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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County
The Honorable Debra R. McCaslin, Circuit Court Judge
Appellant Case No. 2024-000129

THE STATE, RESPONDENT

v.

DANIEL TAYLOR JONES, APPELLANT

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Did the trial court abuse its discretion by admitting Appellant's prior juvenile adjudications for first degree burglary and petit larceny pursuant to Rule 609(a)(1), SCRE when the probative value of the evidence did not outweigh its prejudicial effect to Appellant, particularly where the court misapplied the *Colf* factors during its analysis?
2. Did the trial court err by refusing to instruct the jury on the lesser included offense of second-degree assault and battery when there was evidence to support the charge?

RESPONDENT'S COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Did the trial court abuse its discretion by admitting the Appellant's prior juvenile adjudication for the offenses of burglary in the first degree and petit larceny when the probative value concerning the Appellant's impeachment overrode any prejudice that may have occurred, which is allowed pursuant to Rule 609(a)(1), and after applying the factors found in *State v. Colf*?
2. Did the trial court err in not to instructing the jury on the lesser included offense of assault and battery in the second degree when no sufficient evidence was raised revealing that the Appellant committed the offense of assault and battery in the second degree?

STATEMENT OF THE CASE

Daniel Taylor Jones (Appellant), along with his co-defendant Christopher Shumpert (Chris), was arrested on March 27, 2020, and charged with murder, attempted murder, and possession of a weapon during the commission of a crime of violence. On February 7, 2022, the Appellant was indicted by the Lexington County Grand Jury for the offense of murder. (R*). Later, on, April 4, 2022, the Appellant was indicted for the offenses of assault and battery of a high and aggravated nature and possession of a weapon during the commission of a violent crime (R*).

On January 17, 2024, a pre-trial hearing was held before the Honorable Debra R. McCaslin. Present was the Appellant along with his counsel Aimee Zmroczek. Representing the State of South Carolina were Assistant Solicitors, Rhonda Patterson and Bradley Pouge of the Eleventh Circuit Solicitor's Office. During this discovery motion the Appellant requested the training records from 2018 of each officer testifying. (Pre-trial Tr. p. 4 l. 4-5). This request was denied by the trial court. (Pre-trial Tr. p. 14 l. 11). Appellant also argued that body cameras were turned off and one officer did not have one at all. So, Appellant moved for a dismissal. (Pre-trial Tr. p. 15 l. 6-11). The court denied this motion since the officers being available to testify, so there exists no prejudice. (Pre-trial Tr. p. 23 l. 22-23; p. 24 l. 4-6). There was also a *Jackson v. Denno* hearing regarding statements by Appellant to law enforcement while still a suspect. Appellant, after arrest, also contacted law enforcement in order to make a statement. The trial court decided to allow the statement but ordered a redaction of anything in the email from the Appellant to law enforcement about attorneys, or any character evidence. (Pre-trial Tr. p. 68 l. 12 – p. 69 l. 5).

On January 22, 2024, this case was called for trial before Judge McCaslin. Present before the trial court was the Appellant with attorney Zmroczek and representing the State of South Carolina were Assistant Solicitors Patterson and Pogue. After five days of testimony a jury of his

peers found the Appellant guilty of murder, ABHAN, and possession of a weapon during the commission of a violent crime. (Tr. p. 868 l. 9-17). After the reading of the verdict, the Appellant appeared before the trial court for sentencing. For the offense of murder, Appellant was sentenced to a forty-year period of incarceration, credit was given for one-thousand four-hundred days of pre-trial incarceration. (Tr. p. 882 l. 13-15) For the offense of ABHAN the court sentenced the Appellant to a twenty-year period of incarceration. (Tr. p. 881 l. 21-23). For possession of a weapon during the commission of a crime of violence, Appellant was sentenced to five-years. (Tr. p. 881 l. 20-21).

While serving his sentence the Appellant filed a timely notice of appeal before this court. The Respondent's brief addressing the Appellant's allegations and their defenses follows.

STATEMENT OF FACTS

In March of 2020, Jada Ellison and her boyfriend David Payton were living with Barry Joe Chavis (victim). (Tr. p. 313 l. 5-7; l. 16-17). A friend of Jada's Jacqueline Aiken borrowed fifty ($50.00) dollars. (Tr. p. 314 l. 17-19). The next day Jada was making efforts to contact Jacqueline who was not answering her calls nor texts. Jada thought Jacqueline was trying to avoid her. (Tr. p. 315 l. 3-10). Jada discovered Jacqueline was at her friend Lane's house, the victim gave Jada and David a ride to Lane's so Jada could confront Jacqueline regarding the fifty dollars. (Tr. p. 203 l. 25; p. 315 l. 15; p. 203 l. 6-7). Once they arrived Jada confronted Jacqueline concerning the money that was owed. (Tr. p. 316 l. 7-9). Jacqueline gave the money to Jada but would not let the bill go so it ripped; Jada then took a hundred-dollar bill from Jacqueline. (Tr. p. 316 l. 11-14). These two women got into an altercation over this money. (Tr. p. 316 l. 23-24). Once the altercation ended, the victim, Jada, and David got into the victim's vehicle and left. (Tr. p. 317 l. 24-25).

Chris and Jacqueline followed, eventually catching up to the victim, David, and Jada. Chris proceeded to cut them off, and they came to a stop. (Tr. p. 205 l. 12-13). After cutting them off Chris angrily got out of his car. The victim stuck his gun out of the car window and fired a warning shot into the ground. The victim told Chris to get back into his car. (Tr. p. 206 l. 24 – p. 207 l. 5). After this, Chris got back into his car. The victim, David, and Jacqueline were allowed to drive away. (Tr. p. 207 l. 6-10).

Chris drove to Mr. Corey Chaney's residence. Mr. Chaney was the Appellant's step-father. Chris drove to Mr. Chaney's house looking for the Appellant because he knew the Appellant had guns. (T. p. 274 l. 2-9). Chris asked Mr. Chaney if the Appellant was at his house, however, he was then living with his grandmother, so he was not there. (Tr. p. 250 l. 4-6). After informing Mr. Chaney of what occurred, Chris wanted Mr. Chaney to go with him. Mr. Chaney declined, because

he did not wish to get involved. (Tr. p. 250 l. 19-20). Mr. Chaney insisted that Chris contact law enforcement. (Tr. p. 250 l. 23-24).

Chris then drove to the Appellant's grandmother's house where Chris found the Appellant, and told him what had happened. (Tr. p. 275 l. 24 – p. 276 l. 2). After being informed about what occurred, Appellant armed himself with his .300 Blackout assault rifle and gave his .9mm Luger to Chris. Appellant, along with Chris and Jacqueline, then drove to the victim's residence. On the way Jacqueline informed them that she was scared, so Chris dropped her off at a dirt road and told her to "shut up and wait." (Tr. p. 279 l. 3-4).

About an hour after the initial incident the Appellant and Chris arrived at the victim's residence. (Tr. p. 207 l. 18-20). Present was the victim, David, Jada, and two more of their friends, Steven Phillips and Kevin Kimbler. (T. p. 208 l. 16-17; l. 19-22). The victim was in a shed near the house doing mechanical work. (T. p. 209 l. 4-9). Chris got out of his car, armed with the .9mm handgun. He pointed it in the victim's face. (T. p. 209 l. 11-12). Chris and the victim exchanged words, then the victim went back to his work area.(Tr. p. 214 l. 19-24). The entire time the Appellant was standing on the passenger side holding the assault rifle. (Tr. p. 215 l. 1-2). After the victim walked away, Chris fired off three or four shots. Appellant also shot towards the truck; the victim fell in front of his truck. (Tr. p. 215 l. 5-9). After they shot the victim Chris and the Appellant got into Chris' car and sped away. (Tr. p. 218 l. 24-25). No one at the house was armed when Chris and the Appellant arrived. (Tr. p. 218 l. 3-6). After the shooting, Jada and David ran to the victim who had a big hole in his neck near his jaw. (Tr. p. 219 l. 11-12). Kevin Kimbler also had a gunshot wound to the upper thigh. (Tr. p. 123 l. 22-23; 127 l. 24).

After the shooting Chris picked up Jacqueline and dropped off Appellant at his grandmother's house. (Tr. p. 282 l. 18-20). Chris and Jacqueline then drove to Aiken, South

Carolina, and checked into a hotel. They went to Aiken because they knew law enforcement would be looking for them in Gaston. (Tr. p. 286 l. 4-10).

After the shooting, Appellant went to his mother's house and hid the assault rifle behind a bass boat. (Tr. p. 677 l. 13-14). The Appellant then went to his cousin, Heath Short's house. Appellant told Heath what happened and gave him the .9mm to hide. (Tr. p. 679 l. 4-10). While the Appellant was at Heath's house he got a call from his grandmother. She informed him that law enforcement was looking for him. (Tr. p. 680 l. 6-9). The Appellant then returned to his grandmother's house.

During the police investigation Roy Williams of the Lexington County Sheriff's Department went to Heath's house. Officer Williams got consent to search from Heath. (Tr. p. 371 l. 21-24). Heath then escorted Officer Williams to a bedroom where there was a safe. In the safe Officer Williams found a .9mm black handgun. (Tr. p. 372 l. 3-7). Sergeant Michael Hart of the Lexington County Sheriff's Department also learned about the possible location of the assault rifle. (Tr. p. 478 l. 18-24). Sergeant Hart went to Appellant mother's house and got consent to search. (Tr. p. 480 l. 10-11). Sergeant Hart found the .300 Blackout under a boat in the back of the house. (Tr. p. 481 l. 15-21; p. 483 l. 17-19). Sergeant Hart also made contact with the Appellant and collected samples for a gunshot residue (GSR) test. (Tr. p. 496 l. 1-4).

During trial, Lexington County Sheriff's Department Crime Scene Investigator Patrick Ward testified as to what was discovered at the crime scene. Investigator Ward testified that he discovered several cartridge cases in the front yard of the crime scene location. (Tr. p. 388 l. 17-19). Investigator Ward stated that when he arrived at the crime scene, he found the victim on the ground in front of a Dodge Dakota. (Tr. p. 389 l. 10-11). The victim appeared to have two gunshot wounds, one that entered his neck and exited his collarbone area, and the other struck him in the

thigh or buttocks area. (Tr. p. 389 l. 14-15; l. 18-21). Investigator Ward stated that he found cartridge casings all head-stamped .300 blackout, and .9mm Luger. (Tr. p. 398 l. 9-10; p. 399 l. 1-3).

South Carolina Law Enforcement Division (SLED) agent Jennifer Nates also testified. She was found qualified as an expert in the field of residue collection and analysis. (Tr. p. 556 l. 3-5). She received and analyzed the GSR tests collected from the Appellant. (Tr. p. 560 l. 19-20). From these results she confirmed Appellant had gunshot residue on his right hand, but not on his left hand. (Tr. p. 564 l. 14-17).

SLED agent Paul Greer also testified. He was found qualified as an expert in the field of firearms identification and tool marks. (Tr. p. 574 l. 6-8). Agent Greer determined that there were thirteen cartridge cases fired from a .9mm Luger. (Tr. p. 583 l. 3-11). Agent Greer also determined that seven casings discovered were fired from the .300 Blackout assault rifle. (Tr. p. 590 l. 9-10). Agent Greer also determined that each cartridge casing discovered at the crime scene was fired by either a .9mm or the .300 Blackout. (Tr. p. 593 l. 20-22). Agent Greer determined that the cartridges found at the crime scene were shot by the .300 Blackout and .9mm Luger which belonged to the Appellant. (Tr. p. 590 l. 14-17; p. 591 l. 15-20).

Dr. Angelina Phillips, forensic pathologist, also testified. On March 28, 2020, Dr. Phillips performed the autopsy on the victim. (Tr. p. 615 l. 13). Dr. Phillips was found qualified as an expert in forensic pathology. (Tr. p. 614 l. 13-15). Dr. Phillips testified that the victim was shot three times. The first bullet entered the right side of his back, and exited out the front of his body near the collarbone area. (Tr. p. 621 l. 8-9; l. 21-22). The second bullet was a graze shot to the head that caused an injury to his jaw. (Tr. p. 627 l. 11-13). This was an elongated wound going through the jaw. (Tr. p. 623 l. 1-6). The third wound was at the muscle in the thigh and buttocks and it traveled

through the thigh fracturing the femur. (Tr. p. 628 l. 14-18). Both entry wounds entered the victim's body in his back. (Tr. p. 629 l. 12-15). Dr. Phillips testified that in her opinion the cause of death was two gunshot wounds to the back and right buttocks region. (Tr. p. 630 l. 12-13). Dr. Phillips determined that the manner of death was homicide. (Tr. p. 630 l. 13-14).

ARGUMENTS

1. **The trial court did not abuse its discretion by admitting the Appellant's prior juvenile adjudications for the offenses of burglary in the first degree and petit larceny pursuant to rule 609(a)(1) since the probative value regarding the impeachment of the Appellant when he took the stand overrode any prejudice it might have caused after considering the factors applied in *State v. Colf.***

Relevant Facts

Prior to the Appellant testimony, it was mentioned that he had two adjudications as a juvenile in family court. These adjudications were for the offenses of burglary in the first degree (burglary 1st), and petit larceny. Appellant's counsel argued that mentioning these offenses would be strictly for character evidence and had nothing to do with this case. (Tr. p. 643 l. 1-4). Appellant's counsel argued that pursuant to the rules of Evidence, the Appellant's prior record is subject to a Rule 403 analysis. (Tr. p. 643 l. 18-19). The trial court ultimately ruled that the burglary 1st and petit larceny adjudications could be used to attack the Appellant's credibility. (Tr. p. 644 l. 13-15).

Standard of Review

In criminal cases the Appellant court sits to review errors of law only. *State v. Baccus,* 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission or exclusion of evidence is a matter within the trial court's sound discretion. *State v. Dennis,* 401 S.C. 627, 635, 742 S.E.2d 21,25 (Ct. App. 2013). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant.

State v. Preslar, 364 S.C. 466, 472-73, 613 S.E.2d 381, 384 (Ct. App. 2005). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *State v. Pegan,* 369 S.C. 210, 208, 631 S.E.2d 262, 265 (2006). Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy. *State v. Wiles,* 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). The admission of evidence concerning past convictions for impeachment purposes remains within the trial judge's discretion, provided the judge conducts the analysis mandated by the evidence rules and case law. *Green v. State,* 338 S.C. 428, 432-434, 527 S.E.2d 98, 100-101 (2000).

Discussion

Appellant argues that the trial court allowing his prior record into evidence was in violation of the rules of evidence. This was due to the fact that the prejudicial effect outweighs its probative value. Respondent argues that under Rule 609 of the South Carolina Rules of Evidence, and the factors raised by the South Carolina Supreme Court in *State v. Colf,* 337 S.C. 622, 525 S.E.2d 246 (2000), the trial court was correct in allowing the prior adjudication into evidence for impeachment purposes only.

Rule 609 of the South Carolina Rules of Evidence specifically states:

> Evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Rule 609(a)(1), SCRE.

It was determined and not challenged by the Appellant that he had a juvenile adjudication in family court for the offense of burglary 1st and petit larceny. The rules allow for a juvenile adjudication

to be used for impeachment, Rule 609 specifically states, "[E]vidence of a juvenile adjudication is admissible under this rule if conviction of the crime would be admissible to attack the credibility of an adult. Rule 609(d), SCRE.

In *Colf* the Supreme Court established that in order to determine that the probative value of a prior conviction outweighs its prejudicial value, federal courts apply five factors:

1. The impeachment value of the prior crime.
2. The point in time of the conviction and the witness's subsequent history.
3. The similarity between the past crime and the charged crime.
4. The importance of the defendant's testimony.
5. The centrality of the credibility issue.

Colf, 337 S.C. at 627, 525 S.E.2d at 248.

In looking at the *Colf* factors, the trial court made the correct decision in allowing these adjudications into evidence when the Appellant decided to testify. When considering the *Colf* factors the result should be that the trial court made no errors.

<u>The impeachment value of the prior crime</u> – The Appellant was previously adjudicated for the crime of burglary 1st and petit larceny. These are very serious crimes, and since the Appellant was claiming self-defense against other eyewitnesses with prior convictions, albeit not as serious, disclosing Appellant's prior crimes was necessary to challenge his credibility against the other individuals who testified against him.

<u>The point and time of the conviction and the witness's subsequent history</u> – The prior adjudication occurred in 2017.(Tr. p. 650 l. 21-22), three years before this crime occurred. The prior burglary and petit larceny occurred within the 10-year window allowed under the Rules of Evidence. *See,* Rule 609(b), SCRE.

The similarity between the past crime and the charged crime – The past crime was for burglary 1st and petit larceny. The Appellant was charged in this case for murder, ABHAN and possession of a weapon during the commission of a violent crime. There are no similarities between these offenses. They have different elements and are not alike in any way. Disclosing these prior adjudications were only for the purposes of impeachment and not to attack Appellant's character. This was in no way prejudicial regarding the current offense.

The importance of the defendant's testimony – During this trial the Appellant raised the defense of self-defense. During his testimony, he stated that he knew all of the witnesses that were testifying against him. (Tr. p. 662 l. 6-21). Appellant testified that his intentions were to go over there and help Chris get his stuff back and he took his guns because he knew they had guns too. (Tr. p. 666 l. 4-9). Appellant also testified that he saw the victim reaching in his waistline, then heard gunshots. (Tr. p. 674 l. 9-13). The Appellant testified that he only shot on the ground because he was scared. (Tr. p. 674 l. 14-15). This testimony was totally different than the evidence that was presented by the Solicitor. Since the Assistant Solicitor's witnesses' prior record was presented for impeachment, it was necessary to present the same evidence regarding the Appellant.

The centrality of the credibility issue – Credibility is central to this case because it is essentially the Appellant's word about the event against the other eyewitnesses. Although there was some forensic evidence, in order to question the Appellant's credibility, it was important that his prior adjudications be revealed.

In the current case although the trial judge did not go through each of the *Colf* factors precisely, the trial court did apply these factors, and the documents of the adjudication were presented to the court. The trial court made this ruling based on the *Colf* factors, and the records presented. The trial court then ordered that these adjudications were only to be used for

impeachment. A trial judge is not required to state his analysis of each of the five factors with special precision. *State v. Dunlap,* 346 S.C. 312, 323, 550 S.E.2d 889, 895 (2001), *quoting, United States v. Jimenez,* 214 F.3d 1095 (9th Cir. 2000).

The trial court fully explained the ruling and the reasons why the inclusion of the Appellant's prior record was admissible for impeachment. Although the trial court did not mention the *Colf* factors verbatim, in her reasoning, the trial court did go over all of the factors and how they were related to this case. As stated by the trial court prior to her ruling:

> "Well, I think it's the Court's job to weigh the probative value of the prior convictions against the prejudicial effect of the accused. In this case, I think the impeachment value is – from what this Court has heard, I've heard several different witnesses, and it appears that all of them have a different story so to speak. So, I think that the impeachment value is great in this case."
>
> "The point in time of the conviction itself. It's a 2017 conviction. It's somewhat close in time. Also, the similarity I've considered between the past crime of the burg first and the charged crime, which is the murder and ABHAN – and possession of a weapon. Really there's not a lot is similarity there, therefore, the less prejudicial it is to the defendant. The importance of the defendant's testimony it's very important. Again, he's given three statements…Two statements. And I think there was some other statements by the other witnesses to that were kind of conflicting. So, I think his testimony is very important in this case and I think his credibility revolves right around it. So, I'm gonna allow for those reasons the burglary first and the petit larceny."
>
> "I'm just telling you I've read the Robinson case, the Bryant case, the Burdette case, and I've considered all of the case law – relevant case law that this Court has found, and I'm allowing it."

(Tr. p. 650 l. 13 – p. 652 l. 13).

The Court revealed that there was consideration of all of the *Colf* factors and made an informed decision to allow the prior adjudications into evidence. After the trial court conducts the balancing test, the judge must make a determination and articulate, on the record, the specific reasons for his ruling. *Colf,* 337 S.C. at 627, 525 S.E.2d at 248. These factors are not exclusive; trial courts should

exercise their discretion in light of the facts and circumstances of each particular case. *State v. Robinson,* 426 S.C. 579, 594, 828 S.E.2d 203, 211 (2019).

Within his brief, the Appellant argued that the trial court erred in allowing the previous petit larceny adjudication. Appellant make this argument due to the fact the penalty is not in excess of a year, and it is not a crime involving dishonesty or false statements. *See,* Rule 609(a)(2), SCRE. This was not argued before the trial court so it was not preserved for appeal. An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review. *State v. Nichols,* 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997).

The decision of the trial court in allowing the Appellant's adjudications to be raised during his testimony for the limited reasons of impeachment was allowed because its probative value overrode any prejudicial effect. This decision by the trial court was lawful so it should be affirmed by this court.

2. **The trial court did not err in deciding not to instruct the jury on the lesser included offense of assault and battery in the second degree since the actions of the Appellant and his co-defendant did not support assault and battery in the second degree so they were not entitled to this jury instruction.**

Relevant Facts

At the conclusion of the trial all parties were discussing potential jury instructions, the Appellant requested that the trial court give a jury instruction for assault and battery in the second degree (assault and battery 2nd), in the shooting of Kevin Kimber. The Solicitor argued that there was testimony that Kimber was shot so this was an act by means likely to produce death or great bodily injury. (Tr. p. 776 l. 10-14). The Solicitor also argued that Kilmer was shot in the upper thigh and torso, where a tourniquet had to be tied around his leg to avoid him "bleeding out." (Tr. p. 778 l. 3-5). The Appellant's trial counsel argued that there was no testimony about this and the jury could infer from the video that was placed into evidence revealing Kilmer's injuries. (Tr. p.

778 l. 6-8). The Solicitor argued that Agent Swygert did testify to this and the video revealed this. (Tr. p. 778 l. 10-11). The trial court decided not to give a jury instruction for assault and battery 2nd.

Standard of Review

While upon indictment for a greater offense a trial court has the requisite jurisdiction to charge and convict a defendant of any lesser included offense. *State v. Geiger,* 370 S.C. 600, 606, 635 S.E.2d 669, 673 (2006). An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. *State v. Mattison,* 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). 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. *State v. Jennings,* 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011). The law to be charged is determined by the evidence presented at trial. *State v. Gourdine,* 322 S.C. 396, 398, 472 S.E.2d 241 (1996). To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. *Mattison,* 388 S.C. at 479, 697 S.E.2d at 583. To justify charging the lesser crime, the evidence presented must allow a rational inference the defendant was guilty only of the lesser offense. *Geiger,* 370 S.C. at 607, 635 S.E.2d at 673.

Discussion

The Appellant argues that the trial court erred in not giving a jury instruction for the crime of assault and battery 2nd for the shooting of Mr. Kimber, who was shot while at the scene of the murder. Appellant was indicted for the offense of ABHAN, which the South Carolina Code of Laws states, "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. S.C. Code Ann. §16-3-600(B)(1)(2010).

Appellant argues that the trial court erred in not instructing the jury for the offense of assault and battery 2nd. The South Carolina Code of Laws state: " 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 injury to another person results or moderate 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(D)(1)(2010).

The major difference between ABHAN and assault and battery 2nd is ABHAN requires a great bodily injury or means likely to produce death or great bodily injury, whereas assault and battery 2nd only requires moderate bodily injury. In South Carolina law, great bodily injury is defined 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)(2010).

For a person to be convicted of assault and battery 2nd that person must have only caused moderate bodily injury which according to South Carolina law is defined as:

> "[p]hysical 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."

S.C. Code Ann. §16-3-600(A)(2)(2010).

Appellant argues that the injuries to Kimber were injuries that could be considered moderate bodily injuries. However, according to South Carolina law there is an additional element in ABHAN that is not included in assault and battery 2nd. In order to be convicted of ABHAN there must not only be a great bodily injury, but there must be an act that accomplished by means likely to produce death or great bodily injury. The Respondent argues the means in which Mr. Kimber was injured require this to be only considered an ABHAN and not an assault and battery 2nd.

Mr. Kimber was at the scene and was shot in the leg by one of the defendants. The Appellant provided his co-defendant a .9 mm Luger and he was at the scene with a .300 Blackout assault rifle. Although the Appellant testified that he brought these guns for his own protection, there is no evidence that any other person shot weapons but the defendants. In viewing the evidence, it is obvious who was the aggressor and who did all of the shooting. There were twenty cartridge cases found at the scene all belonging to either a .9mm or a .300 Blackout. (T. p. 593 l. 20-22). These were the weapons Appellant admitted they took to the scene. According to South Carolina law ABHAN occurs if the act is accomplished by means that are likely to produce death or great bodily injury. Shooting guns indiscriminately at a group of people could produce death, and one person was killed, and great bodily injury also occurred since they had to place a tourniquet on the leg of Mr. Kimber in so that he did not bleed to death. This is an element that does not exist in assault and battery 2nd; therefore, Appellant's actions are not defined within the constructs of assault and battery 2nd.

Appellant argues that he should have been given the jury instruction for assault and battery 2nd. There is no evidence supporting that the Appellant committed assault and battery 2nd. The Appellant committed ABHAN. A lesser included offense instruction is required only when the evidence warrants such an instruction. *State v. Coleman,* 342 S.C. 172, 175, 536 S.E.2d 387, 389

(Ct. App. 2000). The law to be charged is determined by the evidence presented at trial. *State v. Gourdine,* 322 S.C. 392, 398, 472 S.E.2d 241 (1996). The use of guns during this event reveals means likely to produce death or serious bodily injury, so it is obvious the Appellant's crime could not be that of assault and battery 2nd. He was not entitled to a charge on the lesser included offense. The trial court performed no error in denying Appellant's request for a jury instruction for the lesser offense of assault and battery 2nd. A judge is required to charge a jury on a lesser-included offense if there is any evidence from which it could infer the lesser rather than the greater offense committed. *Geiger,* 370 S.C. at 607, 635 S.E.2d at 673. The Appellant was not entitled to a jury charge on assault and battery 2nd because that is not the offense he committed. They were shooting into a group of people where one person was killed and another seriously injured. With these facts, there was no other offense committed other than ABHAN. It is obvious in looking at the evidence presented that not only were the acts of the defendants likely to produce death or serious bodily injury, a person was actually murdered, another was actually seriously injured. A lesser included offense instruction is required only when the evidence warrants such an instruction, and it is not error to refuse to charge the lesser included offense unless there is evidence tending to show the defendant was guilty **only** of the lesser offense. *Geiger,* 370 S.C. at 607, 635 S.E.2d at 673. (emphasis added).

CONCLUSION

The Respondent argues that decisions made by the trial court were lawful and should be affirmed by this court.

Respectfully submitted,

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