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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Allendale County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CLEVELAND MAXWELL,

APPELLANT.

APPELLATE CASE NO. 2024-001125

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Whether conduct created a "substantial risk of death" or was "likely to produce" "serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ," § 16-3-600(A)(1), (C)(1)(b)(i), is a question of fact for the jury to decide under the circumstances as it finds them to exist. Only if the jury concludes that, as a matter of fact, Appellant's alleged conduct was likely to cause death or great bodily harm is he guilty of first-degree assault and battery. Yet it was not given the chance to decide that question. The trial court decided for it, and that was error. Because courts must "view the facts in the light most favorable to the defendant," this Court should conclude that there is at least the possibility a reasonable jury could have found Appellant was guilty of only second-degree assault and battery. *State v. Williams*, 427 S.C. 148, 156, 829 S.E.2d 702, 706 (2019). Therefore, Appellant's conviction should be reversed.

Here, according to the state's evidence, there were no injuries despite the multiple gunshots. Thus, there was a reasonable basis for the jury to conclude that great bodily injury and death were not *so* likely as to amount to first-degree assault and battery. The likelihood and severity of any potential injuries were for the jury to determine. Further, the jury acquitted Appellant of attempted murder and thus did not believe the state demonstrated Appellant had an intent to kill. It would not have been unreasonable for the jury to also conclude that someone who is not trying to kill might not be "likely" to cause death or great bodily harm.

The use of a firearm does not so invariably cause death or "serious, permanent disfigurement or protracted loss or impairment" as to justify refusal of the charge as a matter of law. This is in part for two reasons, both a recognition that this is ultimately a factual question for the jury to determine. First, the question cannot be, "How likely would a serious injury be to occur

assuming injury had occurred?" Such an analysis would strip the jury of its responsibility under subsection (A)(1) of determining the likelihood of any potentially resulting injury. Second, even if one assumes that an injury had resulted from the alleged conduct, it is entirely possible—perhaps even likely—for gunshot wounds to not amount to the statutory definition of great bodily harm. They might instead be likely to cause moderate bodily injury, i.e. "temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ, or injury that requires medical treatment when the treatment requires the use of regional or general anesthesia or injury that results in a fracture or dislocation." S.C. Code Ann. § 16-3-600(A)(2). The severity of any potential injury is always an element for the jury to determine under the facts as it finds them to exist. Because both the likelihood and severity of a potential injury are questions of fact, it was improper for the trial court to deny the charge as a matter of law.

In *State v. Middleton*, 407 S.C. 312, 755 S.E.2d 432 (2014), the Court affirmed two attempted murder convictions. 407 S.C. at 314, 755 S.E.2d at 433. There the defendant approached a car containing a driver and passenger, then he began firing into it. *Id.* The driver was injured only by shattered glass; the passenger was not injured at all. 407 S.C. at 314, 755 S.E.2d at 433-34. The trial court refused to instruct the jury on first-degree assault and battery as to the passenger, reasoning that he was entirely uninjured. 407 S.C. at 314-15, 755 S.E.2d at 434. On appeal, the Court found it was error to deny the requested charge: "It is undisputed that the elements of subsection (b) [concerning attempts] are met in this case." 407 S.C. at 317, 755 S.E.2d at 435. In exactly the same way in this case, the elements of subsection (D)(1)(a), if the state's evidence is believed, were met and "[t]hus, the circuit court erred in refusing to charge the lesser-included offense . . . ." *Id.*

The majority in *Middleton* found this error harmless, however, because "the only conclusion established by the evidence is that [Middleton] was guilty of attempted murder." 407 S.C. at 319, 755 S.E.2d at 436. Importantly, the jury found Middleton guilty *of the other attempted murder* even after it was instructed it could find Middleton guilty of first-degree assault and battery of the driver. In direct contrast, here the only indication of the jury's belief is that it did *not* think Appellant intended to kill either occupant of the car. Had it been informed second-degree assault and battery might apply, as it should have been, it very reasonably could have so found.

In its brief, the state points to *State v. Lindsey*, 372 S.C. 185, 642 S.E.2d 557 (2007), and *State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000), to demonstrate the certain likelihood of this factual question concerning the dangerousness of firearms. They are inapposite. Both cases concerned motions for a directed verdict as to specific statutory aggravator to qualify for the death penalty. *Lindsey*, 372 S.C. at 194-95, 642 S.E.2d at 562; *Locklair*, 341 S.C. at 366-67, 535 S.E.2d at 427-28. But the standard for reviewing a directed verdict is the opposite of that for a requested jury instruction on lesser-included offenses. *Compare State v. Cherry*, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004) (citations omitted) ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury."), *with Williams*, 427 S.C. at 156, 829 S.E.2d at 706 ("The trial court is required to charge a 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." (quoting *Suber v. State*, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007))). Appellant does not now contend he was entitled to a directed verdict of second-degree assault and battery. It is therefore unimportant that other courts have held the use of a firearm is some evidence from which the jury could conclude there was a great risk of death or danger. At this stage, the question

is only whether there was any evidence from which the jury could have concluded Appellant is guilty of second-degree assault and battery rather than first. Because there was such evidence, the charge should have been given. *See* 16 Corpus Juris, *Criminal Law* § 2451, at 1023 (1918) ("Where, under the evidence, defendant may be found guilty of any offense necessarily included within the crime charged, the court should, on his request, so instruct the jury . . . .").

The state's citation to cases from other jurisdictions is similarly unavailing. In *State v. Johnson*, 119 N.E.3d 914 (Ohio Ct. App. 2018), the Ohio Court of Appeals affirmed the denial of a directed verdict, and thus it is as unenlightening as *Lindsey* and *Locklair*. *Johnson*, 119 N.E.3d at 923-24. In addition, that case concerned an arson charge where "substantial risk" was defined by statute. *Johnson*, 119 N.E.3d at 923 (quoting Ohio Rev. Code Ann. § 2901(A)(8)). Even if there were reason to adopt Ohio's definition, that definition specifies a "substantial" risk is one that is "as contrasted with a remote *or significant* possibility." Ohio Rev. Code Ann. § 2901(A)(8) (emphasis added). Using that standard as the state appears to suggest in its brief, the jury in this case could have concluded there was not a "substantial risk" even if there might have been a "significant" one. Certainly, there is some evidence from which the jury could so conclude, and thus the charge should have been given and Appellant's conviction must be reversed.

The Florida case on which the state relies is also misplaced. In *Miller v. State*, 613 So. 2d 530 (Fla. Dist. Ct. App. 1993), the trial court refused a jury instruction "on the justifiable use of non-deadly force" as opposed to the use of deadly-force, where the defendant fired a gun at someone. *Miller*, 613 So. 2d at 531. The defendant testified he had "instead fired a warning shot in the air," and thus he argued his use of force was non-deadly and that lesser instruction should have been given. *Id.* The Court disagreed, holding "even a so-called 'warning shot" amounts to "the use of deadly force." *Id.* That Court applied Florida's "standard jury instructions"—not South

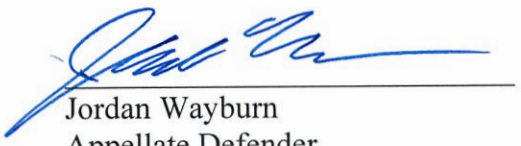
Carolina's assault and battery law. *Id.* Under those standard instructions, "deadly force" is defined as "force likely to cause death or great bodily harm."[1] *Fla. Bar re: Standard Jury Instructions Crim. Cases*, 477 So. 2d 985, 999 (Fla. 1985). In *Miller*, the case depended on the dangerousness of the force used in the abstract rather than on the facts of the case on the reasoning that a firearm is always deadly force, regardless of how it is used or where it is pointed. 613 So. 2d at 531; *see also Hosnedl v. State*, 126 So. 3d 400, 405 (Fla. Dist. Ct. App. 2013) (extending *Miller* to the accidental discharge of a weapon because "[t]he fact that in *Miller* the discharge was purposeful and in the present case the discharge was accidental does not make the force any less 'deadly'"). Here, however, the issue did not require the trial court to determine the strength of the force used in the abstract but rather required the jury to determine the likelihood and severity of injury resulting from the alleged conduct. That distinction makes *Miller* insignificant to the analysis in this case, in addition to its different context of distinguishing between self-defense instructions.

[1] The instructions also do not define "great bodily harm" as our statutes do.

CONCLUSION

The likelihood and severity of the potential resulting harm from Appellant's alleged conduct was a question of fact for the jury to decide. A reasonable jury could have found neither death nor great bodily injury, as defined in the statute, were "likely" to result. Therefore, the trial court erred by not charging the jury with the lesser-included offense of second-degree assault and battery.

Appellant respectfully requests this Court reverse his conviction and remand the case.



Jordan Wayburn
Appellate Defender

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This 25th day of August, 2025.

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THE STATE,

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APPELLATE CASE NO. 2024-001125

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies true copies of the Initial Reply Brief of Appellant in the above-referenced case have been served upon Ambree M. Muller, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 25th day of August, 2025.

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From: Stock, Chris
To: Ambree Muller; Grace Sommer
Cc: Wayburn, Jordan
Subject: 2024-001125 The State v. Cleveland Maxwell - Initial Reply Brief of Appellant
Date: Monday, August 25, 2025 4:50:00 PM
Attachments: 2024-001125 The State v. Cleveland Maxwell - Initial Reply Brief of Appellant.pdf
2024-001125 The State v. Cleveland Maxwell - Initial Reply Brief of Appellant - AG Cover Letter.pdf

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Ms. Muller,

Please find attached for service the Initial Reply Brief of Appellant for Cleveland Maxwell's appeal which will be filed today with the Court of Appeals.

Thank you.

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