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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DANIEL TAYLOR JONES,

APPELLANT

APPELLATE CASE NO. 2024-000129

FINAL BRIEF OF APPELLANT

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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?

STATEMENT OF THE CASE

A Lexington County grand jury indicted Appellant on February 7, 2022, for murder, assault and battery of a high and aggravated nature, and possession of a weapon during the commission of a violent crime. R. 744 – 749. A pretrial hearing was held on January 17, 2024, before the Honorable Debra R. McCaslin. Appellant's case was called to trial before Judge McCaslin, and a jury, on January 22, 2024. Assistant Solicitors Rhonda Patterson and Bradley Pogue represented the state. Aimee Zmroczek represented Appellant. R. 1.

On January 26, 2024, the jury found Appellant guilty as indicted. R. 741, ll. 9-17. He was sentenced to forty years for murder, twenty years for assault and battery of a high and aggravated nature, and five years for the weapons offense. R. 742, l. 18 – 743, l. 18.

This appeal follows.

STATEMENT OF FACTS

In March 2020, eighteen year old Appellant was best friends with Christopher Shumpert. R. 166, l. 25 – 167, l. 7; R. 536, ll. 14-21. Christopher was dating Jacqueline Aiken at the time. Christopher and Jacqueline were living "couch to couch, hotel to hotel." Occasionally, they slept at Barry Joe Chavis's trailer. R. 164, l. 21 – 166, l. 9; R. 212, l. 21 – 213, l. 3. David Payton and Jada Ellison, who were also dating, had been living at Chavis's trailer for about two months. R. 109, l. 13 – 110, l. 23; R. 212, ll. 5-20. Appellant, Christopher, Jacqueline, David, Jada, Chavis, and another friend, Steven Phillips, all hung out as a group. They were all teenagers with the exception of Chavis, who was twenty-eight years old. Additionally, they were all addicted to methamphetamine and enjoyed "getting high" together. R. 110, l. 24 – 111, l. 4; R. 536, l. 14 – 538, l. 22.

On March 27, 2020, Jacqueline borrowed fifty dollars from Jada while they were at Chavis's trailer. Jacqueline "was supposed to come right back" to repay Jada. However, despite repeatedly attempting to contact Jacqueline for several hours, Jada could not get in touch with her. Jada believed Jacqueline was purposefully ignoring her. R. 111, l. 13 – 112, l. 19; R. 167, l. 16 – 168, l. 9; R.213, l. 4 – 214, l. 10. Consequently, Jada asked Chavis to drive her to Lane Taylor's house off Treemount Lane, where she expected Jacqueline to be, so she could confront Jacqueline and get the cash she was owed. Chavis drove Jada and her boyfriend, David Payton, to the home on Treemount Lane. R. 112, l. 23 – 113, l. 14; R. 214, ll. 11-21. When they arrived, they found Christopher and Jacqueline in Christopher's car parked in the driveway. Jada got into the backseat of Christopher's car and confronted Jacqueline about the money she owed her. Jada eventually snatched one hundred dollars out of Jacqueline's lap. Jada then physically beat

Jacqueline outside the car. R. 113, l. 15 – 114, l. 2; R. 168, l. 10 – 169, l. 22; R. 214, l. 22 – 216, l. 7.

After the altercation, Chavis, Jada, and David left in Chavis's truck. Christopher and Jacqueline also left in Christopher's car. Christopher was understandably upset that Jada had beat Jacqueline. While driving down Treemount Lane, Christopher pulled his car in front of Chavis's truck and blocked the roadway. Christopher then got out of his car and exchanged "hostile" words with Chavis. Chavis, who was wielding a pistol, ultimately fired a shot into the dirt road near where Christopher was standing and ordered Christopher to leave. Christopher, who was unarmed, got back into his car, and left. R. 114, l. 5 – 116, l. 8; R. 169, l. 23 – 172, l. 15; R. 215, l. 23 – 218, l. 13.

According to Jacqueline, Christopher was angry and "went to go find Danny [Appellant]" because "he knew he [Appellant] had guns." R. 173, ll. 2-11. Christopher drove to Appellant's mother's house. However, Appellant was not there. Appellant's stepfather spoke to Christopher in the driveway. R. 173, l. 22 – 174, l. 16. He told Christopher "not to involve" Appellant and to "call the police." R. 152, l. 17 – 154, l. 9. After Christopher spoke to Appellant's stepfather, he drove to Appellant's grandparents' house where Appellant lived. Appellant was there when Christopher arrived. Christopher told Appellant about the prior altercation on Treemount Lane. Christopher and Jacqueline were both upset and crying. Seeing his friends upset, Appellant wanted to help. He agreed to accompany them to Chavis's house to help Christopher and Jacqueline get their money back as well as some belongings they had left at Chavis's trailer. R. 539, l. 5 – 540, l. 2; R. 541, ll. 2-9.

Before leaving, Appellant grabbed his 9mm pistol and his .300 Blackout semiautomatic rifle. Appellant explained that he brought his firearms because he knew Chavis and others at

Chavis's trailer would be armed. Appellant got into Christopher's car with Christopher and Jacqueline. Christopher drove, Appellant sat in the front passenger seat, and Jacqueline sat in the back. R. 174, l. 17 – 177, l. 5.

Christopher drove to Chavis's trailer off Fish Hatchery Road. Shortly before arriving, he dropped Jacqueline off on a nearby dirt road. R. 177, l. 16 – 178, l. 8. Christopher pulled into Chavis's driveway and parked. Appellant called out to Chavis, who was in the yard, and asked him to come to the car so they could talk. Chavis refused and told Appellant to get out of the car. Appellant got out of the car and started talking calmly to Chavis. He asked Chavis why "they" beat Jacqueline and why Chavis shot at Christopher earlier that day. Appellant also asked Chavis if they could get the money back that Jada had taken from Jacqueline and Christopher's and Jacqueline's belongings that were at the house. R. 548, ll. 6-12. Chavis appeared "a little angry" and his voice was "hostile." R. 547, ll. 9-12.

Appellant's conversation with Chavis did not last long. It was interrupted when Jada, David, and their friend, Steven Phillips, came rushing out of Chavis's trailer. Jada ran up to Appellant and began yelling and screaming at him. Her boyfriend, David, stood at the steps of the trailer and also began yelling at Appellant. David had a gun in his hand while he was yelling and repeatedly waved the gun "in the air." Meanwhile, Christopher got out of the car and began arguing with Chavis. R. 545, l. 22 – 546, l. 19.

Appellant was "scared" because Jada and David were threatening him and David was waving a gun. Steven was also outside yelling. R. 546, l. 1 – 547, l. 5. The situation escalated quickly. Christopher and Chavis, who were both armed, also began yelling at each other. They were "all yelling at each other." Appellant told "them all to just chill out." R. 548, ll. 16-25. Because he feared for his life, Appellant grabbed his rifle out of Christopher's car. Appellant

saw Chavis reach for his waistline and then Appellant heard gunshots. Because of the chaos, Appellant could not tell who fired the first shot. "The first thing that [came] to [his] mind was [his] own life, so [Appellant] started shooting the AR." Appellant shot toward the ground and Chavis's pickup truck. He did not intend to harm anyone. He was "scared" and thought firing toward the ground would "help [him] out." Appellant ultimately shot eight times while standing just outside the passenger door of Christopher's car. R. 549, l. 8 – 551, l. 10. The evidence showed that Christopher fired the 9mm pistol at least thirteen times. R. 285, l. 18 – 290, l. 6. Unbeknownst to Appellant at the time, Chavis was shot twice. He died within minutes from his injuries. R. 504, l. 9 – 517, l. 14. Kevin Kimbler, who was also in the yard at the time, was shot in the thigh, but survived his injuries.[1] R. 39, ll. 16-23; R. 44, ll. 22-24.

After the shooting, Appellant and Christopher got back into Christopher's car and left. Christopher picked Jacqueline up where he left her on the dirt road and then drove to Appellant's mother's house. R. 180, l. 23 – 181, l. 6; R. 551, l. 14 – 552, l. 16. Appellant hid the rifle by a boat outside his mother's house. Appellant hid the gun because he was "worried" and "scared" and "didn't know how to handle the situation." R. 552, l. 17 – 553, l. 7. Christopher then dropped Appellant off at Appellant's cousin's house. Appellant told his cousin what happened and gave him the 9mm pistol Christopher used in the shooting. R. 553, l. 11 – 554, l. 13.

While he was at his cousin's house, Appellant learned the police were looking for him at his grandmother's house. Appellant had his cousin drive him to his grandmother's house where he waited for the police. Detectives with the Lexington County Sheriff's Department arrested Appellant within minutes of his arrival. While being questioned in one of the detective's vehicles, Appellant lied and told the police he had not seen Christopher that day and did not

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[1] Kevin Kimbler died before Appellant's trial. His death was unrelated this case. R. 360, ll. 5-8.

know anything about the shooting. He lied because he was “scared and nervous.” The detectives became angry with Appellant, began cursing and yelling at him, and one put his hands around Appellant’s neck and began choking him. Appellant was handcuffed with his hands behind his back at the time. R. 555, l. 5 – 560, l. 22. While Appellant refused to speak with law enforcement on the day of his arrest, he ultimately provided a statement to police through a kiosk at the jail on April 17, 2020. His statement was consistent with his testimony before the jury. R. 595, l. 9 – 598, l. 6.

The trial court charged the jury on self-defense but refused to charge the lesser included offense of involuntary manslaughter. The jury ultimately convicted Appellant as indicted.

STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review errors of law only." State v. Robinson, 426 S.C. 579, 591, 828 S.E.2d 203, 209 (2019) (citing State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). "The admission of evidence concerning past convictions for impeachment purposes remains within the trial [court's] discretion, provided the [trial court] conducts the analysis mandated by the evidence rules and case law." Id. (quoting State v. Dunlap, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001)) (alterations in original) (internal quotation marks omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. (quoting State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006)) (internal quotation marks omitted).

"In reviewing jury charges for error, [this Court] examine[s] the trial court's charge as a whole in light of the evidence and issues presented at trial." State v. Williams, 427 S.C. 148, 156, 829 S.E.2d 702, 706 (2019) (citing State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010)). "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." Id. (quoting Suber v. State, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007)) (internal quotation marks omitted). "In determining whether the evidence requires a charge on a lesser-included offense, [this Court] view[s] the facts in the light most favorable to the defendant." Id. (citing State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996)).

ARGUMENT

1.

The trial court abused its discretion by admitting Appellant's prior juvenile adjudications for first degree burglary and petit larceny pursuant to Rule 609(a)(1), SCRE, since 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.

Relevant Facts

The state sought to admit Appellant's prior juvenile adjudications for first degree burglary and petit larceny if Appellant testified in his defense. Defense counsel objected to the admission of Appellant's prior adjudications arguing the adjudications would "strictly" be used as bad "character evidence" and should be excluded pursuant to Rule 403, SCRE. Citing to State v. Robinson, 426 S.C. 579, 828 S.E.2d 203 (2019), the assistant solicitor maintained the state should be permitted to impeach Appellant's credibility with his prior adjudications because "credibility is greatly involved in this case." R. 529, l. 1 – 529, l. 5. Defense counsel in turn argued that a conviction for first degree burglary is "not probative of his [Appellant's] truthfulness" based on our Supreme Court's holding in State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006).

The trial court ultimately ruled Appellant's prior adjudications were admissible after commenting on each of the Colf factors. The court found "the impeachment value [of the prior adjudications] is great" because the jury "heard several different statements from several different witnesses, and it appears that all of them have a different story so to speak." As to the "point of time" of the prior convictions, the court found the adjudications, which occurred in 2017, were "somewhat close in time." The court further found "there's not a lot of similarity"

between the prior adjudications (first degree burglary and petit larceny) and the charges for which Appellant was being tried (murder, assault and battery, and possession of a weapon). Lastly, the court found Appellant's testimony was "very important." R. 531, l. 13 – 532, l. 20.

Defense counsel noted her objection to the court's ruling for the record. R. 533, ll. 5-8.

At the beginning of Appellant's testimony, defense counsel asked Appellant about his 2017 juvenile adjudications, which occurred when he was sixteen years old, specifically simple possession of marijuana, possession of a pistol by an unlawful person, first degree burglary, and petit larceny. R. 534, l. 20 – 535, l. 5.

The court later gave the jury a limiting instruction:

> You have heard evidence that the defendant was adjudicated of a crime other than the one for which the defendant is now on trial. This evidence may be considered by you only in deciding whether the defendant's testimony is believable and for no other purpose. You must not consider the defendant's prior record as any evidence of the defendant's guilt of the charge we are trying today.

R. 724, ll. 8-15.

Discussion

The trial court abused its discretion by admitting Appellant's prior juvenile adjudications for first degree burglary and petit larceny pursuant to Rule 609(a)(1), SCRE, since 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.

Rule 609, SCRE, governs the admissibility of a witness's prior convictions for purposes of impeachment. In pertinent part, Rule 609 provides:

> (a) General Rule. For the purpose of attacking the credibility of a witness,
>
> (1) 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

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

....

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

....

(d) Juvenile Adjudications. **Evidence of a juvenile adjudication is admissible under this rule if conviction of the crime would be admissible to attack the credibility of an adult.**

(emphasis added)

"Rule 609(a) invokes three impeachment scenarios. First, under Rule 609(a)(1), evidence that a witness other than an accused has been convicted of a crime punishable by death or imprisonment for more than one year (in the jurisdiction where the conviction occurred) is admissible, subject to Rule 403, SCRE. Under Rule 403, evidence of such a conviction 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.' The Rule 403 test places the burden upon the opponent of the evidence to establish inadmissibility pursuant to Rule 403." State v. Robinson, 426 S.C. 579, 593, 828 S.E.2d 203, 210 (2019).

"Second, under Rule 609(a)(1), when the accused chooses to testify during his trial, if the State seeks to introduce impeachment evidence that the accused has been convicted of a crime punishable by imprisonment for more than one year, **the evidence is admissible *if the State establishes* the probative value of admitting the evidence outweighs its prejudicial effect upon the accused**." Id. (emphasis added).

"Third, under Rule 609(a)(2), if a witness, even an accused, has been convicted of a crime involving dishonesty or false statement, evidence of such a conviction shall be admitted regardless of the maximum punishment and regardless of the probative value or prejudicial effect of the evidence." Id. (citing State v. Bryant, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006)).

Appellant's prior juvenile adjudication for petit larceny should have been excluded because the crime is not punishable by imprisonment for more than one year as required by Rule 609(a)(1), SCRE. South Carolina Code Ann. § 16-13-30 states that a person convicted of petit larceny "must be fined not more than one thousand dollars, or imprisoned not more than *thirty days*." (emphasis added). Additionally, Appellant's petit larceny adjudication was not automatically admissible as a crime of dishonesty or false statement pursuant to Rule 609(a)(2), SCRE. See State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015) (explaining that "for impeachment purposes, crimes of 'dishonesty or false statement' are crimes in the nature of *crimen falsi* 'that bear upon a witness's propensity to testify truthfully.'"); see also Bryant, 369 S.C. at 517, 633 S.E.2d at 155-56 (citing United States v. Smith, 181 F.Supp.2d 904 (N.D. Ill. 2002)) ("a conviction for robbery, burglary, **theft**, and drug possession, beyond the basic crime itself, is not probative of truthfulness.") (emphasis added). Consequently, the trial court abused its discretion by admitting evidence of Appellant's prior adjudication for petit larceny.

In State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000), our Supreme Court adopted the five factor analysis employed by federal courts when weighing the probative value of prior convictions against the prejudicial effect to the accused. These factors include: (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. Id. These factors are not exclusive. Trial courts should exercise their discretion in light of the facts and circumstances of each particular case." Id. "Although Colf focused on the admission of prior convictions more than ten years old under Rule 609(b), our courts have also consistently applied these factors for purposes of a Rule 609(a)(1) analysis." Robinson, 426 S.C. at 594, 828 S.E.2d at 211 (citing Bryant, 369 S.C. at 517 n.1, 633 S.E.2d at 155 n.1).

Appellant's juvenile adjudication for first degree burglary was also not automatically admissible as a crime of dishonesty or false statement pursuant to Rule 609(a)(2). See State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015) (explaining that "for impeachment purposes, crimes of 'dishonesty or false statement' are crimes in the nature of *crimen falsi* 'that bear upon a witness's propensity to testify truthfully.'"). Therefore, the trial court was required to conduct an analysis under Rule 609(a)(1) and State v. Colf to determine whether the probative value of admitting Appellant's prior adjudications outweighed the prejudicial effect to Appellant.

The first Colf factor is the impeachment value of the prior crime. "Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility, of the witness." Robinson, 426 S.C. at 598, 828 S.E.2d at 213 (citing State v. Black, 400 S.C. 10, 21-22, 732 S.E.2d 880, 887 (2012)). The trial court here confused this factor with the fifth factor, "the centrality of the credibility issue." The court found the impeachment value of Appellant's

prior adjudications was "great" because "several different witnesses" who testified had a "different story so to speak." The court failed to weigh how Appellant's prior adjudications bore on *Appellant's* credibility. Respectfully, Appellant's prior adjudications had little, if any, bearing on his credibility. The adjudications were not probative of Appellant's propensity for telling the truth. See Bryant, 369 S.C. at 517, 633 S.E.2d at 155-56 (citing United States v. Smith, 181 F.Supp.2d 904 (N.D. Ill. 2002)) ("a conviction for robbery, **burglary**, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness.") (emphasis added). Rather, as defense counsel argued at trial, the adjudications merely raised concerns about Appellant's character. First degree burglary, in particular, as a crime of violence, was not probative of Appellant's truthfulness. See State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012) (holding "crimes of violence, which may result from a myriad of causes, generally do not" relate to credibility).

The second factor is the "point in time of the conviction and the witness's subsequent history." The trial court here found Appellant's 2017 adjudications were "somewhat close in time" without elaborating further. The court did not indicate how the timing of Appellant's prior adjudications may or may not have impacted his credibility. Appellant's adjudications occurred three years before the shooting and roughly seven years before Appellant stood trial. Unlike in Robinson, where "the trial court found Robinson's prior convictions revealed a continuing pattern of criminal behavior that could have legitimately impacted [Robinson's] credibility in the eyes of the jury," the trial court here made no similar finding. See Robinson, 426 S.C. at 600, 828 S.E.2d at 214. Appellant's prior adjudications occurred when he was sixteen or seventeen years old and did not demonstrate a pattern of criminal behavior. Based on the limited information in the record, the prior adjudications appear to be an isolated event years before the

shooting that led to the decedent's death and over seven years before Appellant was tried. The timing of Appellant's prior adjudications did not impact his credibility.

The third factor is the similarity between the past crime and the charged crime. The trial court found Appellant's adjudications for first degree burglary and petit larceny were not similar to the offenses of murder, assault and battery of a high and aggravated nature, and possession of a weapon, the charges for which Appellant was being tried. Consequently, the court found the admission of Appellant's adjudications would be "less prejudicial." However, the court failed to appreciate that first degree burglary and murder and assault and battery of a high and aggravated nature are all violent crimes. Because Appellant's prior first degree burglary adjudication was also a violent crime, the evidence suggested to the jury that Appellant had the propensity to commit the crimes with which he was charged. See Robinson, 426 S.C. at 600, 828 S.E.2d at 214 ("Evidence of similar offenses inevitably suggests to the jury the defendant's propensity to commit the crime with which he is charged."). Moreover, the elements of burglary are similar to Appellant's actions as alleged by the state. More specifically, burglary occurs when a person enters a dwelling without consent and with the intent to commit a crime therein. See S.C. Code Ann. § 16-11-311. The state alleged during trial that Appellant entered the decedent's property without his consent and with the intent to engage in unlawful conduct. Consequently, the trial court erroneously applied this factor by finding the prior adjudications were not similar.

The fourth factor is the importance of the defendant's testimony. The trial court found Appellant's testimony was "very important." Appellant agrees. Appellant's testimony was essential to his defense and was certainly not cumulative to any other evidence presented. Appellant testified that he armed himself in self-defense after Jada "ran up on" him and David waved a gun in the air while both were screaming and threatening him. Appellant ultimately

fired his weapon after he saw the decedent, who Appellant knew or suspected was armed, reach for his waistline immediately before Appellant heard gunshots. Because Appellant's testimony was extremely important, the admission of his prior adjudications was unduly prejudicial, particularly where the evidence merely served as propensity evidence. This factor weighs heavily in favor of excluding the prior adjudications.

The fifth and last factor is the "centrality of the credibility issue." The trial court found the case "revolves" around Appellant's credibility. While Appellant agrees his credibility was important, which could have enhanced the probative value of admitting evidence of his prior convictions, Appellant's prior adjudication for first degree burglary, as argued above, was not probative of his truthfulness and had little, if any, bearing on his credibility. Therefore, the evidence again only served as improper propensity evidence or bad character evidence and should have been excluded.

Accordingly, the trial court abused its discretion by admitting Appellant's prior juvenile adjudications for first degree burglary and petit larceny since the state failed to establish that the probative value of admitting the evidence outweighed its prejudicial effect to Appellant. Respectfully, this Court should reverse Appellant's conviction and remand for a new trial.

2.

<u>The trial court erred 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.</u>

Relevant Facts

During the charge conference, Appellant requested the trial court instruct the jury on second degree assault and battery as a lesser included offense of assault and battery of a high and aggravated nature. Defense counsel argued there was evidence to support the charge. R. 650, l. 25 – 651, l. 23.

The assistant solicitor argued "there was sufficient testimony that the injury that Mr. Kimbler sustained was committed with the act accomplished by means likely to produce death or great bodily injury by the simple fact he was shot twice with a gun." R. 651, ll. 10-14. The solicitor seemed to argue there was evidence to support a conviction for assault and battery of a high and aggravated nature, the indicted offense. However, the solicitor did not assert there was no evidence to support the lesser included offense of second degree assault and battery.

Defense counsel emphasized that the state failed to present any evidence concerning the extent of Kimbler's injuries. "They just said he was shot." The trial court in return stated there was evidence from a body camera video that showed Kimbler sitting on the porch with a tourniquet, and based on the footage, it looked like Kimbler had been shot in the thigh area. R. 652, ll. 11-24. The solicitor maintained Kimbler was shot twice, in the upper thigh and torso, but this evidence was not presented to the jury. R. 653, ll. 1-6. Defense counsel insisted there was evidence to support the lesser included offense and the state was free to argue during closing any inferences that could be drawn from the body camera footage and other evidence. R. 653, ll. 6-9.

The trial court ultimately stated it would "decline to change" assault and battery, second degree. R. 653, ll. 12-14.

Discussion

The trial court erred 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.

"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." State v. Williams, 427 S.C. 148, 156, 829 S.E.2d 702, 706 (2019) (quoting Suber v. State, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007)) (internal quotation marks omitted). "In determining whether the evidence requires a charge on a lesser-included offense, we view the facts in the light most favorable to the defendant." Id. (citing State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996)).

Appellant was indicted and tried for assault and battery of a high and aggravated nature. This offense is codified in S.C. Code Ann. § 16-3-600(B)(1), which states in relevant part, "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." 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). "Under the statute, ABHAN is a lesser-included offense of attempted murder." Id. (citing § 16-3-600(B)(3)). "Assault and battery in the first degree is a lesser-included offense of both attempted murder and ABHAN." Id. (citing § 16-3-600(C)(3)). "Further, assault and

battery in the second and third degree are each lesser-included offenses of every preceding offense." Id. (citing § 16-3-600(D)(3) and § 16-3-600(E)(3)).

Section 16-3-600(D)(1) states in relevant part, "A person commits the offense of assault and battery in the second degree if the person unlawfully injuries 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." Moderate bodily injury is defined as "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 of 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, slinters, or any other minor injuries that do not ordinarily require extensive medical care." S.C. Code Ann. § 16-3-600(A)(2).

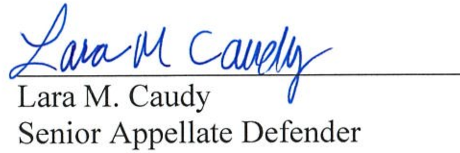
Unlike the trial court concluded, the fact that an individual suffered a gunshot wound does not make that injury *per se* "great bodily injury." Stated another way, a gunshot wound, although caused by a deadly weapon, is not *per se* "great bodily injury." In the light most favorable to Appellant, the jury could have found Kevin Kimbler's injuries merely constituted "moderate bodily injury." While there was not a great deal of testimony or other evidence concerning his injuries, it appears Kimbler suffered a gunshot wound to the thigh. The state did not present any evidence Kimbler suffered any serious or lasting injury. He was conscious when emergency medical services (EMS) arrived on scene and presumably transported him to the hospital for treatment. The state failed to present any evidence concerning what medical treatment Kimbler received.

Accordingly, because there was evidence from which it could be inferred the lesser, rather than the greater, offense was committed, the trial court erred by refusing to instruct the jury on second degree assault and battery. Respectfully, this Court should reverse Appellant's convictions and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of August, 2025.

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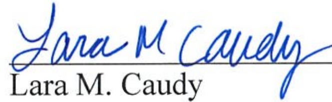
Aug 26 2025
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 26, 2025.



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

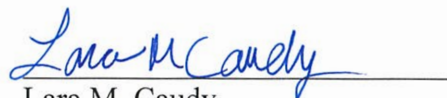
DANIEL TAYLOR JONES,

APPELLANT

APPELLATE CASE NO. 2024-000129

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above referenced case has been served upon Tommy Evans, Jr., Esquire, at his primary email address listed in the Attorney Information System (AIS), this 26th day of August, 2025.



Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR APPELLANT

From: Mcinnis, Sara
To: Tommy Evans, Jr.
Cc: Brandy Rankin; Caudy, Lara
Subject: 2024-000129 The State v. Daniel T. Jones Final Brief of Appellant
Date: Tuesday, August 26, 2025 11:20:00 AM
Attachments: 2024-000129 The State v. Daniel T. Jones Final Brief of Appellant.pdf
Bound Copies Cover Letter.pdf

Good Morning Mr. Evans,

Attached for service in the above-referenced case is the final brief of appellant, which will be filed with the Court of Appeals today, August 26, 2025, via email filing. I have also attached a copy of the cover letter that will accompany the bound copies of the record on appeal and final brief when they are delivered to the Court this afternoon.

Thank you,

Sara McInnis
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