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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LAVON BERNARD JULIUS,

APPELLANT

APPELLATE CASE NO. 2023-001994

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to charge voluntary manslaughter where there was evidence elicited by the state that the decedent pulled a gun on appellant and grabbed him by his shirt, where the judge instructed the jury on self-defense, since appellant was also entitled to a charge on voluntary manslaughter given this evidence of the decedent's use of a deadly weapon and him initiating physical contact with appellant?

STATEMENT OF THE CASE

Appellant was indicted at the June 2022 term of the Lexington County grand jury for the offense of murder. R. p. *. His case was called to trial on December 11, 2023, before the Honorable Walton J. McLeod, IV, and a jury. David Mauldin and J. Erick Bassett represented appellant. Robert McNair and Sutania Fuller were the assistant solicitors. Tr. 1.

On December 13, 2023, the jury found appellant guilty of murder. Tr. 414, ll. 21-23. Judge McLeod sentenced appellant to life imprisonment. Tr. 429, ll. 20-22.

This appeal follows.

STANDARD OF REVIEW

"The law to be charged to the jury is determined by the evidence presented at trial." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense." State v. Sams, 410 S.C. at 308, 764 S.E.2d at 513; see also State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986); State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). "An appellate court will not reverse the trial [court]'s decision absent an abuse of discretion." State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). "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. at 570, 647 S.E.2d at 166–67. "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." Id. at 570, 647 S.E.2d at 167.

"In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant." Sams, 410 S.C. at 308, 764 S.E.2d at 513 (citing State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)). "The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense." Id. (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995); State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994)).

ARGUMENT

The court erred by refusing to charge voluntary manslaughter where there was evidence elicited by the state that the decedent pulled a gun on appellant and grabbed him by his shirt, where the judge instructed the jury on self-defense, since appellant was also entitled to a charge on voluntary manslaughter given this evidence of the decedent's use of a deadly weapon and him initiating physical contact with appellant.

Relevant facts

Appellant and the decedent both lived in the Town and Country Apartments in Lexington County. Appellant lived there with his wife and daughter. The fifteen-year-old decedent was six-foot-two, and he weighed 233 pounds. He also had a mustache. Tr. 220, ll. 11-12; 233, ll. 10-13. The decedent lived in the apartment complex with his mother in their grandmother's apartment.

Terran Moye was in his apartment on the night of January 29, 2022, with his girlfriend, his girlfriend's daughter, and his niece and nephew. Tr. 109, ll. 15-25. They were watching television when Moye heard gunshots. He went to the window to investigate, since it sounded like the gunshots were "right outside our door." Tr. 110, ll. 1-10.

When he looked out the window, Moye recalled: "I saw the defendant come from around the corner of the building and walk down the sidewalk. After that, I don't know where he went, because I went downstairs to check on the kids because our kids was (sic) outside at the time." Tr. 110, 11. 11-17. Moye said he had seen appellant outside in the apartment complex with his daughter on a few occasions before that night. Tr. 110, ll. 18-22.

When Moye walked outside into the parking lot "that's when I seen (sic) the young man laying on the ground." Moye also saw appellant outside and "he looked calm to me. He wasn't – he was walking as if nothing happened." Tr. 111, l. 14 – 112, l. 9.

Moye admitted on cross-examination that he did not know what occurred before the gunshots. However, he testified he did not hear any arguing or fighting before he heard the gunshots. Tr. 114, l. 11 – 115, l. 22.

Leticia Gates lived in apartment 4-F, with her son and his girlfriend at the time of the shooting. Gates was lying in bed when she heard four gunshots. Tr. 116, l. 5 – 118, l. 19. Gates testified:

> I didn't get up immediately. I kind of waited just to see what's going on. You know? I just wanted to wait. When I got up, I saw the defendant coming from the island out there—right here, walking towards the apartments. And I was just assuming that he was getting off work. And once I saw him walking from the car area, I just kind of laid back down again, you know, because I didn't know what else to do. So I just laid down again.

Tr. 118, ll. 9-25.

Gates said she knew appellant because they were both truck drivers, and they had talked about their jobs on prior occasions. Tr. 119, ll. 11-16.

Appellant's wife, Constance Julius, was called as a state's witness. She testified that she was living with appellant and their eight-year-old daughter at the Town and Country Apartments on the night of January 29, 2022. Tr. 125, l. 15 – 127, l. 4. Julius knew the decedent only because she had seen him in the apartment complex, and she knew that he lived there. Tr. 127, ll. 5-13. As seen, the decedent was a very large teenager. He was six-foot-two, and he weighed 233 pounds. Tr. 220, ll. 11-12; 233, ll. 10-13.

Julius testified that she knew appellant had problems with the decedent in the past because the decedent would ask appellant for cigarettes. She did not think appellant liked being accosted in this manner in the parking lot by the decedent. Tr. 127, ll. 14-24.

Julius remembered on the night of January 29, 2022, that appellant had taken their daughter to a "kids' birthday party" at his aunt's house on Prescott Road. Tr. 128, ll. 4-19. Julius noted that these kids' parties normally turned into "adult parties." She knew appellant had been drinking when he and his daughter got home at about 10:30 that evening. Tr. 128, l. 23 – 129, l. 10.

Julius recalled that their daughter came into the apartment with food they had picked up on the way home from the party. Tr. 129, l. 21 – 130, l. 5. Julius asked their daughter where appellant was and "she said he was outside talking to a man. So I kind of peeked outside to see what he was doing and just saw him having a conversation with Zeloni [the decedent]." Tr. 130, ll. 6-15. Appellant also had his cellphone in his hand. She offered that neither appellant nor the decedent seemed to be acting aggressively at the time she saw them. Tr. 131, l. 9 – 132, l. 4.

Julius went back inside the apartment, and she closed the door and locked it. After that she heard gunshots, and appellant came inside the apartment. He laid the gun he usually kept in his car under a cushion on one of their chairs. The solicitor asked Julius what appellant told her about what had occurred outside. She answered that appellant "initially said *that the young man pulled a gun out on him and grabbed his shirt.*" Julius confirmed this was the first thing appellant told her when she asked him what had happened outside. Tr. 133, l. 22 – 134, l. 4. (emphasis added).

The solicitor also asked Julius about other statements appellant made to her, and Julius answered "he [appellant] just said *the guy pulled out a gun on him.* I was just trying to figure out

what happened, and I told him, if something had happened, let's go outside to the police because they were outside at this point." Tr. 134, ll. 11-16. (emphasis added). Julius said in addition to appellant telling her about the decedent pulling a gun on him, she said at a later point, appellant indicated "he wasn't involved." Tr. 134, ll. 11-24.

Julius testified that appellant went back outside after the shooting and he was assisting the decedent by placing a towel on him while he was laying on the ground, and appellant was trying to give him "like, chest suppressions (sic)." Tr. 134, l. 25 – 135, l. 23. Julius remembered the decedent's mother was outside at that point. In addition to appellant telling her the decedent had *pulled a gun on him,* appellant also told his wife the decedent asked for a cigarette and "*grabbed his shirt.*" Tr. 136, ll. 7-25. (emphasis added).

Julius also testified appellant "tossed his gun behind the building" while law enforcement was investigating the shooting. Tr. 137, l. 8 – 139, l. 16. The following occurred on direct examination of Julius:

> Q Now, are you familiar with your husband's use of the phrase "Is you good?"
>
> A Yes, sir.
>
> Q Is that a greeting that he would use?
>
> A No. It would normally mean there's an issue [problem].

Tr. 139, ll. 20-24.

As will be seen infra, the state would also introduce evidence appellant said "Is you good?" to the decedent before the shooting.

The solicitor played State's Exhibit 57 for the jury which showed appellant's daughter coming inside the apartment after they got back from the birthday party, and four gunshots are

heard in the background while the daughter is walking up the stairs inside the apartment. Tr. 140, l. 17 – 141, l. 11.

Julius also testified that when she walked out of the apartment with appellant after the shooting that she thought he was going to turn himself in to the police who were investigating the shooting in the parking lot. Tr. 145, ll. 1-5; 146, ll. 3-9.

On cross-examination, Julius admitted she told the police in her written statement on the night of the shooting -- that when appellant opened the door to let their daughter into the apartment with the food when they got back from the party -- she looked outside and saw appellant and the decedent talking. Tr. 153, ll. 21-25.

Twelve-year-old Travis W. was a friend of the decedent. He remembered he was on the phone with the decedent at the time of the shooting. Travis said he heard the decedent say "Can I get a cigarette?" and he heard a man respond: "Is you good?" Travis testified that he then heard a gunshot, and he maintained he heard the decedent "trying to breathe" after the gunshot. Tr. 246, l. 13 – 248, l. 21. Next, he heard the decedent's mother screaming: "Zeloni." Tr. 249, ll. 2-6.

Frederick McCrea worked with appellant at Fraley Schilling, a trucking company, and they were friends. Tr. 252, l. 11 – 253, l. 7. McCrea was at the children's birthday party with appellant, and he said that he was drinking on the night of the shooting. He remembered appellant leaving the party with his daughter. Tr. 254, l. 6 – 256, l. 6.

McCrea said he called appellant to check on him after the party, and appellant told him on the phone: "Yes, I'm in the parking lot. Everything (sic) good." Tr. 256, ll. 13-24. McCrea testified while he was on the phone with appellant, that he heard gunshots. He said appellant did not tell him after he heard that gunshots that he had just shot someone. Tr. 257, ll. 8-12.

McCrea testified that he was given a ride home from the "kid's birthday party" because he was too intoxicated to drive. Tr. 259, ll. 4-15. McCrea's wife was driving that evening. The state's "point" was apparently that appellant was also intoxicated after the party, and he drove anyway. Tr. 259, l. 19 – 260, l. 11.

Juanita Ellison, the decedent's mother, testified the decedent went to Irmo High School. She thought he was in the tenth grade at the time of the shooting. Tr. 283, ll. 7-14. Ellison testified that they were living with her mother at the Town and Country Apartments at the time of the shooting. She remembered on the night of January 29, 2022, that the decedent stepped outside to talk on the telephone. Tr. 283, l. 24 – 284, l. 20.

Ellison said while the decedent was outside, she heard what she thought were five gunshots. Tr. 284, l. 19 – 285, l. 8. After hearing the gunshots, Ellison went outside and she saw appellant walking towards the decedent. She asked appellant: "Were these gunshots?" She testified appellant answered: 'I don't know. But he is around here, laying on the ground.'" Tr. 285, ll. 12-21. Ellison told the solicitor appellant was acting "nonchalant. Like nothing just happened." Tr. 286, ll. 16-25.

Ellison then saw her son lying face down in the grass. She called out his name and she was trying to figure out where he was shot. Tr. 286, l. 21 – 287, l. 24. Ellison testified that she asked appellant what the decedent was shot with "because I didn't see any casings." She said appellant answered: "They must have used a revolver." Tr. 287, l. 25 – 288, l. 7.

Ellison recalled appellant was kneeling next to her decedent son at the time, but she did not think he was doing CPR or "mouth to mouth" resuscitation on the decedent. Tr. 288, ll. 8-20. Ellison said when she saw the police officer putting appellant in handcuffs, she asked him

"Did you kill my child?" Tr. 289, ll. 9-12. On cross-examination, Ellison said she yelled at appellant: "You killed a fifteen-year-old child." Tr. 295, ll. 9-11.

Lexington Police officer Zach Truel remembered arriving at the Town and Country Apartments on the night of the shooting. He saw the decedent laying on the ground at the time. Tr. 296, l. 3 – 297, l. 25. He saw appellant kneeling over the top of the decedent on the ground, and it "looked like he was maybe trying to do CPR or something on him. I wasn't sure at the time. It looked like he was possibly trying to help him. So I said, 'hey, where's he shot at?' and he said 'I don't know.'" Tr. 298, ll. 1-6. Truel said he checked the decedent's neck for a pulse, and he concluded that the decedent was deceased. Tr. 298, l. 1 – 299, l. 17.

Truel said that appellant seemed to wander away from the scene for short time, and when he saw him again, he said: "Hey, sir, sir, are you the guy that was trying to help the kid when I got here?" Truel testified he started talking to appellant at that point, and appellant acknowledged he was with the decedent when Truel first arrived. Tr. 300, ll. 10-25. Truel offered when he was talking with appellant that night, appellant was giving him inconsistent statements about what happened. Tr. 301, l. 7 – 302, l. 5.

Truel remembered he saw another police officer talking to appellant's wife nearby. That officer walked over to Truel, and he said: "'Hey, we need to detain him. He was involved in the shooting.' She [appellant's wife] said he was involved in the shooting. So we put him in handcuffs at that point, and I told him he was being detained. And that's when I advised him of his Miranda[1] rights because, at that point, I realized he's possibly actually involved in the shooting." Tr. 302, ll. 8 – 20.

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

Truel asked appellant if he had a gun, and appellant told him: "I don't have a gun." Truel said he responded: "Well, just be honest with me, man. Tell me what happened." Appellant responded: "Just take me to jail." Tr. 304, ll. 2-7.

Truel testified the gun was found the next day by canine officers at the apartment complex. Tr. 356, ll. 2-3. The jury was shown a video of the police talking with appellant in the parking lot after the shooting. His wife is in in the background talking to another police officer. State's Exhibit 56, the video, is on file with this Court for viewing. Tr. 356, l. 4 – 359, l. 7.

Charge conference

At the charge conference, defense counsel Mauldin requested jury instructions on self-defense and voluntary manslaughter. Tr. 365, ll. 7-8. Defense counsel argued appellant was entitled to act on appearances, and there was evidence the victim grabbed him and the victim was armed with a gun. Defense counsel said these were threats, and appellant had a right to act on the appearance of danger and "the gunshots were all at one time." Tr. 365, l. 7 – 366, l. 8. Defense counsel reminded the judge it was 10:30 at night when appellant said he was assaulted, grabbed and when he saw a gun in the decedent's hands. Tr. 366, ll. 1-8.

The solicitor argued there was no evidence of voluntary manslaughter or self-defense sufficient for those jury instructions. Tr. 366, l. 10 – 367, l. 5. As the discussion about voluntary manslaughter and self-defense continued, defense counsel continued to argue that appellant had been grabbed and he had seen a gun in the decedent's hand. There was evidence of a lack of malice being involved in the shooting The solicitor continued that he "totally disagreed" with voluntary manslaughter being instructed in this case. Tr. 368, l. 1 – 375, l. 10. The solicitor argued that appellant's statement about the decedent pulling a gun on him did not have any

context to it. The solicitor also objected a jury instruction that appellant had the right to act on appearances. Tr. 375, ll. 1-25.

As to voluntary manslaughter, when specifically asked about that instruction alone at one point during the colloquy, defense counsel said some of the "evidentiary concerns" regarding self-defense were also implicated in voluntary manslaughter. Appellant was grabbed and a gun was involved. This was an assault and battery and it went beyond mere words. The solicitor said he disagreed on voluntary manslaughter because he apparently did not think a sufficient legal provocation was involved. The solicitor also said if appellant was in fear, "[it] has to be such that it would just overcome your will. Right?" Shortly after this discussion, the judge denied the defense request for a jury instruction on voluntary manslaughter, and the self-defense discussion continued. Tr. 369, ll. 3-5. The judge ultimately agreed to charge self-defense but not voluntary manslaughter. Tr. 369, l. 3 – 382, l. 17. The defense chose to rest without presenting a defense. Tr. 382, ll. 16-17.

After the jury was charged on self-defense but not voluntary manslaughter, the judge asked: "Any issue other than what was already said? Any issue with the reading of the charge?" Defense counsel answered that he had, "No -- no additional . . . [requests for instructions]." The judge responded: "I understand." Tr. 413, ll. 7-13.

Discussion

Defense counsel requested a charge on voluntary manslaughter where there was evidence the decedent pulled out a gun on appellant and grabbed him by his shirt. This was evidence of an assault and battery committed on appellant by the six foot three, two hundred-and thirty-three-pound decedent, and where the large decedent had also pulled a gun on appellant. Tr. 220, ll. 11-12; tr. 233, ll. 10-11. As defense counsel noted, all of this occurred at the same time. Again, the

state elicited from appellant's wife on direct examination that appellant said the decedent pulled a gun on him and grabbed him by his shirt. Appellant was entitled to an instruction on voluntary manslaughter given this evidence.[2]

In State v. Penland, 275 S.C. 537, 540, 273 S.E.2d 765, 767 (1981), our Supreme Court held that a statement given by the defendant following a shooting created a jury question on the issue of provocation and heat of passion where the evidence was that the decedent pointed a gun at the defendant and there was a subsequent struggle. In order for a court to refuse to charge the jury on the lesser-included offenses of voluntary or involuntary manslaughter, there must be no evidence whatsoever tending to reduce the crime from murder to manslaughter. If there is any evidence at all of voluntary manslaughter, then the court must give that instruction to the jury. See Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991).

Further, where there are inconsistent statements given by the defendant, the defendant is still entitled to an instruction on voluntary manslaughter if any of the inconsistent statements provide any evidence of voluntary manslaughter. See State v. Knoten, 347 S.C. 396, 555 S.E.2d 391 (2001). In State v. Grubbs, 353 S.C. 374, 382-83, 577 S.E.2d 493, 497-98 (Ct. App. 2003), this Court held that inconsistent evidence implicating self-defense and voluntary manslaughter warrant jury instructions on both. In Grubbs, in one of her statements she alleged the decedent pushed her and punched her in the eye. This Court held that this constituted evidence of the heat of passion and sufficient legal provocation necessary for a voluntary manslaughter instruction.[3]

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[2] The state also put evidence before the jury that when appellant said: "Are you good?" that this meant there was a problem and appellant was angry or exasperated with what was occurring.

[3] There was also evidence in Grubbs that the defendant suffered long term abuse at the hands of the decedent.

In State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 273 (1993), there was evidence which, if believed, tended to show that the decedent and Lowry were in a heated argument and that the decedent was about to initiate a physical encounter when the shooting occurred. Even though the physical encounter had not occurred, as it did in this case when the decedent grabbed appellant by his shirt after pulling a gun on him, our Supreme Court held that Lowry was still entitled to a jury instruction on the lesser-included offense of voluntary manslaughter. The Court again stressed that voluntary manslaughter is only properly eliminated when there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. See State v. Norris, 253 S.C. 31, 168 S.E.2d 564 (1969).

In State v. Jackson, 301 S.C. 41, 389 S.E.2d 650 (1990), found that the evidence in that case warranted the submission of voluntary manslaughter to the jury. The evidence was that Mr. and Mrs. Jackson were legally separated. Mrs. Jackson testified that on August 17, 1987, she was in her house with her shotgun on the floor next to her. She carried the gun for protection.

Mrs. Jackson maintained that when Mr. Jackson came into the house through the door, that he reached "toward his pocket" and said, "I come to kill you, bitch." Mrs. Jackson remembered firing one shot but did not remember firing two shots into the back of Mr. Jackson's head. The Supreme Court in State v. Jackson held that a voluntary manslaughter instruction was warranted under these facts even though Mr. Jackson may have been unarmed and Mrs. Jackson shot acting on appearances.

In this case, appellant's wife testified as a state's witness that appellant told her the decedent pulled a gun on him and the decedent grabbed him by his shirt. The state also offered evidence that appellant was angry or exasperated because the decedent had accosted him in the parking lot about cigarettes in the parking lot in the past. The decedent was six-foot-three and

weighed over 230 pounds. The state also offered evidence that when appellant said, "are we good?" that this meant appellant was exasperated or angry. Regardless, the evidence of the decedent pulling a gun on appellant and initiating physical contact by grabbing appellant by his shirt constituted the "any evidence" necessary to warrant a voluntary manslaughter instruction.

In State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1998), there was also evidence of past difficulties involving the parties involved. The evidence showed that Gilliam was angry with a woman, Daisy Mae, and that he shot and killed her lover, John Austin. Gilliam was angry with Daisy Mae because she persisted in making harassing phone calls to Gilliam's wife. Daisy Mae taunted Gilliam during their conversation at her place of work that day. Gilliam then drove to the Brown Derby to look for John Austin because Daisy Mae had told Gilliam that Austin wanted to see him.

Gilliam found Austin at the Brown Derby, and Gilliam motioned for him to come outside. Gilliam and Austin then began arguing and Austin apparently made threatening statements to appellant. Austin then took a gun from his pocket and shot at appellant before appellant could reach for his own gun. Appellant Gilliam then shot back at Austin killing him.

Our Supreme Court in Gilliam held the evidence supported a charge on voluntary manslaughter. Voluntary manslaughter is the unlawful killing of a human being in a sudden heat of passion upon a sufficient legal provocation. State v. Damon, 285 S.C. 125, 328 S.E.2d 628 (1985).

The evidence here that the large decedent pointed a gun at appellant and grabbed him immediately before appellant shot him constituted the "any evidence" necessary for a charge on voluntary manslaughter. See State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993); State v. Penland, 275 S.C. 537, 273 S.E.2d 765 (1981); State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493

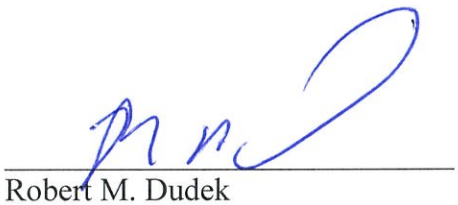
(Ct. App. 2003); State v. Jackson, 301 S.C. 41, 389 S.E.2d 650 (1990); State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1998).

"The charge request is properly rejected only when there is no evidence tending to show the defendant was guilty of the lesser offense." See State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Cooney, 320 S.C. 107, 463 S.E.2d 595 (1995). Because there was evidence appellant committed the lesser rather than the greater offense of murder, he was entitled to an instruction on the lesser offense. See State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994).

The decedent pulling a gun on appellant and grabbing him by his shirt warranted a jury instruction on voluntary manslaughter because the decedent was armed with a deadly weapon and the decedent grabbing appellant by his shirt was certainly an assault and battery accompanied by the additional threatening gesture of the large decedent being armed with a deadly weapon. This provided both the sufficient legal provocation and the heat of passion necessary for a jury instruction on voluntary manslaughter as argued above. State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993); State v. Penland, 275 S.C. 537, 273 S.E.2d 765 (1981). Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and his case remanded to the Lexington County Court of General Session for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of April, 2025.