

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Greenville County

Honorable G.D. Morgan, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DENIS JOHN HINKLE, JR.,

APPELLANT

APPELLATE CASE NO. 2026-000478

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court's instruction that extreme indifference to human life was evidenced by the use of a deadly weapon was an unconstitutional comment on the facts?

STATEMENT OF THE CASE

A Greenville County grand jury indicted Appellant for domestic violence of a high and aggravated nature (DVHAN) at its February 18, 2025 term. R.* (Indictment). Appellant was tried from February 17 to 19, 2026, before the Honorable G.D. Morgan, Jr., and a jury. Tr. 1. Assistant public defenders Zackary R. DeMaio and Morgan C. Shankle represented Appellant; Elterrice F. Westfield and Peyton C. Swancy represented the state. Tr. 1. The jury convicted Appellant as indicted. Tr. 228, ll. 18-22. Judge Morgan sentenced Appellant to fifteen (15) years' imprisonment, suspended upon the service of eight (8) years' imprisonment followed by three (3) years' probation. Tr. 233, ll. 11-17.

This appeal follows.

STATEMENT OF FACTS

The state alleged that on April 5, 2023, Appellant repeatedly struck Brittany Woods in the face, threatened to kill her, and then attempted to hit her with his truck. Woods testified that she and Appellant had been dating for about six months, and they had previously lived together for about three months. Tr. 89, ll. 15-17; 90, ll. 1-13. Earlier in the day on April 5, 2023, Appellant asked Woods to come to his home in Abbeville to assist with a home renovation project. Tr. 91, ll. 7-10. The two worked on that project for the majority of the day. Tr. 92, ll. 9-12.

Woods testified that, on the drive back to her house, she and Appellant got into an argument about a previous disagreement. Tr. 93, ll. 9-14. This argument escalated into a screaming match and then became physical. Tr. 93, ll. 9-14. Appellant reached over and struck Woods in the face and threatened to kill her. Tr. 93, ll. 17-18. Woods eventually got out of the truck, at which time Appellant sped up and caused Woods to be knocked to the ground by the truck. Tr. 95, ll. 7-18. Woods testified that Appellant then backed up, causing her to be squeezed between the curb and “him spinning tires on the left side of [her] body.” Tr. 95, ll. 16-21.

During its closing argument, the state emphasized that Appellant’s truck constituted a “deadly weapon” in the manner that he used it. Tr. 193, ll. 4-5; 197, ll. 10-11 (“So come on, you all. A truck is involved.”). The trial court charged the jury on DVHAN and the lesser-included offenses of domestic violence first and second degree. Tr. 214-15.

During its charge on DVHAN, the trial court charged the jury the following:

Now, the Defendant is charged with [DVHAN]. The state must prove beyond a reasonable doubt that the Defendant caused physical harm or injury to a member of the Defendant’s own household, or that the Defendant offered or attempted to cause physical harm or injury to a member of the Defendant’s own household, with the apparent present ability to cause harm or

injury under circumstances reasonably creating a fear of imminent danger.

...

Now, the state must also prove one of the following: No. 1) that the Defendant committed the offense under circumstances manifesting extreme indifference to the value of human life, and great bodily harm to the victim results, or; No. 2) The Defendant committed the offense with or without an accompanying battery and under circumstances manifesting extreme indifference to the value of human life, and would reasonably cause a person to fear imminent great bodily injury or death.

Now, circumstances which may show extreme indifference to the value of human life *include using a deadly weapon*. Deadly weapon means any instrument which can be used to inflict deadly force.

Tr. 213, l. 14 – 214, l. 12 (emphasis added). After one hour and one minute of deliberation, the jury requested to be recharged on DVHAN and both lesser-included offenses. Tr. 222, ll. 21-25; R.* (Court's Exhibit 2). The trial court obliged, again charging the jury that "circumstances which may show extreme indifference to the value of human life include using a deadly weapon." Tr. 225, ll. 5-8. Appellant did not object to either charge. Tr. 222, 228.

The jury ultimately convicted Appellant of DVHAN, and the trial court sentenced Appellant to a split sentence of prison followed by probation. Tr. 228, ll. 18-22; 233, ll. 11-17.

STANDARD OF REVIEW

Whether a given jury charge constitutes an unconstitutional comment on the facts should be reviewed *de novo* as a question of law. *See State v. Frasier*, 437 S.C. 625, 633-34, 879 S.E.2d 762, 766 (2022) (holding constitutional criminal procedure questions of law are reviewed *de novo*); *State v. Miller*, 441 S.C. 106, 119, 893 S.E.2d 306, 313 (2023) (extending *Frasier* to voluntariness of a confession); *cf. Powell v. Keel*, 433 S.C. 457, 462, 860 S.E.2d 344, 346 (2021) (interpretation of a statute is reviewed *de novo*).

ARGUMENT

The trial court's instruction that extreme indifference to human life was evidenced by the use of a deadly weapon was an unconstitutional comment on the facts.

The trial court improperly gave the jury an “example” of extreme indifference to human life by instructing that using a deadly weapon constituted “circumstances which may show extreme indifference to the value of human life.” That jury charge was an unconstitutional charge on the facts. Further, because the constitutional prohibition on commenting on the facts is a limitation on the judicial power itself, the issue is exempted from typical error preservation rules. This Court should reverse and remand for a new trial.

A. The trial court commented on the facts.

"Judges shall not charge juries in respect to matters of fact but shall declare the law." S.C. Const. art. V, § 21; *see State v. Brown*, 443 S.C. 196, 198-99, 904 S.E.2d 448-449-50 (2024) (collecting cases). The Constitution “forbid[s] the judge, unqualifiedly, from charging the jury in respect to matters of fact, and thus leaving such matters exclusively to the jury, unaided by any suggestions from the judge.” *State v. Mitchell*, 56 S.C. 524, 35 S.E. 210, 213 (1900). The question this Court must ask is “simply whether the circuit judge erred in giving any advice or suggestion to the jury as to how they might deal with the facts.” *Id.* at 214. Article V, Section 21 is a limitation on judicial power itself; the provision “prohibit[s] courts from commenting to the jury on the facts of a case.” *State v. Stukes*, 416 S.C. 493, 499, 787 S.E.2d 480, 483 (2016). “Accordingly, it is not within the province of the court to express an opinion to the jury on its view of the facts.” *Id.*

The charge given in this case is almost perfectly analogous to another jury charge that, in the past, was frequently given: that malice can be inferred through the use of a deadly weapon. In

State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), our Supreme Court analyzed the inferred malice charge. The Court held that the charge was improperly given in Burdette’s case because there was some evidence that tended to “reduce, mitigate, or justify Burdette’s killing of Victim....” *Id.* at 495, 832 S.E.2d at 578 (citing *State v. Stanko*, 402 S.C. 252, 260, 741 S.E.2d 708, 712 (2013)). However, the Court went on to analyze whether the implied malice charge should be given in *any* case. *Id.* at 502, 832 S.E.2d at 582. The Court first noted that “it is improper to give examples of conduct the jury may consider when determining whether the State has proven an element of a crime....” *Id.* (citing, *inter alia*, *State v. Grant*, 275 S.C. 404, 407-08, 272 S.E.2d 169, 171 (1980) (holding it was improper for the trial judge to charge the jury that the defendant’s flight may be considered as evidence of guilt) (parenthetical in *Burdette*)). Accordingly, “[w]hen the trial court tells the jury it may use evidence of the use of a deadly weapon to establish the existence of malice, a critical element of the charge of murder, the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury.” *Id.* Therefore, the Court directed that the jury charge should *never* be given to the jury. *Id.* at 503, 832 S.E.2d at 582.

The manifestation of “extreme indifference to the value of human life,” is an essential element of DVHAN. S.C. Code Ann. § 16-25-65(A). Without it, the offense of DVHAN cannot be committed. *See id.*¹ While the fact that extreme indifference is evidenced by the use of a deadly weapon may be a correct statement of law, that fact does not save a comment on the facts. *See id.* § 65(D)(1). The Constitution does not prohibit *legally inaccurate* comments on the facts; it prohibits *all* comments on the facts. S.C. Const. art. V, § 21 (“Judges *shall not* charge juries in

¹ It is also possible to commit the offense of DVHAN by committing domestic violence first degree while simultaneously violating a protection order. *Id.* § 65(A)(3). That sub-element is not at issue here and was not charged to the jury.

respect to matters of fact, but shall declare the law.” (emphasis added)). “The testimony of a victim [in a criminal sexual conduct trial] need not be corroborated....” S.C. Code Ann. § 16-3-657. However, charging the same to the jury constitutes reversible error as a comment on the facts. *Stukes*, 416 S.C. at 499, 787 S.E.2d at 483. And, as the *Burdette* Court recognized, the inferred malice instruction that it invalidated is legally accurate, but it was invalidated all the same. *See* 427 S.C. at 503-04, 832 S.E.2d at 583 (“Of course, our ruling does not prohibit a trial court from citing outside the presence of the jury the proposition that malice may be inferred from the use of a deadly weapon,” such as when ruling on a motion for directed verdict).

Here, the solicitor repeatedly argued that Appellant’s truck could be a “deadly weapon” under the circumstances of this case. The solicitor was entitled to make this argument, however the solicitor was not entitled to the trial court’s help. By charging the jury that extreme indifference to human life could be inferred through the use of a deadly weapon, the trial judge gave an improper “example” which emphasized and elevated a major fact to the jury. Because that is the exact evil that the constitutional prohibition on comments on the facts is meant to cure, the trial court unconstitutionally commented on the facts, and this Court should reverse and remand for a new trial.

B. Comments on the facts are exempt from typical error preservation rules.

“[I]t is not within the province of the court to express an opinion to the jury on its view of the facts.” *Stukes*, 416 S.C. at 499, 787 S.E.2d at 483. At common law, “it was customary to state to the jury the issues involved, to explain the law applicable to the case, and to recapitulate the testimony so as to refresh the minds of the jurors and enable them to apply the law to the testimony, and to pass intelligently upon it.” *Norris v. Clinkscales*, 47 S.C. 488, 25 S.E. 797, 804 (1896). Prior to the adoption of the current Article V, § 21, it was exceedingly common for

judges to give the jury their opinion on matters of fact. In fact, it was considered “not only the right, but also the *duty* of the Judge, in cases of complicated facts, to give to the jury the aid of his experience, discrimination and judgment, upon the evidence as well as the law, so as he finally leaves the ultimate decision of all facts to their judgment.” *Devlin v. Killcrease*, 27 S.C.L. 425, 428 (1842).²

Perhaps unsurprisingly, the Supreme Court noted shortly after the adoption of the current Article V, § 21, that the “power ha[d] been greatly abused.” *Norris*, 25 S.E. at 804. “Not unfrequently judges evinced partisanship in their charges, and molded verdicts to their will; and as frequently juries shirked responsibility, and really adopted the opinion of the judge, finding their verdict as he directed.” *Id.* The express purpose of Article V, § 21 was “to put a stop to this.” *Id.*; *Redding v. South Carolina R.R. Co.*, 5 S.C. 67, 69 (1874) (“it is quite clear that [the constitutional provision’s] sole intention was to prevent judges from forcing upon the juries their own convictions as it regards matters of fact”).

In *State v. Orr*, 128 S.C. 279, 122 S.E. 771 (1924), our Supreme Court reviewed a jury charge argued to be a charge on the facts. In that case, the trial court instructed the jury: “In this case, you are relieved of the necessity of determining whether or not there has been a homicide, and you are likewise relieved of the necessity of determining who committed it. The defendant admits that he slew the deceased with a deadly weapon. But he says, ‘While I did that, I did it in self-defense’.” 122 S.E. at 772. The Court found that this was an unconstitutional comment on

² This common law power was placed on full display during one of the most famous trials in the history of this nation. During the trial of Lizzie Borden, the presiding justice instructed the jury, among other things, that “they should take into account Lizzie’s exceptional Christian character, which entitled her to every inference in her favor.” Douglas O. Linder, *The Trial of Lizzie Borden: An Account*, Famous Trials, <https://famous-trials.com/lizzieborden/1437-home> (last accessed August 5, 2026). One newspaper report described the justice as “the senior counsel for the defense.” *Id.*

the facts. *Id.* Interestingly, the defendant did not “call the attention of the trial court” to the issues, which the *Orr* Court recognized was typically a bar to appellate review of the issue. *Id.* However, the Court stated: “[Error preservation] is a rule of court and *must give way* to the constitutional prohibition as to a charge on the facts.” *Id.* (emphasis added). The Court vacated the conviction and remanded for a new trial. *Id.*

While it does not appear that this rule has been employed since *Orr*, *Orr* has never been overruled. And its rule is a logical exception to the error preservation rules, because the constitutional prohibition on commenting on the facts is a limitation of judicial power itself. In other contexts, limitations on judicial power are exempt from appellate preservation rules. *See, e.g., Town of Hilton Head Island v. Godwin*, 370 S.C. 221, 223, 634 S.E.2d 59, 62 (Ct. App. 2006) (lack of subject matter jurisdiction can be raised at any time, including for the first time on appeal). “This imperative mandate found in the organic law of the land, this court, even if disposed to do so, cannot and will not evade the responsibility of enforcing whenever such mandate is violated.” *State v. Mitchell*, 56 S.C. 524, 35 S.E. 210, 213 (1900) (reversing conviction where trial court improperly commented on credibility of witnesses); *see State v. Kennedy*, 272 S.C. 231, 234, 250 S.E.2d 338, 339 (1978) (applying provision and stating, “A fundamental concept of our system of justice is that every person charged with a crime has an absolute right to a fair and impartial trial”); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND ch. 27 (1769) (Wallachia Publishers 2015) (“if the judge’s opinion must rule the verdict, the trial by jury would be useless”). The sheer importance of correcting unconstitutional comments on the facts must outweigh mere procedural rules such as error preservation.

Accordingly, Appellant's challenge to the trial court's jury charge need not be preserved. This Court should consider the merits and reverse.

C. The error was not harmless.

Finally, because the evidence against Appellant ultimately came down to the eyewitness testimony of one witness, and because there was evidence by which the jury could have found Appellant guilty of either lesser-included offense rather than DVHAN, the error was not harmless.

"When considering whether an error with respect to a jury instruction was harmless, [the Court] must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (*quoting State v. Kerr*, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)). The inquiry "is not what the verdict would have been," but rather, "whether the erroneous charge contributed to the verdict rendered." *Burdette*, 427 S.C. at 496, 832 S.E.2d at 578 (*quoting Middleton*, 407 S.C. at 317, 755 S.E.2d at 435). If it is "entirely conceivable" that the jury could have found the way that it did because of an erroneous jury charge, the error is not harmless. *State v. Belcher*, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009).

Here, the trial court instructed the jury on DVHAN, domestic violence first degree, and domestic violence second degree. The jury could reasonably have found Appellant guilty of at least domestic violence first degree instead of DVHAN. Domestic violence first degree, as relevant here, can be accomplished by causing physical injury to a household member, and either great bodily injury results or the act was accomplished by means likely to produce great bodily injury. S.C. Code Ann. § 16-25-20(B)(1). Domestic violence second degree, as relevant here, can

be accomplished by causing injury to a household member by means likely to result in moderate bodily injury, or actually resulting in moderate bodily injury. *Id.* § 20(C)(1).

The evidence here showed that Appellant may have attempted to run over Woods with his vehicle. The most severe injury suffered by Woods in this case was described by several witnesses as “road rash.” Under these circumstances, the jury could have rejected the idea that Appellant’s use of his truck constituted “extreme indifference to the value of human life,” *id.* §§ 16-25-65(A) (1, 2), especially without the trial court’s endorsement of the solicitor’s version of events. Because whether a defendant’s actions constitute extreme indifference is generally a jury question, *cf., e.g., State v. McKnight*, 352 S.C. 635, 645-46, 576 S.E.2d 168, 173 (2003), that call was the jury’s to make. Rather, the jury could have returned a verdict of guilty on domestic violence first degree by finding that Appellant’s alleged attempt to hit Woods with the truck was instead an “act... accomplished by means likely to result in great bodily injury....” *Id.* § 16-25-20(B)(1); *cf. State v. Shank*, 447 S.C. 564, 929 S.E.2d 403 (driving backwards into a police officer while evading arrest is an act likely to result in great bodily injury). Given that the fact pattern of this case could just as easily be found to constitute domestic violence first degree rather than DVHAN, it cannot be said that “the only conclusion established by the evidence is that Appellant was guilty of [DVHAN].” *Middleton*, 407 S.C. at 319, 755 S.E.2d at 436.

Further, Appellant’s jury requested clarification on the differences between the degrees of offenses. R.*(Court’s Exhibit 2). The fact that the jury requested to be recharged on the lesser-included offenses shows that the jury paid “special attention” to both the lesser-included offenses and the improper jury charge. *State v. Blassingame*, 271 S.C. 44, 47, 244 S.E.2d 528, 530 (1978). Thus, it is “entirely conceivable” that the jury did not return a guilty verdict on a lesser-included offense, rather than DVHAN, because of the erroneous jury charge. *Belcher*, 385 S.C. at 612,

685 S.E.2d at 810. Therefore, it cannot be said that, without the trial court “comment[ing] upon facts in evidence, elevat[ing] those facts, and emphasiz[ing] them to the jury,” that the verdict cannot have been different. *Burdette*, 427 S.C. at 502, 832 S.E.2d at 582.

Accordingly, the trial court’s comment on the facts was not harmless. This Court should reverse and remand for a new trial.

CONCLUSION

For the foregoing reasons, Appellant's conviction and sentence should be reversed, and this case should be remanded for a new trial.



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ATTORNEY FOR APPELLANT

This 5th day of August, 2026.