A substantial risk of death" does not mean that the injury must result in death. Indeed, Ohio has defined it as "a strong possibility, as contrasted with a remote or even a significant possibility, that a certain result may occur, or that a certain circumstance may exist." *State v. Johnson*, 119 N.E.3d 914, 923 (Ohio 2018). The State contends that firing a deadly weapon at someone is always "likely to cause great bodily injury" and creates a "substantial risk of death." Although our appellate courts have not defined "substantial risk" or directly ruled on this particular issue, they have made a number of rulings noting the inherent danger of using a firearm. In *State v. Locklair*, the appellant argued a firearm is not a "weapon or device which would normally be hazardous to the lives of more than one person." Our supreme court disagreed and held the 'great risk of danger' aggravator in a capital case was properly submitted to the jury "because there was ample evidence that suggested Locklair put the lives of more than one person in danger in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person" where he shot a gun on a public street where there were many people in the vicinity. *State v. Locklair*, 341 S.C. 352, 366-67, 535 S.E.2d 420, 427-28 (2000). Similarly, the supreme court in *State v. Lindsey* held that a reasonable person would know that shooting a gun into the confined space of a car's interior would create a great risk of harm to more than one person. *State v. Lindsey*, 372 S.C. 185, 195, 642 S.E.2d 557, 562 (2007).

In Florida, the District Court of Appeal for the Third District held that firing a firearm in the air, even as a so called "warning shot," constitutes the use of deadly force as a matter of law because it is the use of force likely to cause death or great bodily harm and not, as urged, the use of force *not* likely to cause death or bodily injury. *Miller v. State*, 613 So.2d 530 (Fla. Dist. Ct. App. 1993). The court explained: "A firearm is by definition a deadly weapon, which fires projectiles likely to cause death or great bodily harm; whenever it is fired in the vicinity of human beings, as here, there is real danger that the fired projectile may hit someone, even if not aimed at anyone, as such projectiles are quite capable of ricocheting off nearby objects and hitting people in the area." *Id.*

In this case, there were two distinct theories of Appellant's involvement in Varner's shooting, but under either theory, the shooting occurred when two or more armed individuals intentionally exchanged gunfire with each other. Varner claimed he was shot by Appellant trying to thwart an attack by Appellant, Canales, and the other attackers. Although he did not testify, Appellant argued that Varner fired first and that any gunshot wounds suffered by Varner were inflicted in response to Varner's act. However, regardless of which version of events a jury believed, it could not have found Appellant guilty of the lesser, rather than the greater, offense. *State v. Williams*, 427 S.C. 148, 156–57, 829 S.E.2d 702, 706 (2019); *State v. Drayton*, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987) (holding the trial court did not err in failing to charge the lesser-included offense because, under the State's version of the facts, the defendant was guilty of the greater offense, and under the defendant's version of the facts, he was innocent of any charge).

Shooting a person three times is likely to cause or produce death or great bodily injury. Indeed, this is the only inference supported by the cases above *and* by the actual evidence

produced at trial. EMS responder McAllister said the crime scene was "high priority" because Varner "needed advanced life support." (Tr.p.70, lines 1-8). He noted the tourniquet had been applied to Varner's leg to stop "gross bleeding" and explained that with a thigh wound a shooting victim can lose "multiple liters of blood." (Tr.p.74, line 10-p.75, line 9). Officer Nation talked to Varner at the hospital where he reported being in "extreme pain." (Tr.p.101, lines 8-25). Varner himself testified that after being shot three times, his whole left side was bleeding from top to bottom and he thought he was going to die. (Tr.p.176, lines 10-18). He said he recognized that most people die from one bullet regardless of where they are shot, yet he had been shot three times. (Tr.p.203, lines 3-10). Indeed, as summed up by Dr. Regino, shooting a person three times is likely to injure the person in a manner that causes: (1) substantial risk of death; (2) serious permanent disfigurement; and (3) protracted loss or impairment of the function of a bodily organ. (Tr.p.247, line 18-p.248, line 11).

As the evidence demonstrates, a gun being fired at someone is likely to produce death or great bodily injury. Under Section 16-3-600(B)(1)(b), the analysis is not controlled by the injuries sustained. Consequently, there is no evidence tending to show that Appellant committed solely the lesser offense. The trial court committed no error in refusing to charge the jury on the lesser-included offense of second-degree assault and battery and therefore, Appellant's convictions and sentence should be affirmed.

CONCLUSION

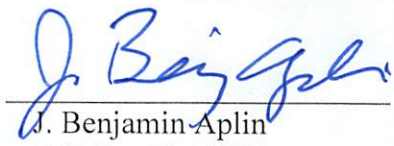
For all of the foregoing reasons, the State respectfully requests that Appellant's convictions and sentence be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: 
J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
June 30, 2025