STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Thomas E. Cooper, Jr., Circuit Court Judge

Appellate Case No. 2013-000492

THE STATE, ...RESPONDENT

v.

DONALD EUGENE PETERS, ...APPELLANT.

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Respondent's Statement of Issue on Appeal 1

Statement of the Case 2

Statement of Facts 3

Argument:

The trial court properly declined Appellant's request to charge the jury on the lesser included offense of assault and battery in the second degree where no evidence was presented at trial from which it could be inferred only the lesser, rather than the greater, offense was committed. 14

Conclusion 22

TABLE OF AUTHORITIES

Cases:

State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003) 20, 21

State v. Geiger, 370 S.C. 600, 635 S.E.2d 669 (Ct. App. 2006)....................................... 16

State v. Gilliland, 402 S.C. 389, 741 S.E.2d 521, (Ct. App. 2012) 19

State v. Green, 397 S.C. 268, 724 S.E.2d 664 (2012).. 15

State v. Hariott, 210 S.C. 290, 42 S.E.2d 285 (1947) 20

State v. Hill, 315 S.C. 260, 433 S.E.2d 838 (1993) 15

State v. Holland, 385 S.C. 159, 682 S.E.2d 898 (Ct. App. 2009).................................... 15

State v. Mallory, 270 S.C. 519, 242 S.E.2d 693 (1978) 19

State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010) 19

State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014)................................. 16, 20, 21

State v. Peer, 320 S.C. 546, 466 S.E.2d 375 (Ct. App. 1996) 15

State v. Santiago, 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006)..................................... 16

State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009).................................... 16

State v. Small, 307 S.C. 92, 413 S.E.2d 870 (Ct. App. 1992) 19

State v. Weaver, 265 S.C. 130, 217 S.E.2d 31 (1975)... 15

State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001).. 15

Statutes:

S.C. Code Ann. § 16-3-29.. 16,17

S.C. Code Ann. §16-3-600..16

S.C. Code Ann. § 16-3-600(B)(3)... 16

S.C. Code Ann. § 16-3-600(C) 14

S.C. Code Ann. § 16-3-600(C)(1) (Supp. 2013)....17

S.C. Code Ann. § 16-3-600(C)(3)....16

S.C. Code Ann. § 16-3-600(D) (Supp. 2013)....17

S.C. Code Ann. § 16-3-600(D)(3)....16

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court properly declined Appellant's request to charge the jury on the lesser included offense of assault and battery in the second degree where no evidence was presented at trial from which it could be inferred only the lesser, rather than the greater, offense was committed.

STATEMENT OF THE CASE

Donald Eugene Peters (Appellant) was indicted at the July, 2011 term of the grand jury for Beaufort County for burglary in the first degree (2011-GS-07-1456), armed robbery (2011-GS-07-1457), assault and battery in the first degree (2011-GS-07-1458), and safecracking (2011-GS-07-1459). Appellant was represented by Ehrick K. Haight, Esquire, of the Beaufort County Bar. The State was represented by Assistant Solicitors Meredith Bannon and Mary Jordan Lempesis of the Fourteenth Circuit Solicitor's Office. (Tr.p.1). On February 25-27, 2013, Appellant proceeded to trial by jury before the Honorable Thomas W. Cooper, Jr. At the end of the State's case, the trial judge granted Appellant's motion for a directed verdict on the safecracking charge; however, the jury ultimately found him guilty of first-degree burglary, armed robbery, and first-degree assault and battery. Appellant was sentenced to twenty-three (23) years' imprisonment for first-degree burglary, twenty-three (23) years' concurrent imprisonment for armed robbery, and ten (10) years' concurrent imprisonment for first-degree assault and battery, for an aggregate sentence of twenty-three (23) years' imprisonment. (Indictments & Sentencing Sheets; Tr.p.421, line 15-p.422, line 9). Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent (the State) follows.

STATEMENT OF FACTS

In the early morning hours of June 29, 2011, 69-year-old Ronald Lanier (the victim) was sitting in a chair in his kitchen when two men wearing hoodies came rushing in from his living room. They started beating him with something that felt like a pipe and demanded his keys. The victim put up his hands to try to protect his head, but the intruders continued to beat his arms, neck and shoulders until he was unconscious. When the victim woke up a short time later, he was bleeding from the head and discovered all of the telephones in his house had been disabled. He went to a neighbor's house and asked him to call 9-1-1. The victim testified the assailants took approximately $9,500 from his locked safe which was located behind the locked door to his closet. The victim was not able to identify the two male intruders because he never saw their faces. (Tr.p.72, line 15-p.88, line 2). During the subsequent investigation the police developed Appellant, Kurtis Edwards (Edwards), Lauren Baughman (Baughman), and Ashley Pierce (Pierce) as suspects in the home invasion and ultimately charged each of the four co-conspirators in regard to his or her participation in the burglary, assault and battery, and armed robbery of the victim.

Trial

At trial, the State made an opening statement setting forth its theory of the case. The solicitor said Appellant, Edwards, and Baughman made a plan to rob the victim because he was old, lived alone, and had lots of money on hand as a result of his barbering business. Baughman knew about the money because she frequently visited the victim's house where she exchanged sexual favors and/or housecleaning for cash. The solicitor said that in the early hours of June 29, 2011, Baughman drove Appellant and Edwards to the victim's house. Appellant was armed with a metal baton when he and

Edwards entered the house and beat the victim until he gave up the keys to his closet and safe. They ransacked the house and stole all the money they could find, leaving the victim unconscious. The solicitor said Appellant, Baughman, and Edwards then spent the next 12 hours living-it-up in a hotel room. (Tr.p.24, line 10-p.26, line 21).

Next, Appellant's counsel made an opening statement. He told the jury the victim would not be able to identify Appellant as one of the assailants and that although the police recovered a baton likely used in the assault, the forensic evidence from the crime scene would not link Appellant to that baton. He acknowledged Appellant made a statement to the police that he was involved in the crimes but was only a lookout; however, he criticized the fact that Appellant's alleged statement was not written or recorded. Counsel explained Appellant's theory of the case was that Baughman and Edwards committed the crimes with another man, but had decided to identify Appellant as their "fall guy" so they could make deals with the State for lower sentences in exchange for their testimony against Appellant. (Tr.p.26, line 25-p.29, line 22).

The State then called Melanie Smith, the Beaufort County Communication Coordinator who oversees 9-1-1 calls, and Eugene Smith (Smith), the victim's neighbor who made the distress call to 9-1-1, to the stand. Smith explained he is Baughman's step-father and had been the victim's neighbor for approximately six years. He described waking up on the morning of June 29, 2011, when his dogs started barking, coming outside, and encountering the victim. The victim was bleeding from the head and wobbly, and said some people had broken into his house, beaten him up, and robbed him. (Tr.p.30, line 18-p.37, line 16).

Next, the state called several witnesses who responded to the crime scene including Beaufort County EMT David Kendrick, Lance Corporal John Ferguson of the Beaufort County Sheriff's Office, and Staff Sargent Daniel Langford of the Sheriff's Office, who was serving as the patrol shift supervisor on the night of the incident. Kendrick was qualified as an expert in emergency medicine. He testified the victim was bleeding from head wounds, which in his opinion were serious. Kendrick said the victim told him he had been beaten with a baton-type weapon. He testified the victim had injuries consistent with being beaten with a baton. The victim had bruising on his upper body and lacerations on his head. (Tr.p.39, line 7-p.43, line 23). Ferguson confirmed the victim was bleeding from head wounds and was stumbling around. He entered the victim's house where he found blood on the kitchen floor, splattered on the kitchen counter, and down the front of the cabinets. Ferguson also found a pair of eyeglasses in a puddle of blood on the counter and a chair with blood smeared on it. He noticed a closet door that was open and saw a safe inside the closet. Ferguson described several rooms as being in complete disarray, while other rooms were not touched, as if the intruders were looking for something specific. (Tr.p.45, line 2-p.51, line 11). Langford testified there was blood everywhere in the victim's house and the house in shambles. He noted the victim's telephone had been disconnected from the wall and was lying in the middle of the floor. (Tr.p.53, line 3-p.66, line 9).

The State then called the victim to the stand. He testified he had lived in his house for 35 to 40 years, was a barber, and runs "Ron's Barber Shop" right around the corner from his house. The victim had known Pierce and Baughman for years and described them both as "friends." He said Pierce and Baughman would come to his

house to do odd jobs and have sex with him, and he would pay them for sex. On the evening of June 28, 2011, Pierce and Baughman were hanging out at the victim's house drinking but they eventually left, leaving him home alone. The victim testified he normally only used the door beside his carport to go in and out of his house rather than the front door. He explained how he used a rope to secure the front door and that it couldn't be opened unless somebody cut the rope from the inside of the house. In the early morning hours of June 29, 2011, the victim was sitting in a chair in his kitchen when two men wearing hoodies came rushing in from his living room. They started beating him with something that felt like a pipe and demanded his keys. The victim put up his hands to try to protect his head, but the intruders continued to beat his arms, neck and shoulders until he was unconscious. When the victim woke up a short time later, he was bleeding from the head and discovered all of the telephones in his house had been disabled. He went to a neighbor's house and asked him to call 9-1-1. The victim testified the assailants took approximately $9,500 from his locked safe which was located behind the locked door to his closet. He noted that because of his relationship with Baughman, she knew he kept a lot of cash in the safe in his closet. The victim was not able to identify the two male intruders because he never saw their faces. (Tr.p.72, line 15-p.88, line 2).

The State subsequently called criminal investigator Andrew Rice of the Sherriff's Office to the stand. Rice initially went to the emergency room to interview the victim, and later went to the incident scene where he was able to talk the victim a second time. Rice saw blood all over the victim's kitchen and saw that the telephone had been pulled from the wall. He said the victim was unable to identify or precisely describe the two

intruders because they were wearing masks but had an idea Baughman and Pierce were connected to the crimes since they had been in his house earlier that evening. The only other person the victim could think of that had been in his house before the robbery was a man named Steve who had done work there, but the victim didn't know Steve very well. Rice said the sole description the victim was able to give of the intruders was that one was younger and the other was older, and that based on their speech he believed the younger one was black and the older one was white. (Tr.p.112, line 2-p.117, line 25).

After speaking with the victim, Rice located and interviewed Pierce and Baughman. Baughman admitted some involvement in the crimes and produced $2,130 in cash which she claimed came from the home invasion. At the end of the interview Rice placed Baughman under arrest for the crimes against the victim. Next Rice located and interviewed Edwards, who was also placed under arrest. Based on these interviews, Rice determined Appellant was an additional suspect. Rice then obtained consent from Baughman and Edwards to search a bedroom and common area in the trailer where they were living. When Rice and Sergeant John Gobel arrived at the trailer, Edwards' roommate, Ronald Hopkins, answered the door, and advised them Appellant was also inside. Rice placed Appellant under arrest, advised him of his Miranda rights, and questioned him about the home invasion. At first Appellant denied everything, but after Rice told Appellant they had already talked to Edwards and Baughman, he stated he never went inside the house, was not part of taking the money or beating the victim, and merely served as a lookout in the front yard. Appellant told Rice that Baughman had driven him and Edwards to the victim's house, let them out, waited in the car until they were done, and drove them back to Edwards and Baughman's residence. Rice then

searched the residence. In Edwards and Baughman's bedroom he found an expandable baton similar to the kind police officers carry as well as several items of clothing that appeared to have bloodstains on them. (Tr.p.118, line 1-p.125, line 9).

Rice testified he ultimately returned the money produced by Baughman to the victim and that at the time the victim was still hurting pretty badly from the injuries he received during the assault. Rice noted that during the course of interviewing the suspects he determined cell phones were a key form of communication in planning the home invasion. He obtained a cell phone from Baughman and although he was able to learn the cell phone numbers of all four suspects, he was only able to recover specific information and text message content pertaining to Baughman's phone. Rice identified the messages between Baughman and the other individuals and prepared a PowerPoint presentation displaying those texts. He also prepared an audio recording of two women and two men reading the actual text messages to and from Baughman's phone. (Tr.p.125, line 10-p.130, line 24). Both the PowerPoint presentation and the audio recording of those slides were later introduced into evidence over Appellant's objection. (Tr.p.158, lines 8-22). Rice went on to describe the rest of his investigative efforts including obtaining buccal swabs from Appellant, Edwards, and the victim for purposes of DNA testing, submitting evidence to the DNA lab, taking photographs of the victim's injuries, taking photographs from Baughman's and Edwards' residence, taking photographs from the hotel in Hardeeville where the Appellant, Edwards and Baughman stayed after the home invasion, obtaining surveillance video from that hotel, and obtaining surveillance video from a metal recycling business in Hardeeville where the three were seen together near the time of the home invasion. (Tr.p.130, line 25-p.159, line 14).

Next, the State called the three other participants in the home invasion to the stand. Pierce, Baughman, and Edwards, each gave detailed and largely consistent accounts of Appellant's active participation in the planning and execution of the burglary, assault and battery, and armed robbery of the victim. First, Pierce described the sexual relationship she and Baughman had with the victim and how on the evening of June 28, 2011, Baughman hatched a plan to set the victim up to be robbed later that night. She testified Baughman said she was going to get help from Edwards and Appellant for the actual robbery, and then unlocked the front door while Pierce was talking to the victim in the kitchen. Pierce also described seeing Baughman, Edwards, and Appellant in a car together after the robbery and said she accepted one hundred dollars in "hush money" from them. (Tr.p.168, line 14-p.176, line 17).

Next, Baughman testified at length about her relationship with the victim, as well as her relationships with Pierce, Edwards, and Appellant. Baughman described how she and Edwards decided to rob the victim, and then secured Appellant's agreement to assist with the plan. She testified Appellant entered the victim's house with Edwards, and that he later told her he was the one who held the victim in the kitchen while Edwards broke the phones and got the money from the closet. Baughman testified Appellant had blood on his hands when he returned to the car and admitted he hit the victim with the baton. She testified Appellant was the intruder who beat the victim during the robbery and he and Edwards were the only two people who went into the house. She described what happened after the robbery and that she and Edwards gave Appellant two hundred dollars in exchange for his help. (Tr.p.191, line 8-p.246, line 16).

Finally, Edwards testified in detail about his role in the home invasion and Appellant's active participation in the crimes. He explained his relationship with the other suspects, and described how Baughman came up with the plan, asked him to help, and later asked Appellant to help. Edwards testified he went into the victim's house first, with Appellant right behind him. After they were inside he witnessed Appellant and the victim wrestling in the kitchen, at which point Appellant hit the victim on the side of the head with his fist. He said Appellant was holding the baton in his fist and that upon being hit, the victim began to bleed and surrendered. Edwards testified he and Appellant were the only two people in the house when the victim was injured and that Appellant was the one carrying the baton. (Tr.p.263, line 14-p.287, line 9).

The State also called Mauricio Jimenez, a worker at M&J Metal Recycling Center in Hardeeville; Rontak Patel, the manager of the Quality Inn in Hardeeville; John Donahue, DNA technical leader in the Beaufort County Sheriff's Office Forensic Laboratory; and Detective Sergeant John Gobel of the Sheriff's Office, to fill in additional details regarding the investigation and the events prior to and after the home invasion. (Tr.p.178, line 9-p.186, line 4; p.255, line 4-p.263, line 8; p.293, line 20-p.308, line 4; p.308, line 12-p.318, line 5). Gobel was present when the victim and the suspects were questioned, and he testified neither the victim, Baughman, nor Edwards indicated there was a third person besides Edwards and Appellant who entered the victim's house. He testified Appellant denied beating the victim and insisted he did not even go into the victim's house. (Tr.p.313, line 13-p.315, line 5).

Motions and Charge Conference

After the State rested, Appellant moved for a directed verdict on all charges. The trial court granted a directed verdict on the charge of safecracking but denied the motion as to the remaining charges. After questioning Appellant outside of the presence of the jury in regard to his right to testify, the trial judge explained what law he intended to charge to the jury. (Tr.p.318, line 8-p.328, line 3).

In regard to the injury to the victim, the trial judge noted he would charge assault and battery in the first degree and said: "There appears to me to be no lesser included in this connection." He then asked the parties if they had any requests for additional charges or exceptions. Appellant stated: "Certainly, Your Honor, we would like a lesser included on the assault and battery charge, similarly on the burglary charge." The trial judge discussed the relatively new statutory definitions of assault and battery in the first and second degree, and the elements of those crimes and said he would take Appellant's request under consideration over the lunch break. The solicitor objected to a charge on assault and battery in the second degree, arguing she did not believe it is a lesser included offense because it has separate elements. The trial judge agreed that the typical test for determining whether an offense is a lesser included offense is whether the greater includes all of the elements of the lesser, and agreed the elements seemed different here, but advised he would further consider the request and make a ruling before the jury returned. (Tr.p.328, line 8-p.332, line 23). After the lunch break the trial judge ruled: "On reconsideration, I've decided not to charge the lesser included of assault and battery second degree." (Tr.p.334, lines 5-9).

Closing Arguments, Jury Charge, and Verdict

During closing arguments, the solicitor claimed the evidence was sufficient to firmly convince the jurors that Appellant knew about the burglary, went into the victim's house to help commit the burglary, beat the victim, and took his money. She noted Appellant's own statement to the police admitting he went to the crime scene and served as a lookout. The solicitor explained the "hand of one hand of all" theory of accomplice liability and argued Appellant was guilty even if he wasn't the one who actually beat the victim and took the money. She described the circumstantial evidence linking Appellant to the crimes as evidence he was an accomplice, as well as the direct testimony from Baughman and Edwards that Appellant was an active participant in the planning and commission of the crimes. (Tr.p.336, line 20-p.356, line 21). In response, Appellant's counsel noted the lack of fingerprints or DNA evidence which could link Appellant to the crimes and questioned the credibility of Baughman and Edwards. He argued Appellant's statement to the police was not knowing and voluntary, and that even in that statement Appellant emphatically denied any involvement with actually going into the victim's house. Counsel argued that while there was evidence someone accompanied Edwards into the victim's house, there was no credible evidence it was Appellant. (Tr.p.357, line 1-362, line 22).

The trial judge charged the jury on the State's burden of proof, the presumption of innocence, the defendant's right not to testify, the roles of the judge and jury, direct evidence and circumstantial evidence, expert witnesses, credibility of witnesses, criminal intent, accomplice liability, mere presence, and the elements of first-degree burglary,

armed robbery, and first-degree assault and battery. (Tr.p.362, line 24-p.392, line 21). In regard to first-degree assault and battery the trial judge charged the jury as follows:

> Finally the Defendant in this case is charged with assault and battery in the first degree. Our law says that a person who commits the offense of assault and battery in the first degree if the person unlawfully, number one, injures another person. That's the first element, the unlawful injury of somebody else. And the injury occurred during the commission of a robbery or burglary or theft.
>
> So in order for the State to meet its burden of proof in this particular case, it has to convince you beyond a reasonable doubt that Mr. Peters injured somebody else, and that the injury occurred during the commission of a robbery or burglary or theft.

(Tr.p.381, line 24-p.382, line 11). Upon completion of the jury charge, the trial judge asked, ". . . other than previously noted are there any additional requests or exceptions from the defense?" Counsel stated: "Nothing additional, Your Honor." (Tr.p.392, line 25-p.393, line 3).

After deliberating for approximately twenty minutes, the jury sent out two questions, including one asking for the definitions of the crimes. The trial judge re-charged the elements of the three offenses. (Tr.p.395, line 1-p.401, line 25). At the end of trial, the jury found Appellant guilty of first-degree burglary, armed robbery, and first-degree assault and battery. The trial court sentenced him to twenty-three (23) years' imprisonment for first-degree burglary, twenty-three (23) years' concurrent imprisonment for armed robbery, and ten (10) years' concurrent imprisonment for first-degree assault and battery. (Indictments & Sentencing Sheets; Tr.p.421, line 15-p.422, line 9). Appellant renewed all motions he had previously made and the trial court renewed its earlier rulings. (Tr.p.413, lines 10-15).

ARGUMENT

I.

The trial court properly declined Appellant's request to charge the jury on the lesser included offense of assault and battery in the second degree where no evidence was presented at trial from which it could be inferred only the lesser, rather than the greater, offense was committed.

Appellant argues the trial court erred in finding that assault and battery in the second degree is not a lesser included offense of assault and battery in the first degree. He further argues the trial court then erred in failing to charge the lesser included offense of assault and battery in the second degree because there was evidence in the record from which the jury could infer he committed only this lesser offense rather than assault and battery in the first degree. He contends the jury could believe he injured the victim when he entered the victim's house and punched the victim in the head while the burglary and armed robbery were being committed by Baughman and Edwards, but also believe the punch was **not** thrown "during the commission of" that very same burglary and armed robbery. The State disagrees and submits Appellant's argument is without merit.

A person commits assault and battery in the first degree if the person unlawfully "injures another person," and the act occurred "during the commission of a robbery, burglary, kidnapping, or theft," regardless of the severity of that injury. S.C. Code Ann. § 16-3-600(C). A person commits assault and battery in the second degree if the person "unlawfully injures another person" and "moderate bodily injury to another person results." Here, no evidence was presented at trial to support a charge on the lesser included offense of assault and battery in the second degree. Indeed, regardless of which theory of the case prevailed, Appellant could not have been guilty of **only** the lesser charge. For the same reason, even if the trial court's charging decision was error, it was

harmless because the jury's verdict reflected it could not have convicted Appellant of second degree assault and battery even if the option had been available. The jury specifically determined Appellant was guilty of committing both a burglary and a robbery, which means that any injury Appellant inflicted upon the victim resulted from his act during the commission of those crimes and was necessarily an assault and battery in the first degree. Given the verdict, Appellant's act of injuring the victim simply could not have been **only** assault and battery in the second degree. For these reasons, Appellant's convictions should be affirmed.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The law to be charged to the jury is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). The trial court only commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 838, 849 (1993).

"A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Green, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012). "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 tends to show the defendant was guilty only of the lesser offense." State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006). In reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). An appellate court will not reverse a trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006).

Analysis / Discussion

The Omnibus Crime Reduction and Sentencing Reform Act of 2010 substantially overhauled the state's criminal law in regard to assault and battery offenses. State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014). It codified attempted murder in section 16-3-29 and four degrees of assault and battery in section 16-3-600. S.C. Code Ann. §§ 16-3-29 & 16-3-600 (Supp. 2013). The new 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. Middleton, 407 S.C. at 315, 755 S.E.2d at 434. Under the statute, ABHAN is a lesser-included offense of attempted murder. S.C. Code Ann. § 16-3-600(B)(3). Assault and battery in the first degree is a lesser-included offense of both attempted murder and ABHAN. S.C. Code Ann. § 16-3-600(C)(3). Further, assault and battery in the second and third degree are each lesser-included offenses of every preceding offense. S.C. Code Ann. § 16-3-600(D)(3) & (E)(3).

At trial, the judge ruled: "I've decided not to charge the lesser included of assault and battery second degree." (Tr.p.334, lines 5-9). Appellant contends this was error. In relevant part, the statute provides:

> (C)(1) A person commits the offense of assault and battery in the first degree if the person unlawfully:
>
> (a) injures another person, and the act: (i) involves nonconsensual touching of the private parts ... with lewd and lascivious intent; or (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft, or
>
> (b) offers or attempts to injure another person with the present ability to do so, and the act: (i) is accomplished by means likely to produce death or great bodily injury; or (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.

S.C.Code Ann. § 16-3-600(C)(1) (Supp. 2013) (emphasis added). It goes on to provide:

> (D)(1) A person commits the offense of assault and battery in the second degree if the person unlawfully injures 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; or
>
> (b) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing.
>
> . . . .
>
> (3) Assault and battery in the second degree is a lesser-included offense of 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.

S.C. Code Ann. § 16-3-600(D) (Supp. 2013) (emphasis added).

Initially, the State submits that although the solicitor argued that assault and battery in the second degree is not a lesser included offense, and the trial judge entertained the merits of that argument, the trial court appears to ultimately have found it

is indeed a lesser included offense, but nevertheless declined to charge it because it was not supported by the evidence. Specifically, the court held: "I've decided not to charge **the lesser included** of assault and battery second degree." (Tr.p.334, lines 7-9) (emphasis added). Arguably, the trial judge's later comments during the post-trial ruling suggest the initial ruling was based on the conclusion assault and battery in the second degree is not a lesser included offense; however, the clear and unambiguous statement during trial belies this argument. Whatever the case, even if the basis of the trial court's decision was erroneous, the ultimate ruling was proper and should be affirmed.

Under subsection (a), any injury constitutes assault and battery in the first degree if it occurs during the commission of a robbery, burglary, kidnapping, or theft. Here, the trial judge properly declined to instruct the jury on assault and battery in the second degree because the evidence presented during trial **only** supported a conclusion the victim was injured during the commission of a burglary and robbery. To the extent Appellant participated in the burglary and robbery and the victim was injured, he was guilty of first degree assault and battery and could not be guilty of assault and battery in the second degree. To the extent Appellant did not participate, as he argued, he would not be guilty at all. There is no logically consistent way he could have committed an assault and battery alone, without it being connected to the other crimes. Indeed, Appellant's own theory of the case rejects this scenario. His only argument was that his statement to the police was not knowing and voluntary, and that even in that statement he emphatically denied any involvement with actually going into the victim's house. Counsel argued that while there was evidence someone accompanied Edwards into the victim's house, there was no credible evidence it was Appellant. (Tr.p.357, line 1-362, line 22). In other

words, Appellant's sole claim is that he did not commit any assault and battery, not that he committed an assault and battery outside the scope of the burglary and armed robbery.

Based on the evidence and this theory of defense, the jury could only find that Appellant committed assault and battery in the first degree, or was not guilty. See State v. Mallory, 270 S.C. 519, 523, 242 S.E.2d 693, 695 (1978) ("[I]t is not error to refuse to submit the question of simple assault and battery to the jury under an indictment for assault and battery of a high and aggravated nature, unless there is testimony tending to show that the defendant is only guilty of a simple assault and battery." (emphasis added)); see also State v. Small, 307 S.C. 92, 94, 413 S.E.2d 870, 871 (Ct. App. 1992) ("The evidence does not warrant the charge of the lesser offense of simple assault. Small was guilty of assault and battery of a high and aggravated nature or not guilty. Accordingly, there is no merit to his claim that the court erred in refusing to give the requested charge.").

The evidence established either Appellant injured the victim during a burglary and robbery, or he did not injure, rob, and burglarize the victim at all. If Appellant only acted as a lookout, he is guilty of the burglary and the armed robbery under the "hand of one is the hand of all" theory of accomplice liability. See State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (discussing a jury instruction on accomplice liability). If Appellant simply entered the house and unlawfully injured the victim, he committed a first degree burglary even if he didn't participate in the armed robbery. See State v. Gilliland, 402 S.C. 389, 397 741 S.E.2d 521, 526 (Ct. App. 2012) ("A person is guilty of first-degree burglary if he "enters a dwelling without consent and with intent to commit a crime in the dwelling" and either enters or remains in the dwelling during the

nighttime. S.C.Code Ann. § 16–11–311(A) (2003). Although the intent to commit a crime must exist at the time the accused enters the dwelling, the jury may base its determination of that intent upon evidence of the accused's actions once inside the dwelling."). As a consequence, any injury occurred while that burglary and/or the armed robbery was being committed, and Appellant is guilty of assault and battery in the first degree. Because no evidence was presented supporting a finding the assault and battery on the victim constituted an assault and battery in the second degree, the trial judge did not err in declining to instruct the jury on the lesser included offense. Appellant's convictions should be affirmed.

Harmless Error

Errors are considered to be harmless when they could not reasonably have affected the result of the trial. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003). "It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him." State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 285, 288 (1947). When considering whether an error with respect to a jury instruction was harmless, the appellate court must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict. Middleton, 407 S.C. at 317, 755 S.E.2d at 435. In making a harmless error analysis, the inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered. Id. Thus, whether or not the error was harmless is a fact-intensive inquiry. Id.

In the instant case, the evidence adduced at trial demonstrates that, notwithstanding the failure to charge the lesser-included offense, the only conclusion established by the evidence is that Appellant was guilty of assault and battery in the first degree, given the facts that Appellant was found guilty of burglary and armed robbery, and the victim was injured during the commission of those crimes. The State submits there is no other way to construe the evidence in this case but that Appellant "injured another person, and the act . . . occurred during the commission of a robbery, burglary, kidnapping, or theft." S.C. Code Ann. § 16–3–600(C)(1) (Supp. 2013). Therefore, any error in failing to charge the lesser-included offense was harmless because the erroneous instruction did not contribute to the verdict beyond a reasonable doubt. Middleton, supra; Adams, supra. Appellant's conviction for assault and battery in the first degree should be affirmed.

CONCLUSION

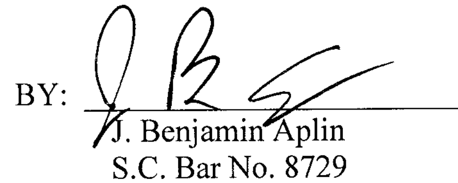
For all of the foregoing reasons, the State respectfully requests that the judgment, convictions, and sentence of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General

ISAAC MUDUFFIE STONE
Solicitor, Fourteenth Judicial Circuit

BY: 

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
August 1, 2014

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AUG 01 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Thomas E. Cooper, Jr., Circuit Court Judge

Appellate Case No. 2013-000492

THE STATE, ...RESPONDENT

v.

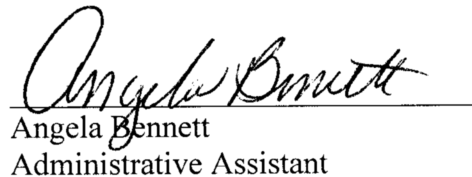
DONALD EUGENE PETERS, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter* , both dated August 1, 2014, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Kathrine H. Hudgins, Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 1st, day of August, 2014.



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AUG 01 2014
SC Court of Appeals

August 1, 2014

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Re: The State v. Donald Eugene Peters
Appellate Case No. 2013-000492

Dear Counsel:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Assistant Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services