STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

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

Opinion No. 28328 (Heard April 21, 2026 – Filed May 6, 2026)

THE STATE,

PETITIONER,

V.

SAMIR KEVIN SHANK,

RESPONDENT

APPELLATE CASE NO. 2025-001241

PETITION FOR REHEARING

On May 6, 2026, this Court reversed a unanimous Court of Appeals panel, concluding "the trial court did not err in refusing to charge the jury on Third-Degree Assault and Battery as a lesser-included offense. No evidentiary basis existed to support the requested lesser-included charge, and the jury was properly instructed on the applicable law." State v. Kevin Samir Shank, Op. No. 28328 (S.C. S. Ct. filed May 6, 2026). This Court based its holding on the premise in State v. Geiger, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (Ct. App. 2006), that no evidence supported a rational inference that Respondent committed *only* the lesser offense. Pursuant to Rule 221(a), SCACR, Respondent requests that this Court grant rehearing because this holding

violates Respondent's due process rights and has created tension and confusion surrounding the lesser-included offense jurisprudence of this state.

Over numerous decades, the lesser-included offense doctrine has been established in this state's jurisprudence. In 1943, our Supreme Court considered whether the defendant was prejudiced by the trial court's failure to charge manslaughter. In discussing whether the defendant was entitled to the lesser-included offense charge, the Court wrote, "[w]here there is *slightest evidence* that accused may have committed the degree of the offense inferior to, and included in, the one charged, the law of such inferior degree ought to be given." State v. Bealin, 201 S.C. 490, 23 S.E.2d 746, 750 (1943) (emphasis added). It has long been the standard in this state that an appellate court "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). This is because due process requires a lesser-included offense be given when warranted by the evidence if it would permit a jury to find the defendant guilty of the lesser offense. See State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999).

Indeed, "[t]he requirement of the Constitution that the judge shall declare the law means that he shall explain so much of the criminal law as is applicable to the issues made by the evidence adduced on trial." State v. Durant, 87 S.C. 532, 70 S.E. 306 (1911). "As a general rule, where the crime charged is one that admits of degrees, and the evidence tends to establish an offense of a grade lower than that charged, the difference between the different degrees should be made the subject of an explanatory charge." State v. Bealin, 201 S.C. 490, 23 S.E.2d 746, 749 (1943). Critically, "an appellate court does not sit as a factfinder in a criminal case and

should avoid resolving case in a manner which appears to place the appellate court in the jury box." State v. Brown, 360 S.C. 581, 594, 602 S.E.2d 392, 400 (2004)

This Court found no evidence in the record to support the lesser-included offense of assault and battery (A&B) third, holding as a matter of law that the manner in which the vehicle was used could only constitute assault and battery of a high an aggravated nature (ABHAN). However, this was an issue of fact to be decided by the jury. Respectfully, this holding ignores the evidence in the record of the actual minor injury to Elder, the slow rate of speed at which the car was moving with its brakes illuminated, that Respondent pulled to the left of the cul-de-sac while Elder pulled to the right so the cars were not directly lined up so that Respondent reversed straight back and not at the officer, and the testimony of Elder that Respondent was not targeting him. App. 65, ll. 5-6. This holding further ignores that there was no evidence presented that Respondent knew Elder's door was open, knew that Elder was standing in the door, or that he knew that the open doors would strike one another. It disregards that the car was moving so slowly that the passenger was able to step out of the vehicle after the doors collided with one another and walk away. Finally, the holding discounted that the jury asked to be recharged on the law of ABHAN. All of this is evidence, taken in the light most favorable to Respondent, required the trial judge to charge the jury on A&B third, and the failure to do so was prejudicial error.[1] See State v. Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014); State v. Gilmore, 396 S.C. 72, 77, 719 S.E.2d 688, 690–91 (Ct. App. 2011).

[1] As stated during the oral argument, Respondent asserts trial counsel should have requested lesser-included offense charges on assault and battery second degree, as well as the requested assault and battery third degree. An argument exists for a lesser-included offense charge of A&B first degree *if* the actual injury to Elder is immaterial because the evidence supports that a jury could find Respondent "unlawfully attempted to injury another with present ability to do so and the act is accomplished by means likely to produce death or great bodily injury" satisfying A&B first degree.

Geiger is inapposite to Respondent's case. Gieger 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 to sustain an inference or on the mere contention that the jury might accept the state's evidence in part and reject it in part. Respondent relies on the *actual evidence* in the record which puts into question Respondent's intent, the actions he took consistent with that intent, and the actual injury of a scraped knee.

Respondent's intent was the sole question at trial. As this Court has long recognized, "whether a defendant possessed the requisite intent at the time the crime was committed is typically a question for jury determination because, without a statement of intent by the defendant, proof of intent must be determined by inferences from conduct." State v. Meggett, 398 S.C. 516, 527, 728 S.E.2d 492, 498 (Ct. App. 2012) citing State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971). In fact, the question of intent is always one for the jury "except in *extreme* cases where there is *no evidence* thereon." Id. (emphasis added).

The evidence in the record makes Respondent's criminal intent a quintessential jury question. While a jury's view of the evidence could support a conviction of ABHAN, there is evidence in the record, noted above, from which a rational juror could have found Respondent guilty of only A&B third degree. Holding otherwise upends decades of jurisprudence which have held that if there is *any evidence* to support the charge, it should be presented to the jury. See Dempsey v. State, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005), abrogated by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Here, as recognized by the Court of Appeals, there is actual direct evidence in the record to support the lesser-included offense. Critically, even the trial court did not rule that there was no evidence to support the offense, only that the state's

theory of the case was ABHAN or nothing. That was not a valid basis upon which to deny the request, as the law to be charged is determined by the evidence presented at trial. State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996).

In minimizing the nature of the injury, the most patent evidence to support the lesser-included offense, this Court found the risk to Elder was not theoretical. To proceed under S.C. Code. Ann. 16-3-600(B)(1)(a), the risk could not be theoretical because an actual great bodily injury is required. However, respectfully, under S.C. Code Ann. 16-3-600(B)(1)(b), the risks must always be theoretical; under this subsection, the actual injury does not need rise to great bodily injury or death, there only needs to be a risk that the injury occurred by means likely to cause great bodily injury. When the state is operating under 16-3-600(B)(1)(b), it is proceeding on a lesser injury that occurred by means which, theoretically, could have caused a greater injury. All AHBAN prosecutions brought under 16-3-600(B)(1)(b) are based on theoretical risk and the fact that an act *could* produce harm but does not produce harm. This is why the assault statute has degrees and subsections. While it is true that ABHAN under the (B)(1)(b) prong does not require a great bodily injury, it does *require an actual injury*. Thus, the nature of the injury is critical to the determination of whether a lesser-included offense should have been submitted to the jury and cannot be so easily disregarded. The injury alone is direct evidence of the A&B third. The other direct evidence in the record, discussed above, further supports the charge. "[W]here there is direct evidence [ ], the trial court, and this court on review, must use the any evidence standard to determine whether the requested charge should be given." State v. Gilmore, 396 S.C. 72, 80, 719 S.E.2d 688, 692 (Ct. App. 2011)

As stated by this Court in 1943, "[a]s a general rule, where the crime charged is one that admits of degrees, and the evidence tends to establish an offense of a grade lower than that

charged, the difference between the different degrees should be made the subject of an explanatory charge." Bealin, 201 S.C. 490, 23 S.E.2d 746, 749-750 (1943). The Court continued,

> It is doubtless true that the conditions are exceptional which warrant a refusal to instruct as to the power to convict of a lower degree of the crime charged, and great care should be preserved not to withhold such instruction unless the case is one in which no possible view of the facts would justify any other verdict except a conviction or acquittal of the crime charged. While if the evidence is of such a character as not to justify a finding of an included or lesser offense the court may properly refuse or omit to charge as to such offense, *it is always a delicate matter for the court to determine the state of evidence as a matter of law and so to withhold from the jury the right to find as to such included or lesser offense.* Generally, such instruction should be given, unless the evidence positively excludes any inference that the lesser crime was committed, and accused is not required to show facts justifying the conclusion that such lesser crime and not the greater was committed in order to have the instruction given."

Id. (emphasis in original).

Questions of intent and fact are for the jury. There is actual evidence in the record to support the lesser-included offense of A&B third. By ruling there was no evidence in the record to support the charge, this Court departed from precedent and improperly invaded the jury's domain of finding the facts. It was for the jury, and the jury alone, to determine whether Respondent's actions that day rose to the level of AHBAN or A&B third.

WHEREFORE, this Court should rehear this case and issue an opinion in line with the decades of precedent holding that *any evidence* in the record that supports the charge requires remand for a new trial. See State v. Gilmore, 396 S.C. 72, 77, 719 S.E.2d 688, 690–91 (Ct. App. 2011).

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This 21st day of May, 2026.