STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Saluda County
Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

Respondent,

v.

STEVEN OTTS,

Appellant.

Appellate Case No. 2014-000274

INITIAL BRIEF OF RESPONDENT AND DESIGNATION OF MATTER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in failing to direct a verdict of acquittal in Appellant's favor where the State failed to present substantial circumstantial evidence of malice, a necessary element of murder?
2. Did the trial judge err in failing to tailor the self-defense instruction to the evidence presented, including evaluating the deceased's intoxication and size to determine the existence of a threat, the reasonableness of the belief of the threat posed, and the amount of force necessary to repel the threat?
3. Did the trial judge err in instructing the jury on the law of defense of others where the instruction served only to confuse the jury because Appellant was not asserting defense of others as a defense to the charged offense and the instruction concerned the conduct of the deceased?
4. Did the trial judge err in failing to provide the specific and clarifying instruction to the jury that an unintentional killing resulting from an unlawful assault and battery not of a character of itself to cause death is involuntary manslaughter?

STATEMENT OF THE CASE

Appellant, Steven D. Otts assaulted Hydrick Burno on January 27, 2011. Burno died three (3) days later on January 31, 2011. Appellant was subsequently charged with Burno's murder. On May 4, 2011, the Saluda County grand jury indicted appellant for murder. (Ind. # 2011-GS-41-288). Appellant was represented on the charge by Tristan M. Shaffer and Catherine T. Johnson, Esquires. (Tr. p. 1). On July 22, 2013, appellant proceeded to a jury trial before the Honorable Thomas A. Russo, Circuit Court Judge. At the trial's conclusion, the jury found appellant guilty of murder. (Tr. p. 597, ll. 91-12). Judge Russo sentenced appellant to thirty (30) years imprisonment for the murder. (Tr. 603, ll. 19-25). Appellant filed a motion for a new trial on August 3, 2013, which was denied by written Order of Judge Russo on January 30, 2014. (Motion for New Trial; Order Denying Motion for New Trial). This appeal followed raising four (4) issues.

RESPONDENT'S STATEMENT OF FACTS

The facts of this case are relatively simple. The evidence produced in the State's case established that on January 27, 2011, three (3) individuals; appellant Steven Otts ("Otts"), his girlfriend Sacca Coleman ("girlfriend" or "Coleman"), and Antonio Valentine ("Valentine") had been hanging out drinking alcohol at a residence in Ridge Springs, S.C. Keisha Stallworth ("Keisha"), who lived next door, came home from work shortly after 8:00 p.m., went next door, and met up with Otts, Coleman, and Valentine. Keisha testified she did not drink any alcohol. Otts and Coleman were intoxicated. The four (4) individuals then decided to go to nearby Orchard Park Apartments and got into Valentine's automobile, a Ford Explorer. Otts and his girlfriend were in the back seat of the Explorer. Valentine was driving and Keisha was in the front passenger seat. The group then rode to Orchard Park Apartments, where Otts resided.[1] (Tr. pp. 157-65).

Upon arriving at the apartment complex, Otts' girlfriend [Coleman] would not get out of the vehicle with Otts because she wanted to stay with Valentine and Keisha. Otts became angry because his girlfriend would not get out of the vehicle and remain at the apartment complex with him. He became aggressive with Coleman. Otts began arguing with Coleman; then there was scuffling, and "licks" were passed. Otts began trying to pull or drag Coleman out of the vehicle. She resisted, and Otts pulled her top clothing off in an attempt to drag her out of the vehicle leaving her with only her bra on. Otts' girlfriend [Coleman] was the murder victim's cousin by marriage *and* also a friend of the murder victim. (Tr. pp. 158-61, 164-65, 175, 373, 375, 346).

Several residents of the apartment complex, including the murder victim Hydrick Burno ("the victim"), heard the altercation and looked to see what was going on and came out of their

[1] The murder victim in this case, Hydrick Burno, also resided at the same apartment complex. Otts and the murder victim were friends. Otts resided with the murder victim's uncle and aunt.

apartments. A crowd of more than ten (10) people assembled to watch the incident. As appellant Otts was becoming more aggressive with his girlfriend Coleman, the victim [Burno], who was now standing nearby in the apartment complex parking lot, came to the defense or aid of his cousin and friend Coleman *and* attempted to calm Otts down.[2] According to one (1) eyewitness, who was watching the whole incident from her balcony directly above the incident, the victim put his arm or arms around Otts from behind [similar to a bear hug] trying to calm Otts down and stop the altercation. (Tr. pp. 158-82, 190-98, 198-218).[3]

Otts stated to the murder victim: "Mother fucker, when you let go of me, I'm going to knock your punk ass out." The victim let go of Otts and backed away from him. According to two (2) different witnesses, Otts then swung at the victim with his fist striking the victim on the left side of his head. The blow was so hard that it fractured the victim's skull and severely damaged the victim's brain. The victim immediately collapsed on the street unconscious striking the back of his head as he fell to the pavement. The victim then went into a seizure. Keisha attempted to render assistance to the victim. Otts turned back to continue the altercation with his girlfriend Coleman. Someone stated to Otts he had knocked the victim out. Otts went over and picked the victim up by the collar, and said "get up, get up," saw the victim was unconscious, and dropped the victim back down on the asphalt causing the victim to strike the back of his head again, which was already bleeding from the first fall. When someone stated the police were being called, Otts fled the scene on foot into some nearby woods. Otts girlfriend also left the scene, but returned later. (Tr. pp. 198-218, 158-82, 190-98; 219-239, 259-99).

An ambulance was called. The victim regained consciousness briefly at the scene but

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[2] Appellant Otts and the victim also knew each other and were friends.

[3] Keisha testified she never saw the murder victim put his hands on Otts. She informed police in her statement Otts pushed the murder victim away when the murder victim first tried to come to the aid of Otts's girlfriend and stop the assault of Coleman by Otts.

while being transported to the hospital began to act strangely due to swelling of his brain. The victim eventually died at the hospital three (3) days later due to swelling of the brain as a direct result of the fractured skull to the left side of his head, in the temple area, caused by the blow from Otts' fist.[4] (Tr. pp. 219-239, 259-99).

Otts remained in hiding until January 31, 2011 when he turned himself in to police. He was subsequently charged with the victim's murder.

In the defense' case, Otts testified and claimed he never assaulted or dragged his girlfriend Coleman, but they were only arguing. He claimed the victim, who was a friend, approached him from behind, tried to pull him away from Coleman, and eventually put him in a bear hug and picked him up and moved him away from Coleman near another car. Otts admitted that when the victim was trying to pull him away from Coleman the victim asked Otts several times to leave Coleman alone. Otts testified he squirmed away from the victim's "bear hug" and was headed back to argue some more with Coleman, when the victim kept grabbing his jacket trying to stop him, and he told the victim to let go of him and whirled and struck the victim on the side of the face.[5] Otts girlfriend, Coleman, who resided with Otts at the time of trial, attempted to corroborate her boyfriend Otts' version claiming she was not physically assaulted and her top was not pulled off during the altercation. She also attempted to discredit a State's witness by testifying Keisha did not work that day and had been drinking all afternoon with her

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[4] The autopsy determined the injury to the back of the victim's skull from being dropped on the asphalt did not cause his death. The blow with the fist to the victim's skull was the proximate cause of his death. (Tr. pp. 259-99).

[5] On cross-examination, at one point, Otts claimed he was not returning to argue with his girlfriend when he broke away from the victim's grasp, but was retreating. However, on direct and cross-examination he admitted when he broke away from the victim's "bear hug" he was attempting to return to the argument with his girlfriend. (Tr pp. 381-84, 415-17, 418, 423). Otts never testified he was afraid for his life or that he was afraid of suffering great bodily harm. He testified the victim was bigger than him and had been drinking and he did not know what the victim was going to do but the victim could have hurt him. (Tr. p. 383).

and Valentine. She claimed Otts was not drinking at all. Otts also testified Keisha was drinking. The State in reply called Keisha's employer who verified through employment records that Keisha did clock in that day and did not leave work until approximately 8:00 p.m. that night. Both Otts and Coleman admitted the victim was attempting to stop the altercation between Otts and Coleman, when he was struck with the fatal blow. Coleman admitted the victim was trying to pull Otts away from her [Coleman] and pursuade Otts to go inside the apartments. Contrary to Coleman's testimony, Otts admitted he had drunk two (2) twenty-four (24) ounce beers before the altercation. Otts admitted he had previously been convicted of receiving stolen goods and providing false information to the police. Coleman admitted she had been convicted on two (2) previous occasions of providing false information to police. Coleman first denied she and Otts had talked about the case since the victim was murdered, and then she admitted they had talked about the case before the trial. (Tr. pp. 370-90, 398-437; 344-70, 468-72).

ARGUMENT I

Judge Russo did not err in denying the motion for a directed verdict where there was evidence of malice.

What Occurred Below

At the close of the State's case, and again at the close of the defense' case, Otts moved for a directed verdict on the ground the State had failed to prove malice. Judge Russo found there was evidence in the record of malice and denied the motions for a directed verdict. (Tr pp. 303-04, 447-48). Judge Russo did not err because there was evidence of malice, both express and implied.

General Standard of Review

(Appellate)

In criminal cases, this Court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Thus on review, the appellate court is limited to determining whether the trial court abused its discretion. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Garrett, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002).

Standard of Review / Directed Verdict
(Appellate)

A defendant may only appeal from a trial judge's denial of a motion for a directed verdict of acquittal where there is a total failure of competent evidence tending to establish the charge laid in the indictment, and absent an error of law, the ruling must stand. State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984).[6] In reviewing a denial of a directed verdict, this Court must

[6] *See also* State v. Tyner, 273 S.C. 646, 258 S.E. 2d 559 (1979); State v. Irvin, 270 S.C. 539, 243

view the evidence in the light most favorable to the State. State v. Cope, 405 S.C. 317, 748 S.E.2d 194 (2013); State v. Rogers, 405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013). This Court views the evidence ***and*** all reasonable inferences in the light most favorable to the State. State v. Lemire, 406 S.C. 558, 753 S.E.2d 247 (Ct. App. 2013), *citing* State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006).[7] The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Brown, 402 S.C. 119, 740 S.E.2d 493, 495 (2013); State v. Gilliland, 402 S.C. 389, 741 S.E.2d 521, *3 (Ct. App. 2012). If there is any direct evidence, or if there is substantial circumstantial evidence, that reasonably tends to prove the defendant's guilt, this Court must find the trial court properly submitted the case to the jury. Brown, 740 S.E.2d at 495; State v. Gentry, 363 S.C. 93, 610 S.E.2d 494, 500 (2005); State v. Rogers 405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013), *citing* State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011); Gilliland at *3. This Court considers only the existence or non-existence of evidence, not witness' credibility, in reviewing the denial of a directed verdict. Rogers *supra*, n. 5, 748 S.E.2d 265, n. 5.[8] Our courts have repeatedly held, where the evidence is circumstantial, the evidence will be considered as a whole, not in isolation, in determining whether there was sufficient evidence to submit the case to the jury. Rogers *supra*.[9] If the State has presented any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must affirm the trial court's decision to submit the case to the

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S.E.2d 195 (1978).

[7] *See also* State v. Palmer, 2014 WL 551581 (Ct. App. 2014).

[8] *See* State v. Cherry, 348 S.C. 281, 286, 559 S.E.2d 297, 299 (Ct. App. 2001)(en banc), *aff'd in result*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004); State v. Scott, 330 S.C. 125, 131, n. 4, 497 S.E.2d 735, 738, n. 4 (Ct. App. 1998).

[9] *See* State v. Frazier, 386 S.C. 526, 532-33, 689 S.E.2d 610, 613-14 (2010)(viewing circumstantial evidence "collectively" and "as a whole" to hold directed verdict properly denied); Cherry, 361 S.C. at 595, 606 S.E.2d at 478 (finding circumstantial evidence, when combined, was sufficient to for the fact finder to infer guilt); State v. Buckmon, 347 S.C. 316, 323-24, 555 S.E.2d 402, 405-06 (2001).

jury. State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013).[10] "The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling." State v. Stanley, 365 S.C. 24, 42, 615 S.E.2d 455, 464 (Ct. App. 2005).

(Trial Court's Standard)

A motion for directed verdict is properly denied when there is any evidence, direct or circumstantial, that reasonably tends to prove the defendant's guilt. State v. Brandt, 393 S.C. 526, 542, 713 S.E.2d 591, 599 (2011). When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of evidence, not its weight. Cope, 405 S.C. 317, 748 S.E.2d 194; Cherry, 361 S.C. at 593, 606 S.E.2d at 477-78; State v. Gaines, 380 S.C. 23, 667 S.E.2d 728, 732-33 (2008).[11] A trial court should grant the directed verdict motion when the evidence merely raises a suspicion the accused is guilty, as suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. Cherry, 361 S.C. at 594, 606 S.E.2d at 478. On the other hand, "a trial judge is not required to find that evidence infers guilt to the exclusion of any other reasonable hypothesis." Hepburn, 406 S.C. 416, 753 S.E.2d 402.[12] The trial judge is required to deny the motion for a directed verdict and submit the case to the jury if there is *any* direct evidence or *any* substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. Hepburn, 406 S.C. at 429, 753 S.E.2d 402, *quoting* State v. Mitchell, 341

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[10] Furthermore, when the defendant offers proof in his case in chief, the appellate court is to consider all of the evidence in ruling on whether a directed verdict motion at the close of the defendant's case was properly denied. *See* Hepburn, 406 S.C. at 429-42, 753 S.E.2d 402, *adopting* State v. Harry, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996); *Cf.* State v. Thompkins, 220 S.C. 523, 68 S.E.2d 465 (1951)(citation omitted).

[11] *See also* State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002); *see* Rule 19(a), SCRCrP.

[12] *See* Cherry, 361 S.C. at 594, 606 S.E.2d at 478 (emphasis removed).

S.C. 406, 535 S.E.2d 126, 127 (2000).[13]

Malice

In a criminal case, where the defendant is charged with murder, the State must establish every element of the offense, including producing evidence of malice. S.C. Code Ann. Section 16-3-10 (2003); *See* State v. Maxey, 262 S.C. 504, 205 S.E.2d 841 (1974). Proof of malice may take two (2) forms: (1) express malice or (2) implied or inferred malice. S.C. Code Ann. Section 16-3-10 (2003). Express malice is when the defendant expresses his hostility toward the victim prior to or at the time of the crime. *See* Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992)(jury instruction was harmless where eyewitnesses established express malice and circumstances of killing established implied malice); Blakely v. State, 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004)(evidence of prior threats by the defendant against the victim are admissible to show malice). Implied or inferred malice is when the circumstances of the crime give rise to an inference that malice existed in the defendant's heart or mind.

> In its popular sense the term "malice," conveys the meaning of hatred, ill-will, or hostility toward another. In its legal sense, however, as it is employed in the description of murder it does not of necessity import ill-will toward the individual injured, but signifies a general malignant recklessness of the laives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief; in other words, a malicious killing is where the act is done without legal justification, excuse or extenuation, and malice has been frequently substantially so defined as consisting of the intentional doing of a wrongful act toward another without legal justification or excuse.

State v. Heyward, 197 S.C. 371, 375, 15 S.E.2d 669, 671 (1941). "In law, malice is a term of art, importing wickedness and excluding a just cause or excuse." State v. Doig, 31 S.C.L. (2 Rich) 179, 182 (1845). Malice "is a wicked condition of the heart, it is a wicked purpose, it is a

[13] If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the case must be submitted to the jury. State v. Freiburger, 366 S.C. 125, 136, 620 S.E.2d 737, 743 (2005); Weston, 367 S.C. at 292, 625 S.E.2d at 648.

performed purpose to do a wrongful act without sufficient legal provocation..." State v. Gallman, 79 S.C. 229, 238, 60 S.E 682, 686 (1908). The South Carolina Supreme Court has defined malice as "the doing of a wrongful act intentionally without just cause or excuse." State v. Bell, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991), *citing* State v. Judge, 208 S.C. 497, 38 S.E.2d 715 (1946). The Court has also defined malice as "the wrongful intent to injure another and indicates a wicked and depraved spirit intent on doing wrong." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998)(citations omitted). *See* Tate v. State, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002)(malice is the wrongful intent to injure another); State v. Johnson, 291 S.C. 127, 128, 352 S.E.2d 480, 481 (1987)(malice is the wrongful intent to injure another); State v. Wilds, 355 S.C. 269, 276, 584 S.E.2d 138, 141-42 (Ct. App. 2003)(same).

Further, malice may be inferred from the use of a deadly weapon which has been defined to include a fist. State v. Bennett, 328 S.C. 251, 260-63, 493 S.E.2d 845, 850-51 (1997); State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); *see* State v. McLemore, 310 S.C. 91, 425 S.E.2d 752 (Ct. App. 1992).

The Evidence of Malice

At trial, the State established appellant Otts, his girlfriend, and two (2) other individuals were in a Ford Explorer. Otts and his girlfriend had both been drinking and were intoxicated. The four (4) individuals drove to the apartment complex where Otts resided and the victim, Hydrick Burno, resided. Once they reached the apartment complex, Otts girlfriend did not want to get out of the vehicle they were in. Otts became angry with his girlfriend because she would not get out of the vehicle and stay with him. Otts first argued with his girlfriend and then became physically aggressive with her, including pulling her clothing over her head leaving her

with only a bra on, grabbing her by the arm and attempting to pull or drag her out of the vehicle, and assaulting his girlfriend. An eyewitness saw the incident and heard licks being passed during the assault. The victim, Hydrick Burno, who heard and saw the assault or domestic violence being committed by Otts, came to the assistance of his cousin and friend, Coleman, and approached Otts from behind attempting to restrain him with a "bear hug" and calm Otts down. Otts did not calm down and called the murder victim a "mother fucker" and told the murder victim that when he let go of him he was going to "knock his punk ass out," i.e. knock the victim unconscious. [Express malice]. *See* Blakely v. State, 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004)(evidence of prior threats by the defendant against the victim are admissible to show malice); State v. Fields, 264 S.C. 260, 267, 214 S.E.2d 320, 322 (1974)(defendant's statement to the deceased constituted evidence of malice). When the victim released Otts and backed away, Otts carried through with his threat to seriously injure the victim by throwing a "hay maker" type punch with the intent to knock the victim out seriously injuring him. Otts punched the victim with such force and ferocity that he fractured the victim's skull and severely injured the victim's brain knocking the victim unconscious and proximately causing his death with the ferocious blow. [Implied or inferred malice]. *See* State v. Gray, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014)(photographs of brain injury were admissible because they showed the force of the blow necessary to cause the injury to the brain and were relevant and probative of whether the defendant acted with malice). Otts then attempted to return to the argument, and when told he had knocked the victim out, walked over, picked the victim up by his collar, yelled at him to get up, and then dropped the victim back to the asphalt causing the victim to hit his head again, further indicating Otss general malignant recklessness for the lives and safety of others demonstrated during his earlier assault on Coleman and on the murder victim. This was

sufficient evidence of malice, both express and implied, to overcome the motion for a directed verdict. As a result, Judge Russo did not abuse his discretion, in denying the motions for a directed verdict on this record. Judge Russo did not err in denying the motions for a directed verdict. Heyward; Bell; Kelsey; Johnson. This appellate ground has no merit and must be denied and dismissed.

ARGUMENT II.

This issue is not preserved for appellate review because the issue raised to this Court was not raised to the trial court; further, Judge Russo's instruction on self-defense adequately covered the law, and there was no prejudice to Otts because he was not entitled to a self-defense instruction on this record; and. any failure to charge was harmless.

What Occurred Below

At the charge conference, Otts requested Judge Russo instruct the jury on the defense of self-defense. Though Judge Russo had some question whether the defense was applicable under these facts, since there was no threat of death or serious bodily injury to the defendant, out of an abundance of caution, Judge Russo instructed the jury on the defense of self-defense. (Tr. pp. 448-61, 479-84, 485-506, 588-91). Otts did not object to Judge Russo's charge on self-defense because he did not adequately tailor his self-defense instruction to the facts of the case. Appellant now alleges Judge John did not appropriately craft his instruction on self-defense to the facts of the case. Respondent submits this issue is not preserved for appellate review; and, furthermore, there is no merit to this issue.

Lack of Preservation of this Issue

This issue is not preserved for appellate review. Below there was no objection that Judge Russo failed to tailor his self-defense charge to the facts of the case as raised on appeal. (See BOA). This issue is not preserved for appellate review and must be dismissed with prejudice. Wilder Corp. v. Wilkie, 330 S.C. 71, 497 S.E.2d 731 (1998); Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995); State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998); State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000).

The Merits

Standard of Review

The conduct of a criminal trial is left largely to the discretion of the trial judge, and this Court will not interfere unless the rights of the appellant were prejudiced. State v. Bridges, 278 S.C. 447, 298 S.E.2d 212 (1982). Therefore, this Court reviews errors of law only and is bound by the trial court's factual determinations unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007). If the instructions given to the jury afford the proper test for determining the issues, the failure to give one side's requested instructions is not prejudicial. State v. Hughey, 339 S. C. 439, 529 S.E.2d 721 (2000).

Jury Charges

"The law to be charged must be determined from the evidence presented at trial." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Mattison, 388 S.C. at 479, 697 S.E.2d at 583.[14]

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[14] If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction. State v. Smith, 391 S.C. 408, 706 S.E.2d 12 (2011). The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand constitutes an error of law. State v. Bryant, 391 S.C. 225, 705 S.E.2d 465 (Ct. App. 2011). A trial court commits error when it fails to give a requested charge on an issue raised by the evidence presented. State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989). The court has a duty to charge the jury as to the law applicable to the facts brought out in the testimony. State v. West, 138 S.C. 421, 136 S.E. 736 (1927).

In order to be entitled an instruction on the law of self-defense, the defendant must produce some evidence or some evidence must be presented at trial establishing the elements of self-defense. State v. Bryant, 336 S.C. 340, 344, 520 S.E.2d 319, 321 (1999)(A self-defense charge is not required unless supported by the evidence); State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994)(same).[15] "If there is any evidence in the record from which it could reasonably be inferred the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008). "Because all of the elements are required to establish self-defense . . . [i]t is an axiomatic principle of law that [self-defense] has not been established if any one element is disproven." In re Tracy B., 391 S.C. 51, 704 S.E.2d 71 (Ct.App. 2011), *quoting* State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010). A self-defense charge is not required unless supported by the evidence. State v. Bryant, 336 S.C. at 344, 520 S.E.2d a 321; Goodson.

A judge is not bound to instruct a jury in the exact language of a request made; it is sufficient if he does so substantially in his own language. State v. Clary, 222 S.C. 549, 73 S.E.2d 681 (1952); State v. Roof, 106 S.C. 281, 91 S.E. 314 (1917); State v. Jones, 101 S.C. 111, 85 S.E. 240 (1915); State v. Harris, 282 S.C. 107, 674 S.E.2d 532 (Ct. App. 2009). A judge's charge to a jury is sufficient if, as a whole, it is substantially correct and covers the law applicable to the case. State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990); State v. Jackson, 297 S.C. 523, 377 S.E.2d 570 (1989); State v. Rabon, 175 S.C. 459, 272 S.E.2d 634 (1980). Furthermore, it is the substance of the law which must be charged to the jury, not any particular

[15] *See* State v. Bruno, 322 S.C. 534, 536, 473 S.E.2d 450, 452 (1996)(defendant was not entitled to a self-defense charge where he presented no evidence he believed he was in imminent danger when he shot the victim).

verbiage. State v. Burkart, 350 S.C. 252, 565 S.E.2d 298 (2002); State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980); State v. Zeigler, 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005). The propriety of a jury charge is measured by what a reasonable juror would have understood the charge to mean. State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991). A jury charge which is substantially correct and covers the law does not required reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994). Where a requested charge is not given, both error and prejudice must be shown. State v. Gaines, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008); State v. Huckabee, 388 S.C. 232, 694 S.E.2d 781 (Ct. App. 2010), *cert. denied. See* Smith v. Winningham, 252 S.C. 464, 166 S.E.2d 825 (1969).

Lack of Merit of this Issue

Regardless of the lack of preservation of this issue, this appellate issue has no merit. Judge Russo instructed jury on the defense of self-defense. (Tr. pp. 588, ln. 25 – 591, ln. 15). The instruction appropriately covered the law. (Tr. pp. 588-91). State v. Rivera, 389 S.C. 399, 699 S.E.2d 157 (2010). When reviewing a jury charge for alleged error, the charge must be considered as a whole in light of the evidence and issues presented at trial. State v. Huckabee, 388 S.C. 232, 694 S.E.2d 781 (Ct. App. 2010); Daves v. Cleary, 355 S.C. 216, 224, 584 S.E.2d 423, 427 (Ct. App. 2003). If the jury charge is reasonably free from error, isolated perotions which might be misleading do not constitute reversible error and the charge is considered correct if it contains the correct definition and adequately charges the law. Id., *citing* Cleary, *supra.* "The test for the sufficiency of a jury charge is what a reasonable juror would have undersood the charge to mean." State v. Benjamin, 345 S.C. 470, 474, 549 S.E.2d 258, 260 (2001); *cited in* State v. Huckabee, 388 S.C. 232, 244, 694 S.E.2d 781, 787 (Ct. App. 2010). Judge Russo's charge on self-defense in this case adequately covered the law in this case, including

consideration of "the physical condition and the characteristics of the defendant and the victim." (Tr. p. 588-91, 590, ll. 8-13). There is no merit to this appellate issue.

Furthermore, Otts was not entitled to self-defense instruction on this record. Judge Russo could not have erred nor can Otts show prejudice resulting from the charge.

Self-defense

The elements of self-defense are as follows: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in actual danger of losing his life or sustaining serious bodily injury; (3) if his defense is based on his belief of imminent danger, the defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such that would warrant a person of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or loss of his life; and (4) the defendant had no other probable means of avoiding the danger. If however the defendant was on his own premises he has no duty to retreat before acting in self-defense. State v. Rivera, 389 S.C. 399, 699 S.E.2d 157 (2010).[16] *See* State v. Wood, 1 S.C.L. (1 Bay)(1794)(key to self-defense is the defendant can only respond with proportionality).

Otts was not entitled to an instruction on self-defense so there could be no prejudice from the self-defense instruction. Davis, *supra.*[17] *See* Bruno (the defendant was not entitled to a self-defense charge where he presented no evidence that he believed he was in imminent danger

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[16] *Citing* State v. Davis, 282 S.C. 45, 46, 317 S.E2d 452, 453 (1984). *See also* State v. Frasier, 401 S.C. 224, 736 S.E.2d 301 (Ct. App. 2013).

[17] *see* Tate v. State, 308 S.C. 163, 417 S.E.2d 553 (1992)(where there is no evidence to suggest defendant believed she was in imminent danger of loss of life at the time she killed, counsel's failure to secure expert on self-defense was not ineffective assistance because the defense was not applicable).

when he shot the victim); Goodson (same). The record shows the victim was only trying to stop the domestic violence *or* argument [if the defendant and his girlfriend are believed] between Otts and Otts girlfriend. Otts was not without fault in bringing on the difficulty, and Otts was not in danger of death or serious bodily injury nor would a reasonable person have been in fear of death or serious bodily injury. State v. Fuller, 297 S.C. 440, 442-43, 377 S.E.2d 328, 330 (1989).[18] Otts had a duty to retreat, and he was not attempting to retreat, but attempting to re-engage his girlfriend in their dispute. State v. Brown, 321 S.C. 184, 467 S.E.2d 922 (1996); State v. Chambers, 310 S.C. 43, 425 S.E.2d 45 (Ct. App. 1992).[19] Further, Otts could have avoided any danger by simply ceasing to assault or argue with this girlfriend Coleman, rather than delivering a ferocious blow to the victim's head fracturing his skull. "It is an axiomatic principle of law that the defense has not been established if any one element is disproven." State v. Williams, 400 S.C. 308, 733 S.E.2d 605 (Ct. App. 2012), *quoting* Bixby, 388 S.C. at 554, 698 at 586. Otts *failed to present* any evidence retreating would have increased the danger to himself. And, *there was no evidence in the record* retreating would have increased the danger to Otts. Frasier; Jackson. As a result, Otts was not entitled to an instruction on self-defense. Rivera, *supra.*

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[18] *See* State v. Wiggington, 375 S.C. 25, 649 S.E.2d 185 (Ct. App. 2007)(defendant was not entitled to self-defense instruction where he did not show a reasonable person would have feared serious bodily harm or loss of life based on the victims words or actions); State v. Lee, 293 S.C. 536, 362 S.E.2d 24 (1987)(finding on the facts of that case any belief in the necessity of using deadly force was unreasonable as a matter of law; consequently holding the court did not err in failing to instruct on defense of habitation, and noting defendant *was not* entitled to self-defense instructions he did receive); State v. Chatman, 336 S.C. 149, 519 S.E.2d 100 (1999)(defendant was not in imminent danger; defendant could have left and avoided any danger; defendant was at fault in bringing on the difficulty; and a reasonably prudent person would not have thought he was in imminent danger; the evidence does not support that defendant was acting in self-defense; therefore, he could not have been acting lawfully, and he was not entitled to accident charge).

[19] "It is one's duty to avoid taking human life where it is possible to prevent it even to the extent of retreating from his adversary unless by doing so the danger of being killed or suffering serious bodily harm is increased or it is reasonably apparent that such danger would be increased." Frasier, *citing* State v. Jackson, 227 S.C. 221, 279, 87 S.E.2d 681, 685 (1955).

There could be no prejudice to Otts from the self-defense instruction he was not entitled to. This appellate ground has no merit and must be dismissed.

Harmless Error

Even assuming *arguendo* Otts was somehow entitled to the specific self-defense instruction he now alleges he should have received, the failure to do so was harmless under the particular facts of this case. *See* State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014)(finding harmless error analysis is appropriate for the failure to charge a lesser included offense); State v. Battle, 408 S.C. 109, 757 S.E.2d 737 (Ct. App. 2014)(same).[20] The failure to give the specific self-defense language, which Otts now argues, was harmless where Otts' version of events was so preposterous and non-credible and the evidence of guilt was so overwhelming that the jury would not have accepted the same and acquitted him of murder even had that specific language been charged. State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006). "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" Middleton, *supra*, *quoting* State v. Kerr, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998). "In making a harmless error analysis, our 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., *citation omitted.* "Thus, whether or not the error was harmless is a fact intensive inquiry." Id. A fact intensive inquiry shows the trial court's not charging the self-defense language now argued did not contribute to the verdict. Whether one considers the State's

[20] Our appellate courts have previously held the refusal to charge the jury with a requested instruction is subject to harmless error analysis. State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41 (Ct. App. 2007), *affirmed* 387 S.C. 310 (2010); State v. Jeffries, 316 S.C. 13, 21, 446 S.E.2d 427, 431 (1994)(harmless error analysis is appropriate where the error complained of is a "trial error" rather than a "structural defect" in the trial mechanism itself). *See also* Lee-Grigg, *Toal, C.J. concurring. Contra* Light; Lee.

evidence, or Ott's evidence, the claim of self-defense is not credible. Otts was either assaulting his girlfriend or violently arguing with her in the parking lot of the apartment complex. All witnesses agree the victim came to the assistance of his cousin and friend, Coleman, and attempted to calm Otts down and stop the altercation between Otts and Coleman. Otts own girlfriend, Coleman, admitted the victim came to her assistance and was trying to persuade Otts to stop the altercation with Coleman and come inside one of the apartments. Otts and the murder victim were friends. Otts was not without fault in bringing on the difficulty; Otts was not in danger of losing his life or sustaining serious bodily harm, and a reasonable person would not have believed he was in danger of losing his life or sustaining serious bodily harm in this situation; and, Otts had other means of avoiding the difficulty other than striking the victim with the fatal blow. Otts admitted on the stand when he first broke away from the victim, he was returning to continue the altercation with his girlfriend Coleman. Given the evidence *in this particular case*, and the self-defense charge given, the failure to charge the specific self-defense language now argued was harmless beyond a reasonable doubt. Middleton (failure to charge lesser included offense was harmless after a fact specific inquiry); *see* Battle (failure to charge lesser included offense was not harmless after a fact specific inquiry).

ARGUMENT III.

Judge Russo appropriately charged the law of defense of others in order that the jury could properly determine the issues involved in the case including whether the State disproved self-defense beyond a reasonable doubt, an issue which Otts raised, and whether the defendant was guilty of the lesser included offenses of voluntary and involuntary manslaughter, rather than murder.

What Occurred Below

During the trial of the case, witnesses testified and the State's evidence showed the victim Hydrick Burno came to the defense of his cousin and friend, Otts' girlfriend, when Otts was committing an act of domestic violence or an assault on the victim Hydrick Burno's cousin and friend Saca Coleman. Otts asserted he acted in self-defense in killing the victim Hydrick Burno.

At the charge conference, the State requested the Court instruct the jury on the law of defense of others because Ottts was asserting self-defense and the jury would need to determine whether or not the victim, Hydrick Burno, was acting appropriately under the law at the time of the offense, so the jury could determine whether Otts was without fault in bringing on the difficulty and the reasonableness of Otts actions, necessary elements of self-defense which the State must disprove beyond a reasonable doubt. Otts objected to the instruction on the law, even though it was necessary for the jury's determination of whether he acted appropriately in self-defense and whether the State had disproved each element of self-defense beyond a reasonable doubt. The trial court agreed that if it was going to instruct the jury on the law of self-defense, it was necessary to instruct the jury on this law [the defense of others] so the jury could appropriately decide the issues in the case including those raised by Otts and which the State must disprove beyond a reasonable doubt. (Tr. pp. 485-99, 500-01).

Judge Russo thereafter instructed the jury on self-defense and the law of defense of

others, and that one (1) of the elements of self-defense the State must disprove beyond a reasonable doubt was whether the defendant [Otts] was without fault in bringing on the difficulty. Judge Russo also charged the jury on the other elements of self-defense including whether the defendant acted appropriately under the circumstances and used reasonable force. Judge Russo also instructed the jury on the lesser included offenses of voluntary manslaughter and involuntary manslaughter. (Tr. pp. 583-91).

The Lack of Merit of this Issue

"The law to be charged must be determined from the evidence presented at trial." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000); State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 91994); State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989). A trial judge is bound to lay before the jury the principles of law as are applicable to the case as made by the evidence. State v. Blackstone, 157 S.C. 278, 154 S.E. 161 (1930); State v. Faulkner, 151 S.C. 38, 149 S.E. 108 (1929); State v. Dodson, 16 S.C. 453 (1881). The purpose of jury instructions are to enlighten the jury and to aid them in arriving at a correct verdict. State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010).

There is no merit to Otts argument. Judge Russo's jury instructions, including the one challenged here, were given as a result of issues raised by the evidence in the trial. Otts essentially wanted the jury to decide whether the State had disproved self-defense in a vacuum. Judge Russo did not err in this instruction on the law since it was necessary for the jury to be able to determine the issues in the case, including the defense of self-defense raised by Otts, and whether the State had disproved the elements of self-defense beyond a reasonable doubt.

Whether the victim acted lawfully in the situation would determine whether the defendant could act in self-defense or was guilty of the lesser included offense of voluntary manslaughter or involuntary manslaughter. If the jury believed the State's witnesses, that Otts was assaulting his girlfriend, then the victim could lawfully come to Coleman's defense and stand in her shoes and prevent the attack, and the defendant could not be acting in self-defense. If the jury believed Otts' witnesses testimony, then the victim could not put his hands on Otts, and the crime could be reduced from murder to voluntary manslaughter or involuntary manslaughter. The jury could not properly determine these issues without being instructed on the law of defense of others given the issues raised by the evidence in the case and raised by Otts. State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000)("The law to be charged must be determined from the evidence presented at trial."); State v. Blackstone, 157 S.C. 278, 154 S.E. 161 (1930)(A trial judge is bound to lay before the jury the principles of law as are applicable to the case as made by the evidence); State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944)(The purpose of jury instructions are to enlighten the jury and to aid them in arriving at a correct verdict.) State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)("An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion."). As a result, Judge Russo did not abuse his discretion in correctly instructing the jury on a recognized principle of South Carolina law.

ARGUMENT IV.

Judge Russo did not err in declining to instruct the specific language on involuntary manslaughter requested by Otts since it was not a correct statement of the law; it constituted a charge on the facts which is not appropriate, and Judge Russo appropriately instructed the jury on the lesser included offense of involuntary manslaughter in essentially the same language requested by Otts.

What Occurred Below

At the charge conference, Otts requested Judge Russo instruct the jury on the lesser included offense of involuntary manslaughter. Judge Russo agreed there was evidence from which the jury could find this lesser included offense and agreed to instruct the jury on involuntary manslaughter and did so. (Tr. pp. 310-11, 461-67, 477-79, 499-500). Otts also specifically requested the following language regarding involuntary manslaughter be charged to the jury:

> The unintentional killing resulting from an unlawful assault and battery not of a character of itself to cause death is [in]voluntary manslaughter.

(Tr. p. 499, ll. 15-22). Judge Russo correctly noted this was not a correct statement of the law, but indicated he would charge something very similar and contained almost the same language. (Tr. pp. 499-500). Judge Russo charged the jury the following language regarding involuntary manslaughter:

> Now, if you find that the state has failed to prove beyond a reasonable doubt that the defendant committed murder or voluntary manslaughter, you may consider whether the state proved beyond a reasonable doubt that the defendant committed involuntary manslaughter.
>
> To prove - - excuse me - - To prove involuntary manslaughter, the state must prove beyond a reasonable doubt that the defendant unintentionally killed the victim without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm or that the defendant unintentionally killed the victim without malice while engaged in lawful activity but with reckless disregard of the safety of others.
>
> Unintentional means that the defendant did not intend for anyone to be killed or seriously injured.

> Reckless disregard for the safety of others is more than mere negligence or carelessness. Mere negligence or carelessness is the failure to use that care that a person of ordinary reason would use under the same circumstances. Recklessness is a conscious failure to use ordinary care.
>
> Recklessness, a - - a - - reckless disregard for the safety of others means that you are not interested in the consequences of your act or the rights and safety of others.

(Tr. p. 586, ln 216 – Tr. p. 587, ln. 14).

The Lack of Merit of this Issue

Judge Russo did not err in declining to instruct the specific language requested by Otts for several reasons. First, the requested language **is not a correct statement of the law**. Involuntary manslaughter is when the defendant, *without malice*, unintentionally kills some one while engaged in an unlawful activity, not naturally tending to cause death *or great bodily harm*. State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010)("Involuntary manslaughter is (1) the unintentional killing of another **without malice**, but while engaged in an unlawful activity not naturally tending to cause death **or great bodily harm** or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others.")(emphasis added)(*citing* State .v Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009); *see also* State v. Burris, 334 S.C. 256, 264-65, 513 S.E.2d 104, 109 (1999). Otts requests leaves out two (2) significant legal principles in the correct charge on involuntary manslaughter.

Second, in this case, Otts request was for an improper charge on the facts. State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000)(defendant was not entitled to the charge requested as it was an improper charge on the exact facts he presented) *overruled on other grounds* Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009) (mercy charge); *See also* State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001)(explaining the decision in Hughey); State v.

Patterson, 337 S.C. 215, 522 S.E.2d 845 (1999); State v. Hartley, 307 S.C. 239, 414 S.E.2d 182 (1992); State v. Huckabee, 388 S.C. 232, 243, 694 S.E.2d 781, 787 (Ct. App. 2010), *cert denied*; Merrit v. Grant, 285 S.C. 150, 328 S.E.2d 346 (Ct. App. 1985); Clark v. Ross, 328 S.E.2d 91 (Ct. App. 1985). Otts essentially wanted Judge Russo to instruct the jury if Otts assaulted the victim with his fist the jury must find him guilty of involuntary manslaughter, not murder. This would be an inappropriate charge on the facts in this case.[21] In this case, given this record, the ferocity of the blow, and whether Otts acted with malice, was an issue to be determined by the jury, not the trial court. S.C. Const. art. V, Section 21 (2009)("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); State v. Huckabee, 388 S.C. 232, 694 S.E.2d 781 (Ct. App. 2010).

Finally, Judge Russo appropriately charged the jury on the lesser included offense of involuntary manslaughter and appropriately defined for the jury the elements of that lesser included offense. A judge is not bound to instruct a jury in the exact language of a request made; it is sufficient if he does so substantially in his own language. State v. Clary, 222 S.C. 549, 73 S.E.2d 681 (1952); State v. Roof, 106 S.C. 281, 91 S.E. 314 (1917); State v. Jones, 101 S.C. 111, 85 S.E. 240 (1915); State v. Harris, 282 S.C. 107, 674 S.E.2d 532 (Ct. App. 2009). A judge's

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[21] Otts cites State v. Chatman, 336 S.C. 146, 519 S.E.2d 100 (1999) in support of his argument; however, Chatman is distinguishable from the present case. In Chatman, the issue was whether under the facts of that case, Chatman *was entitled to an* instruction on the lesser included offense of involuntary manslaughter he did not receive at all. Applying the facts of that case to the law, the Court determined Chatman was entitled to an instruction on involuntary manslaughter. Id. at 152, 519 S.E.2d at 101. In the present case, Otts received the instruction on involuntary manslaughter, and Judge Russo defined involuntary manslaughter to the jury exactly as that set forth in Brayboy and Chatman. Brayboy, 387 S.C. at 180, 691 S.E.2d at 485; Chatman, 336 S.C. at 152; 519 S.E.2d at 101. Judge Russo could not do what the Supreme Court did in Chatman, apply the facts to the law and tell the jury Otts was entitled to a verdict on involuntary manslaughter. Further, in this case, the pathologist testified the blow to the victim's left temple was of such ferocity that it fractured the skull and severely damaged the brain underneath the the skull fracture.

charge to a jury is sufficient if, as a whole, it is substantially correct and covers the law applicable to the case. State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990); State v. Jackson, 297 S.C. 523, 377 S.E.2d 570 (1989); State v. Rabon, 175 S.C. 459, 272 S.E.2d 634 (1980). Furthermore, it is the substance of the law which must be charged to the jury, not any particular verbiage. State v. Burkart, 350 S.C. 252, 565 S.E.2d 298 (2002); State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980); State v. Zeigler, 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005). The propriety of a jury charge is measured by what a reasonable juror would have understood the charge to mean. State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991). A jury charge which is substantially correct and covers the law does not required reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994). Where a requested charge is not given, both error and prejudice must be shown. State v. Gaines, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008); State v. Huckabee, 388 S.C. 232, 694 S.E.2d 781 (Ct. App. 2010), *cert. denied. See* Smith v. Winningham, 252 S.C. 464, 166 S.E.2d 825 (1969).

Otts cannot show any error *or* prejudice where Judge Russo correctly charged the substance of the law of involuntary manslaughter to the jury, including the fact the killing must be *without malice* and the unlawful activity must be such that would not naturally tend to cause death, but also not cause *great bodily harm.* Brayboy; Wharton, 381 S.C. at 216, 672 S.E.2d 789; *see also* Burris, 334 S.C. at 264-65, 513 S.E.2d at 109. And, specifically, Judge Russo instructed the jury that when a defendant, without malice, is engaged in an unlawful act or activity, which would include an unlawful assault and battery, not naturally tending to result in death or serious bodily injury, unintentionally kills someone, the crime is involuntary manslaughter. (Tr. pp. 586-87). Brayboy. Since the substance of the law, and almost the same particular verbiage, was instructed to the jury, and Judge Russo also included all of the

applicable and correct definition of involuntary manslaughter, Otts cannot show either error or prejudice. Burkart; Rabon; Zeigler. This appellate ground has no merit and must be dismissed.

CONCLUSION

For the above stated reasons, Otts' conviction and sentence for the murder of Hydrick Burno must be affirmed.

Respectfully submitted,

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May 8, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Saluda County
Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

Respondent,

v.

STEVEN OTTS,

Appellant.

Appellate Case No. 2014-000274

CERTIFICATE OF SERVICE

I Anthony Mabry, hereby certify that I have served the Initial Brief of Respondent and Designation of Matter in the foregoing action by depositing two copies of same in the InterAgency Mail Susan B. Hackett, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201 this 8th day of May, 2015.

ANTHONY MABRY
Assistant Attorney General

ALAN WILSON
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May 8, 2015

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Steven Otts
Appellate Case No. 2014-000274

Dear Ms. Kitchings:

Enclosed please find the Initial Brief of Respondent and Designation of Matter in the above-captioned matter for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Anthony Mabry
Assistant Attorney General

/lbb
Enclosure

cc: Susan B. Hackett, Esquire
Donald V. Myers, Solicitor
Trisha Allen, Victims Assistance