STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

PETITIONER,

V.

SAMIR KEVIN SHANK,

RESPONDENT

APPELLATE CASE NO. 2025-001241

BRIEF OF RESPONDENT

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

COUNTER STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 8

ARGUMENT

The Court of Appeals correctly held that the trial court committed reversible error in failing to charge the jury with the lesser-included offense of assault and battery third-degree where there was evidence presented during trial to support the charge and where the evidence would permit a jury to rationally find Respondent guilty of the lesser offense. 9

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Keeble v. United States, 412 U.S. 205 (1973) 15

State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006) 8

State v. Brown, 360 S.C. 581, 602 S.E.2d 392 (2004) 15

State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000) 10

State v. Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995) 10

State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 9

State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994) 10

State v. Geiger, 370 S.C. 600, 635 S.E.2d 669 (2006) 12, 13, 14, 15

State v. Gilliland, 402 S.C. 389, 741 S.E.2d 521 (Ct. App. 2012) 9

State v. Gilmore, 396 S.C. 72 , 719 S.E.2d 688 (Ct. App. 2011) 8

State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). 9, 10, 11

State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010) 9

State v. Patterson, 337 S.C. 233, 522 S.E.2d 854 15

State v. Peer, 320 S.C. 546, 466 S.E.2d 375 (Ct. App. 1996). 9

State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) 8

State v. Sams, 410 S.C. 303, 764 S.E.2d 511 (2014) 8, 9

State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986) 11

State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) 10

State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001) 8

Statutes

S.C. Code Ann. § 16-3-600 10

COUNTER STATEMENT OF THE ISSUE

Whether the Court of Appeals correctly held that the trial court committed reversible error in failing to charge the jury with the lesser-included offense of assault and battery third-degree where there was evidence presented during trial to support the charge and where the evidence would permit a jury to rationally find Respondent guilty of the lesser offense?

STATEMENT OF THE CASE

Respondent was indicted during the April 2021 term of the Greenville County grand jury for one count of failure to stop for a blue light, one count of use of a vehicle without permission, and one count of assault and battery of a high and aggravated nature[1] (ABHAN). App. 154-159. The state, represented by Andrew Miller, Sylvia Harrison, and John Waelde called the case to trial on April 25, 2022, before the Honorable R. Scott Sprouse and a jury. Respondent was represented by Paul Neely and Kaitlyn Diaz. App. 1-2.

After a one-day trial, Respondent was found guilty as indicted. App. 132-133. Judge Sprouse sentenced Respondent to concurrent terms of imprisonment for eighteen years on ABHAN, three years on use of vehicle without permission, and five years on the failure to stop for a blue light, with credit for 380 days' time served. App. 151, l. 8 - 152, l. 9; App. 160 –165.

Respondent timely appealed his ABHAN conviction and sentence, arguing the trial court committed reversible error by failing to charge the jury with the lesser-included offense of assault and battery third-degree. Final briefing was completed in August of 2023. The Court of Appeals reversed and remanded the ABHAN conviction in an unpublished opinion, holding that the trial court erred in failing to charge the jury on assault and battery third-degree and that the error was not harmless as the refusal to charge the lesser-included offense contributed to the verdict. State v. Shank, Op. No. 2025-UP-114 (S.C. Ct. App. filed April 2, 2025). The state timely filed a petition for rehearing that was denied on May 22, 2025. The state petitioned this Court for a writ of certiorari on June 30, 3035. The return to the state's petition for writ of certiorari was filed on July 25, 2025. This Court granted certiorari on November 18, 2025. The state filed the brief of petitioner on December 12, 2025. This brief of respondent follows.

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1 On appeal, Respondent does not challenge his convictions and sentencing on the failure to stop for blue lights charge and the use of a vehicle without a permission charge.

STATEMENT OF THE FACTS

Sandra L. Bullock met Respondent through a neighbor, and the two became close friends. Respondent was working on getting his life back together. Bullock had been loaning her car to Respondent so that he could get to and from work. Respondent was supposed to return the car to her every evening with a full tank of gas. App. 35, l. 15 – 36, l. 6. On August 19, 2020, Bullock loaned Respondent her car, but he did not return it that evening. After a few days had passed, Bullock reported the car stolen. App. 36, ll. 1-10.

On August 25, 2020, an automated license plate reader notified law enforcement of a stolen vehicle, a silver Toyota Corolla, in the vicinity of Ackley Road in Greenville County. Officer Andrew Elder with the Greenville Police Department responded to the notification from the license plate reader in his marked patrol car. App. 42, l. 11 – 43, l. 4. Elder was wearing a body-worn camera[2] that captured his encounter with the stolen vehicle. App. 50, l. 24 – 51, l. 14.

While in route to the location of the automated license plate reader notification, Elder observed the vehicle in question at the intersection of Rebecca Street and Clark Street. App. 42, ll. 19-22. Elder pulled behind the stolen vehicle and turned on his blue lights, however the driver of the vehicle did not stop. State's Ex. 7 at 2:57. A brief pursuit ended on a dead-end street where Elder attempted to perform a felony stop on the occupants of the vehicle. State's Ex. 7 at 3:55. In the video, the brake lights of the stolen vehicle are illuminated while Elder is standing behind his open driver-side door with his service weapon drawn issuing commands. The passenger in the stolen vehicle is seen opening the passenger-side door and holding up his hands. State's Ex. 7 at 3:57. Elder continued to issue commands from behind his patrol vehicle's open driver-side door. The driver of the stolen vehicle begins to reverse out of the dead-end street

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2 This footage was entered at trial as State's Exhibit 7. A copy of this exhibit is on file with this Court.

with the passenger-side door still open. State's Ex. 7 at 3:58 – 4:02. The stolen vehicle travels straight back at a slow speed, with its brake lights illuminated. As the stolen vehicle passes Elder, the open passenger-side door strikes the open driver-side door of Elder's patrol vehicle which then strikes Elder and knocks him to the ground. The video shows that the brake lights of the stolen vehicle remained illuminated through the incident. State's Ex. 7 at 4:02 – 4:05. The passenger is seen exiting the stolen vehicle as Elder falls to the ground, just after the impact occurs. State's Ex. 7 at 4:07 – 4:08. App. 43, l. 5 – 45, l. 25; App. 51, ll. 15-21; App. 64, l. 25 – 65, l. 5.

The impact of the collision dislodged Elder's service weapon from his hands. The weapon became closed in the door of the patrol vehicle which caused a dent in the door frame. The driver-side door of the patrol vehicle was dented, and there was some damage to the rear driver-side area of the patrol vehicle from the collision. Elder received a small scrape on his left knee which he treated with an alcohol swab. App. 46, l. 16 – 49, l. 14; App. 60, ll. 7-13; App. 63, l. 23 – 64, l. 4. Other officers with the Greenville Police Department continued the pursuit of the stolen vehicle. The entire pursuit lasted between six-and-seven minutes. The stolen vehicle continued to flee until it was involved in a single-car accident where it rolled numerous times, totaling the vehicle. The driver of the stolen vehicle was identified as Respondent, Samir Shank. App. 67, l. 12 – 71, l. 7. Elder originally charged Respondent with one count of hit and run with property damage which was later voided to bring the charges of failure to stop for a blue light and ABHAN. App. 60, l. 14 – 62, l. 25.

The focus of the trial was the ABHAN charge. During opening statements, defense Counsel Diaz conceded that Respondent was guilty of failure to stop for a blue light. She emphasized to the jury that Respondent's sole intent that day was to evade law enforcement, and

that the collision occurred not because Respondent sought to injure Elder but because the passenger in the vehicle opened his door as Respondent tried to flee. App. 31 – 33.

The state's main witness at trial was Officer Elder. Elder testified that he was close enough to touch the stolen vehicle as it passed him and that after he had been knocked down his head was towards the back of his vehicle between the two cars. App. 45, ll. 18-22; App. 46, ll. 9-15. On cross examination, Elder admitted that the passenger, not Respondent, opened the door that ultimately hit his open vehicle door. App. 58, ll. 2-6. When questioned if Respondent swerved to get around him, Elder responded that "he put it reverse towards my vehicle, yes, ma'am." App. 59, ll. 8-10. On recross-examination, Elder conceded that when the doors struck each other, Respondent was *reversing straight back.* He further testified "I can't say he [Respondent] turned the wheel to strike me. However, I was struck by my door – by his door." App. 65, ll. 1-6.

Counsel Neely requested that the trial court charge the jury on the lesser-included offense of assault and battery third-degree. He argued that the testimony about the specific injury that Elder incurred, a scraped knee, supported a charge on the lesser-included offense. App. 92, ll. 14-19. The state objected to the lesser-included offense being charged to the jury, arguing that while there was an injury, the evidence it had presented went toward whether there was an offer or attempt to commit a great bodily injury. App. 93, ll. 3-9. The trial court noted that the state was proceeding under the second prong from the ABHAN statute, the "means likely to produce" portion. App. 93, ll. 19-21. Counsel Neely highlighted that the ABHAN indictment in Respondent's case included both subsection A, the injury specific provision, and subsection B, the "means likely to produce" provision. He argued "[t]hey [the State] didn't pick a horse and

ride it all the way to the finish line; they kind of done both. And so, because they've done both, I do believe that the A&B third is appropriate." App. 93, l. 22 – 94, l. 21. The trial court ruled:

> Based on the testimony in the case, and the State is producing – is – *the State is proceeding on the – the second part of the statute that they're alleging that this was accomplished by means likely to produce death or great bodily injury, the State is not proceeding on the injury itself. So, I believe that this is an either/or.* This is going to be a question of – of whether the State has proven beyond a reasonable doubt of criminal intent in – in the matter. So, I'm going to deny that request, but your objection is noted for the record.

App. 94, l. 22 – 95, l. 9 (emphasis added).

Both parties spent most of their closing arguments discussing the ABHAN charge. The state placed the entire ABHAN statute on a projector for the jury to view during its closing argument. App. 100, ll. 3-10. The state argued that it was unclear what hit Elder and knocked him to the ground – his door or the door of the stolen vehicle – despite the testimony from Elder that he was in fact struck by his own door.[3] It further argued that it was "sheer luck" that Elder did not lose the use of his fingers and that his head and upper body avoided devastating injury in the collision. The state contended that Respondent did not have to intend to harm Elder that day, that he only had to intend the act that caused the injury, that of reversing the car. App. 101 – 103.

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[3] Q: Now, that opened passenger door makes -- right, it makes contact with your open door, right?
A: Yes, ma'am.
Q: It hits the door of your patrol vehicle, right?
A: Yes, ma'am.
Q: And your patrol vehicle hits you, correct?
A: Yes, ma'am.
Q: So your door pushes you backwards, correct?
A: Yes, ma'am.
Q: To the ground, right?
A: Yes, ma'am.
App. 58, ll. 10-25.

In closing argument, Counsel Diaz reiterated that the case was not about the failure to stop for blue lights charge or the use of a vehicle without permission charge. App. 104, ll. 11-14. She conceded that Respondent was guilty of those charges and focused on the fact that Respondent's goal that day was to flee law enforcement. She noted that Respondent had attempted to swerve around Elder but misjudged the open passenger-side door. She emphasized that Respondent lacked the intent to harm Elder. App. 104 – 106. She further argued that the injury received, a scraped knee, was minor and common and that the jury did not have to imagine what injuries could have occurred because it knew what injury had occurred. App. 107, ll. 6-19; App. 110, ll. 1-12. She argued it was not luck that spared Elder further injury but the fact that Respondent did not intend to harm him. App. 110, ll. 13-20.

During the jury charge, the trial court charged the entire ABHAN statute as well as the definition of "great bodily injury." App. 122, l. 25 – 123, l. 12. After the jury was excused, Counsel Neely renewed the objection and request to charge the lesser-included offense, emphasizing to the court that it had charged the jury on both subsections of ABHAN. App. 127, ll. 13-20. The trial court noted Counsel Neely's renewal for the record but again denied the request to charge the lesser-included offense. App. 127, l. 21 – 128, l. 2. Approximately thirty-five minutes into deliberations, the jury sent out a note requesting that the court define ABHAN again. The court, for a second time, charged the jury with the entire ABHAN statute and the definition of "great bodily injury." App. 130, l. 8 – 131, l. 7. A short time later, the jury returned with the verdicts finding Respondent guilty as indicted. App. 131, l. 20 – 133, l. 8.

STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review only errors of law." State v. Sams, 410 S.C. 303, 307, 764 S.E.2d 511, 513 (2014); see also State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). "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." State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007). "[I]n the context of a trial court's decision not to charge a requested lesser-included offense, we review the trial court's decision de novo. We must reverse and remand for a new trial if the evidence in the record is such that the jury could have found the defendant guilty of the lesser offense instead of the crime charged." State v. Gilmore, 396 S.C. 72, 77, 719 S.E.2d 688, 690–91 (Ct. App. 2011). "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, at 308, 764 at 513.

ARGUMENT

The Court of Appeals correctly held that the trial court committed reversible error in failing to charge the jury with the lesser-included offense of assault and battery third-degree where there was evidence presented during trial to support the charge and where the evidence would permit a jury to rationally find Respondent guilty of the lesser offense.

The trial court committed reversible error when it declined to charge the jury on the lesser included offense of assault and battery third degree. The trial court did not apply the well settled law that the evidence submitted at trial determines the law to be charged to the jury. Instead, the trial court determined that it would not charge the lesser included offense because the state was proceeding under the second portion of the ABHAN statute, that the injury was accomplished by means likely to produce death or great bodily injury, and not on the injury actually incurred by Elder. This was an error of law.

"[T]he purpose of jury instructions is to enlighten the jury as to what law is applicable to a certain state of facts in order that a just, fair[,] and proper verdict can be reached." State v. Peer, 320 S.C. 546, 554, 466 S.E.2d 375, 380 (Ct. App. 1996). "The trial court is required to charge only the current and correct law of South Carolina." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). "The *evidence presented at trial determines the law to be charged* to the jury." State v. Gilliland, 402 S.C. 389, 400, 741 S.E.2d 521, 527 (Ct. App. 2012) (emphasis added).

"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. 303, 308, 764 S.E.2d 511, 513 (Ct. App. 2014); 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). "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." Id. 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)) (emphasis added).

Assault and battery third degree is a statutorily defined lesser included offense of ABHAN. S.C. Code Ann. § 16-3-600 defines the various degrees of assault and battery charges in South Carolina. Section (B)(1) 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." Section (E)(1) states "A person commits the offense of assault and battery in the third degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so." Section (E)(3) states "Assault and battery in the third degree is a lesser-included offense of assault and battery in the second degree, as defined in subsection (D)(1), assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29."

The trial court based its refusal to charge assault and battery third degree not on the lack of evidence in the record but because the state was proceeding under the "likely to produce" section of the ABHAN statute. This Court has already made clear that the state's version of the facts does not dictate the jury charge. In State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241,

241 (1996), the Court of Appeals ruled that "under the State's version of the facts, there was no evidence petitioner committed the lesser offense." However, this Court reversed and remanded for a new trial holding, "*we are not confined to the State's version of the facts*. The law to be charged is determined by the evidence presented at trial." Id. citing State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986) (emphasis added). This Court continued to restate the long-standing principle that "[t]he trial judge is to charge the jury on a lesser included offense if there is *any evidence* from which it could be inferred the lesser, rather than the greater, offense was committed." Id. (emphasis added). The theory of the state's case has absolutely no bearing on what law is charged to the jury. That the state was arguing that the injury occurred by means likely to produce great bodily injury or death would not preclude the jury from finding that Respondent was guilty of assault and battery third degree based on the evidence adduced at trial.

Reviewing the facts in the light most favorable to Respondent reveals that the evidence warranted a charge on the lesser included offense of assault and battery third degree. The video of the incident showed that Respondent did not back the car at or towards Elders but backed the vehicle straight back with the brakes engaged the entire time. The collision that injured Elder only occurred because of the open passenger door colliding with Elder's open driver door which knocked Elder down, not because Respondent was targeting Elder with the stolen vehicle. Had one of the two open vehicle doors been closed, an impact would not have occurred, and Elder would not have sustained any injury. Elder even testified that he could not say Respondent was trying to target him and that he was in fact struck by his own car door, not Respondent's car. Further, the evidence showed that the actual injury Elders suffered was extremely minor, a scraped knee. There was evidence in the record to support a charge of assault and battery third

degree. The trial court's denial of Respondent's request to charge was an abuse of discretion based on an error of law.

Petitioner relies on State v. Geiger, 370 S.C. 600, 635 S.E.2d 669 (2006) arguing that the Respondent could not have been found guilty of only assault and battery third degree because there "would have to be some evidence from which a rational factfinder could conclude that the act was not accomplished by means likely to produce death or great bodily injury and no such evidence existed." Petitioner continues, "Shank hit an officer with a car. Hitting someone with a car is a means highly likely to produce death or great bodily injury." BOP, pg. 8.

Petitioner's argument fails on several fronts. First, its reliance on Geiger is misplaced. In Geiger, the elderly female victim placed a 9-1-1 call in the early morning hours of January 31, 2003, to report that she had been sexually assaulted in her home. When first responders arrived on scene, they located the victim who appeared recently battered, was very frightened, and had blood on her face. Geiger's driver's license was found on the coffee table, and his clothing was discovered in the bathroom. The victim identified Geiger as her attacker prior to being taken to the hospital. Geiger at 603, 635 S.E.2d at 671.

At trial, the victim testified that Geiger was an acquaintance of her son's that had been in her house on other occasions. Geiger appeared at her home that evening unannounced, but she let him into the house and gave him a liquor drink at his request. Geiger excused himself to the bathroom then returned naked and brandishing the victim's pistol. The victim's testimony was somewhat uncertain as to the exact location and chronology of the events, but she maintained that Geiger demanded she give him money, slapped her in the head repeatedly, put the gun to her head, put his penis in her mouth, and attempted to force her legs apart to have sexual intercourse

with her. The victim was able to prevent Geiger from penetrating her. After the physical attack, Geiger searched the home for money and then left. Id. at 603-04, 635 S.E.2d at 671.

First responders described the victim as being very frightened and upset, stating her home was in disarray. The sexual assault nurse examiner who treated the victim at the hospital opined that her injuries were consistent with her description of the events. DNA testing indicated the clothing in the bathroom of her home had been worn by Geiger. Geiger did not put up any witnesses and limited his defense to cross-examination of the state's witnesses. At the close of evidence, Geiger's attorney requested a charge of ABHAN as a lesser-included offense of ACSC. The trial court denied the request, stating the record was devoid of evidence that Geiger committed ABHAN rather than ACSC. Id. at 604, 635 S.E.2d at 671.

On appeal, Geiger argued that the evidence presented at trial supported an inference that he was guilty solely of the lesser-included crime. Id. at 605, 635 S.E.2d at 672. The Court of Appeals disagreed, holding the "mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty only of the lesser offense." Id. at 608, 635 S.E.2d at 674. The court held that the trial record contained no evidence tending to show Geiger may have assaulted the victim but not attempted a sexual battery. The court concluded,

> The trial judge did not err in denying Geiger's request to charge the lesser included offense of ABHAN. There is *no evidence* tending to show Geiger was guilty solely of the lesser crime. *The only reasonable inference to be drawn from the totality of the evidence was that Geiger either did or did not commit ACSC.* The mere contestation that the jury might have disbelieved [victim's] testimony as to the sexual acts and nature of Geiger's assault does not entitle him to have the jury charged with the lesser offense of ABHAN. Id. at 610-11, 635 S.E.2d at 675. (Emphasis added)

Greiger is inapposite to Respondent's case. Grieger argued he was entitled to the lesser included offense because the lack of forensic evidence of a sexual assault could create the inference that no sexual assault occurred. Respondent is not relying on a lack of evidence or on the mere contention that the jury might accept the state's evidence in part and reject it in part but on the *actual evidence* in the record. That evidence shows Respondent's lack of intent to injury Elder, the actions he took consistent with that intent, and the actual injury of a scraped knee. Despite the assertions of Petitioner, the video of the incident showed that Respondent did not back the car at or towards Elder but went straight back. Respondent did not hit anyone with a car, the open passenger-side door of his vehicle collided with Elder's open driver-side door which knocked Elder down. The video shows that constant pressure was applied to the brakes as the vehicle slowly backed up, that the vehicle was at no point angled toward Elder, and that, but for the open doors, the vehicle would have reversed passed Elder without incident. Further, the evidence showed that the actual injury Elder suffered was extremely minor – a scraped knee. Stated plainly, there is a reasonable inference to be drawn from the totality of the evidence that Respondent committed assault and battery third, not ABHAN.

Second, Petitioner's argument ignores the evidence that is in the record. Petitioner relies upon the proposition that Respondent struck Elder with his car. That is an overstatement of what occurred. Respondent's car door struck Elder's car door which in turn then struck Elder. At no time did any portion of Respondent t's car come into contact with Elder's body. Again, the video of the incident shows that Respondent reversed slowly with his breaks on, not at a high speed, and that the car was not angled toward Elder at any point. Further, Elder was not greatly injured. While a jury could have found Respondent unlawfully injured Elder through means likely to produce death or great bodily injury, it is equally plausible that a jury could have found

Respondent guilty of merely causing an unlawful injury to Elder. See State v. Patterson, 337 S.C. at 233, 522 S.E.2d at 854 ("In order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts.")

Third, Petitioner's argument ignores that the trial court did not deny the lesser included charge because it was not supported by the evidence. The trial court denied the lesser included charge because it was not the state's theory of the case. As discussed above, that was improper.

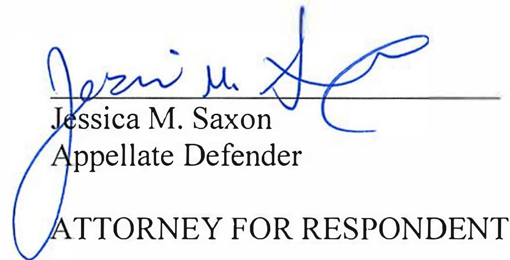
Lastly, Petitioner's argument ignores that the jury had to be recharged on the law of ABHAN. It is apparent that the jury grappled with applying the law that it had been given with the facts it had determined to be true. Considering the record in the light most favorable to Respondent, with such a minor injury and the video from the incident clearly showing Respondent did not drive at Elder, along with the jury's request to be recharged on the law of ABHAN, it is logical to conclude the jury could have found Respondent guilty of the lesser included offense if the court had instructed the jury on the law of assault and battery third degree.

"As recognized by the United States Supreme Court, one reason a defendant is entitled to an instruction on a lesser included offense when supported by the evidence is to prevent a jury—when the defendant plainly is guilty of some offense—from finding the defendant guilty of the greater offense because the only alternative is to let him walk free." State v. Brown, 360 S.C. 581, 596, 602 S.E.2d 392, 401 (2004) citing Keeble v. United States, 412 U.S. 205, 212–213 (1973). The jury in Respondent Appellant's case was never given the opportunity to consider the lesser-included offense. Instead, the jury had to decide whether to find Respondent guilty of ABHAN or let him walk free on the ABHAN charge, even though the evidence in the record tended to show Appellant was guilty of assault and battery third-degree. Respondent was

entitled to an instruction on the lesser-included offense of assault and battery third-degree. The failure of the trial court to charge the jury on the lesser-included offense was error because there was evidence in the record from which a jury could reasonably infer Respondent only unlawfully harmed Elder by causing him to sustain a scraped knee. The evidence in the record does not conclusively establish that Respondent could only be guilty of ABHAN. Thus, the trial court erred in failing to charge the lesser included offense and the failure was not harmless, because the lack of lesser included offense directly contributed to the ABHAN verdict. This Court should affirm the Court of Appeals holding that the trial court committed reversible error in failing to charge the jury on the lesser included offense of assault and battery third degree.

CONCLUSION

Based on the forgoing argument, Respondent respectfully requests that this Court affirm the Court of Appeals and remand the ABHAN charge to the Court of General Sessions of Greenville County for a new trial.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR RESPONDENT

This 20th day of January, 2026.