THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

QUASHON G. MIDDLETON,

APPELLANT

Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

Opinion No. 27358

PETITION FOR REHEARING

On February 26, 2014, this Court affirmed Appellant's convictions for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. State v. Middleton, Op. No. 27358 (filed Feb. 26, 2014). Pursuant to Rule 221(a), SCACR, Appellant respectfully asks this Court to rehear the matter due to the Court's application of harmless error to the trial judge's failure to charge the jury concerning a lesser-included offense was supported by the evidence.

This Court erred in applying harmless error analysis to this type of error and in supplanting its view of the facts for the jury's view of the facts. Although this Court held the trial judge's

refusal to charge the jury on the lesser-included offense of assault and battery in the first degree was erroneous, this Court found the error harmless. In doing so, this Court supplanted its view of the facts for that of the jury by holding "the evidence adduced at trial demonstrate[d] that, notwithstanding the failure to charge the lesser-included offense, the only conclusion established by the evidence [was] that Appellant was guilty of attempted murder, given the facts." Further, this Court stated "[i]n our view, there is no other way to construe the evidence in this case but that Appellant was attempting to kill Stephens and Mack." Specifically, this Court evaluated and weighed the evidence presented, which required an evaluation and determination of the credibility of witnesses, whom the Court had no opportunity to view.

The facts presented at trial clearly demonstrated Appellant's right to have the jury charged as to the lesser-included offense as this Court held, and Appellant makes no challenge to this holding of the Court. On the afternoon of September 28, 2010, Stephanie Mack was driving down Brittlebank Road in Colleton County with Ryan Stephens as her passenger. R. 43 lines 13-23; R. 61 lines 11-20. The pair stopped as a school bus in the on-coming lane stopped. R. 44 lines 2-4; R. 62 lines 10-12. Stephens and Mack claimed that Appellant, riding on a moped, drove up behind Mack and Stephens and brandished a gun. R. 44 lines 7-22; R. 62 lines 12-14. The pair further claimed that Appellant shot in the direction of Mack's car. R. 44 lines 4-9; R. 62 lines 16-17.[1] Despite the close confines of the car and the alleged gunfire, Mack somehow

[1] The South Carolina Law Enforcement Division (SLED) tested the gunshot residue (GSR) kits collected by local law enforcement. According to Kathleen Woodward with SLED, "[t]he quantities of metals found in [Appellant's] kit [did] not indicate the presence of gunshot residue." R. 104 lines 18-21. However, the GSR kit from Mack's right and left palms provided "quantities of metals that may be associated with gunshot residue." R. 104 line 23-25; R. 105 lines 2-3. Similarly, "the quantities of metals found on the right palm of [Stephens'] hand may be associated with gunshot residue." R. 105 lines 7-9. Likewise, the metals found on Stephens' left palm and back of his left hand "may be associated with gunshot residue." R. 105 lines 11-14.

managed to switch seats with Stephens. R. 47 lines 9-15; R. 55 line 23 – R. 56 line 10; R. 62 lines 19-20; R. 70 lines 20-21; R. 76 lines 12-14. While Appellant allegedly continued to shoot, Stephens sped off hitting Appellant's leg. R. 47 lines 16-22; R. 62 lines 22-24.[2] Mack and Stephens then drove to Stephens' home. R. 48 lines 11-12; R. 64 lines 2-4.

At trial, the prosecutor asked Mack "Were you hurt in any way?" R. 48 line 17. Mack responded "No, ma'am." R. 48 line 18. The prosecutor followed up with "Any glass hit you?" and Mack responded "I had a couple of cuts from the glass." R. 48 lines 19-20.

The judge agreed to charge the lesser-included offenses of assault and battery of a high and aggravated nature and assault and battery in the first degree as to Mack. R. 116 line 21 – R. 117 line 1. However, Judge Buckner refused to charge the lesser-included offense of assault and battery in the first degree as to Stephens because there was "no battery involved" with Stephens. R. 117 lines 2-3.[3]

There is no question that assault and battery in the first degree is a lesser-included offense of attempted murder. S.C. Code Ann. § 16-3-600(C)(3). A jury charge to a lesser-included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law mandates a jury instruction on a lesser-included offense when there is any evidence from which it could be inferred that the

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[2] The paramedic testified that Appellant stated he had been run over and the people in the car had been shooting at him. R. 38 lines 2-6. Appellant was in significant pain according to the paramedic due to a a possible leg fracture. R. 34 lines 6-10; R. 36 lines 22 – R. 37 line 1. Appellant was transported to the emergency room. R. 38 lines 19-21; R. 41 lines 3-4.

[3] Judge Buckner issued this ruling despite trial counsel pointing out that the statute contemplated this charge when "there is an offering, or attempting to injure another person, the first part of the statute for assault and battery in the first degree says in A – the person commits this if the person unlawfully, A, injures another person and the act either applies to one or two. And then it says B, offers or attempts to injure another person with the present ability to do so." R. 117 lines 12-21.

lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), "[i]n 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."

In its brief, the state admitted Appellant was entitled to the instruction on the lesser-included offense as to Stephens but argued any error was harmless. BOR 3-4. Unfortunately, this Court agreed with the state that a harmless error analysis was applicable when the trial judge failed to instruct the jury on a lesser-included offense. This was error as explained by the dissent. Appellant is aware of no case decided by this Court holding the defendant was entitled to an instruction on a lesser-included offense, but finding the error harmless or even applying a harmless error analysis to such an error. None of the cases cited by this Court states that harmless error applies when the defendant was entitled to the charge on the lesser-included offense, but the trial court failed to provide one. In State v. Pittman, 373 S.C. 527, 572, 647 S.E.2d 144, 167 (2007), this Court held the defendant was not entitled to an instruction on involuntary manslaughter because the record contained no evidence upon which a jury could find the killings were unintentional and the result of recklessness. Clearly, this was not a decision in which this Court determined Pittman was entitled to the instruction, but failure to give it was harmless error. Likewise, in Hopper v. Evans, 456 U.S. 605 (1982), the United States Supreme Court held the defendant was not prejudiced by Alabama's unconstitutional statute because the

evidence failed to support a charge on the lesser-included offense. These cases are wholly inapplicable to the issue presented in Appellant's case. Furthermore, as explained by the dissent, Neder v. United States, 527 U.S. 1 (1999), which was cited by the majority, does not hold that harmless error analysis applies to a failure to charge the jury on a lesser-included offense. Instead, in Neder, the Court held the trial court's error to charge the jury as to materiality, an element of the charge against Neder, was harmless in light of the facts presented.

Nevertheless, Neder is instructive for determining when harmless error analysis applies. Although most errors, even constitutional ones, are subject to harmless error analysis, some errors are not. When an error is structural, the error requires an automatic reversal. Neder, 527 U.S. at 8. "Those cases ... contain a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" Id. (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)). These "'errors infect the entire trial process.'" Id. (quoting Brecht v. Abrahamson, 507 U.S. 619, 630 (1993)). Such errors "'necessarily render a trial fundamentally unfair.'" Id. (quoting Rose v. Clark, 478 U.S. 570, 577 (1986)). The High Court's decision in Beck v. Alabama, 447 U.S. 625, 638 (1980) explained that Alabama's statutory prohibition on charging juries in capital cases as to lesser-included offenses was a violation of capital defendants' rights to due process. The state conceded that under Alabama's law, Beck was entitled to a charge on a lesser-included based upon the evidence presented, but the statutory prohibition prevented the judge from issuing the instruction. Id. at 630 n. 5. Beck is instructive in demonstrating that where a jury is denied the opportunity to consider a lesser-included offense, the error is not subject to harmless error.

In Stevenson v. United States, 162 U.S. 313 (1896), the Supreme Court reversed a conviction for capital murder where the trial judge failed to instruct the jury on the lesser-

included offense of manslaughter. Of importance to the matter presented herein, the Court did not consider whether the error was harmless beyond a reasonable doubt. In failing to instruct the jury on the lesser-included offense, where the evidence supported the charge, the trial judge "passed upon the strength, credibility, and tendency of the evidence, and decided, as a matter of law, what, it seems to us, would generally be regarded as a question of fact." Id. at 315-316. When a matter "is not to be so asserted, as a matter of law, then it becomes a question of fact in such case, and that question must be answered by the jury." Id. at 322. "Whether the witnesses told the truth in regard to such circumstances is not for the court to say, nor is it for the court to decide upon the weight to be given to them, if proper for the consideration of the jury." Id. Although a trial judge may be satisfied from the evidence that

> the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet, if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of the mind was, and to say whether the crime was murder or manslaughter.

Id. at 323.

In State v. Roof, 298 S.C. 351, 380 S.E.2d 828, (1989), this Court reversed the defendant's conviction for murder where the trial judge instructed the jury it may convict the defendant's co-defendant, who had been charged with murder, on the lesser-included offense of accessory after the fact, but did not give the jury that option for the defendant and the evidence presented against the two was the same. The defendant and co-defendant gave identical statements to law enforcement implicating the other in the murder, but inculpating the writer as an accessory. Id. at 352-353, 380 S.E.2d at 829. The co-defendant testified at trial consistent with his written statement. Id. at 353, 380 S.E.2d at 829. At the conclusion of the trial, the judge instructed the jury on murder and accessory as to the co-defendant, but refused to charge

accessory as to the defendant. Id. This Court held that "by giving the accessory charge as to [co-defendant], the court improperly implied that the court itself gave greater weight to [co-defendant]'s credibility." Id. The jury instruction option "was tantamount to a comment by the court on the dispositive factual issue here – witness credibility." Id. at 353-354, 380 S.E.2d at 829. This reasoning applies in Appellant's case. The trial court's refusal to give the lesser-included offense to one victim and not the other likely gave the jury an impressin of th ejudge's view of the facts.

The error presented in Appellant's case is one involving structural error because it affected the framework in which the trial proceeded. It denied the jury the ability to consider a lesser-included offense, which the evidence supported. This error infected the entire trial process and rendered the trial fundamentally unfair. Therefore, the failure to charge the jury as to a lesser-included offense was not subject to harmless error analysis where the evidence supported giving the charge to the jury.

This Court's conclusion that the evidence presented entitled Appellant to a charge on first degree assault and battery, but that the failure to give such a charge was harmless because "the only conclusion established by the evidence is that Appellant was guilty of attempted murder" is inconsistent and illogical. No precedent supports this Court's decision. If Appellant were entitled to the instruction on the lesser-included offense in light of the evidence before the jury, then the facts would have allowed the jury to convict Appellant of the lesser-included offense, rejecting attempted murder.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

This 13th day of March, 2014.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Quashon G.Middleton, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 13th day of March, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 13th day
of March, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.