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ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2013-002444

THE STATE,

RESPONDENT,

V.

DEMETRISS ALSHAWN GLENN,

APPELLANT.

FINAL BRIEF OF APPELLANT

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II. Did the trial judge err in refusing to instruct the jury on defense of others and the right to act on appearances where the evidence showed that Appellant did not intend to participate in a robbery planned by others, was suddenly awakened while sleeping or passed out drunk in a car during a robbery by others, and was called inside a house to defend a friend who was being attacked?

STATEMENT OF THE CASE

Demitriss Alshawn Glenn ("Appellant") was indicted for murder, burglary in the first degree and armed robbery for crimes that occurred June 26, 2011. Appellant was tried by a jury on November 4-7, 2013. The jury found Appellant guilty on all charges. (R. p. 538.) The Honorable Thomas A. Russo sentenced Appellant to life in prison without parole on the murder conviction, life in prison without parole on the first degree burglary conviction and thirty years on the armed robbery conviction, with all sentences to run concurrently. (R. p. 554.) Appellant timely appealed the convictions.

STATEMENT OF FACTS

The State accused Appellant of murdering Timothy Tice in the early morning hours of June 26, 2011, in the kitchen of Tice's mobile home at Jake's Landing on Lake Murray in Lexington County. Tice died after he was repeatedly struck over the head with a blunt object, which fractured his skull, a forensic pathologist testified. (R. pp. 424-32.) The State alleged that the blunt object was a partially broken bar stool or possibly a wine bottle, and the pathologist agreed those items could have been used to inflict the injuries. (R. p. 427.) An investigatory and a DNA and serology (bodily fluids) expert witness, called by the State, testified that tests revealed eight blood stains on the bar stool. (R. pp. 219-20, 226, 245.) Investigators found fragments of a broken wine bottle at the scene. (R. pp. 169-70, 192-93.) Tice's blood was found on a napkin and piece of the wine bottle. (R. pp. 260-61.)

Investigators did not find any evidence of Appellant's fingerprints or DNA at the crime scene, or any other physical evidence linking Appellant to the murder. (R. p. 263.) The investigation revealed that Margaret Driggers and Kenneth Walters were involved in the incident and were present at the murder scene that night. Margaret Driggers, a/k/a "Roxie," was an escort or prostitute and drug user. (R. pp. 370, 380-82, 386.) Kenneth Walters was Appellant's friend. Walters had facial injuries at his arrest. (R. pp. 274-75, 279.) Investigators described Walters as small, slender man. (R. pp. 274-75, 279, 349-50.) The victim's brother and a friend described Tice as a large, strong man. (R. pp. 123, 132, 233-34.)

Driggers and Walters also were charged with murder and related charges in connection with the death of Tice. (R. p. 50.) Investigators found the DNA of Tice,

Driggers or Walters on certain items of physical evidence. (R. pp. 246-47, 253-55, 259, 262-63.) Neither Driggers nor Walters testified at Appellant's trial.

Several investigators testified about the various steps taken in the investigation, the disarray of the house at the crime scene indicating a fight, witness leads and cellular telephone records which led to the arrest of Driggers, Walters and Appellant within two weeks after the murder. None of the physical evidence placed Appellant at the scene.

A detective testified that, when first interviewing Driggers in the detective's car in a hotel parking lot, she saw a man later determined to be Appellant watching the interview. A short while later after leaving the hotel, she saw Appellant and Driggers riding together in the same car. (R. pp. 270-73.) Another detective testified that Appellant gave him a partially incorrect name (Demetriss Floyd) and an incorrect date of birth when he first spoke with Appellant. (R. pp. 316, 319.)

The primary evidence against Appellant consisted of the testimony of two witnesses – a jailhouse snitch and accused murderer, Charles Plumley, and Appellant's friend or "uncle," Tyrone Williams, who also had a criminal record. (Williams is not related by blood to Appellant.) Plumley and Williams testified that Appellant admitted to them that he killed Tice or implicated himself in the murder, armed robbery and burglary.

Plumley testified that he spent about a year in the Lexington County jail as Appellant's cellmate. Plumley was in jail awaiting trial on charges of murder, armed robbery and burglary in an unrelated case. (R. pp. 361-62.) Plumley testified that Appellant in an early conversation "just told me that that he was involved – he was with some people that went on a robbery, and his co-defendant killed somebody." Appellant identified the co-defendants as Driggers and Walters, Plumley testified. (R. pp. 366-67.)

Appellant said that "Marie and K Dog [Walters] was planning a robbery, and he was asleep in the back seat, and that they went in there and robbed a man, and K Dog hit the man, and then they left," Plumley testified. Although Appellant knew about the plan, he did not intend to participate and stayed in the car. (R. pp. 368-69.)

Plumley testified that Appellant in later conversations said he, Driggers and Walters were at a bar in West Columbia drinking and partying that night. Driggers, who was a prostitute, received a call from Tice, who wanted her to visit him. Driggers and Walters planned the robbery. Driggers would go inside first and then, when Tice was asleep, she would text Walters on his cellular phone to come inside and rob the residence. However, Tice was not asleep when Walters entered and a fight ensued, with the larger Tice badly beating the smaller Walters. Plumley testified that Appellant said that Driggers "ran out there screaming for him to come help – for him to come help his friend because the victim was killing him. And he went inside and tried to pull the man off of him. The man wouldn't get off of him. And he hit the man, and then he left. He didn't know what happened. After he left, [Driggers] came out of the house . . . with something wrapped in a sheet, and it was two rifles." (R. pp. 369-70.)

Plumley testified that Appellant told him that he gave a pistol to Walters, but he did not want to participate in the robbery. Appellant said that he had no choice when called; he had to defend Walters from Tice. Appellant said he hit Tice with a bottle, not a bar stool. (R. pp. 371-72.)

Plumley claimed he had been offered no deal in exchange for his testimony and had received death threats for planning to testify. (R. pp. 362-63, 365.)

On cross examination of Plumley by defense counsel, the following exchange occurred:

Q. You testified that they were – that Marie [Driggers] and Walters planned this robbery, and they were discussing the robbery while they were in the car on the way to Tice's house, isn't that correct?

A. Yes, sir.

Q. You also testified that Mr. Glenn passed out in the back seat during that ride over to Tice's house, is that correct?

A. Yes, sir.

. . .

Q. And you also testified that – you said that he said K Dog [Walters] went in there the first time you talked to him, and that story changed over time, you said. And you said that the version of the story that you got is that this robbery was taking place, and Marie came outside and woke [Appellant] up while he was in the car?

A. Yes, sir.

Q. And he said he ran in to help save his friend?

A. Yes, sir.

Q. Now, is it possible that he didn't learn about this until after this stuff had taken place?

A. I believe –

[STATE]: Speculation, Your Honor. I object, speculation.

THE COURT: Sustained.

Q. Let me rephrase it. You talked about – Beg the Court's indulgence.

THE COURT: Yes, sir.

Q. Like I said earlier, you testified that [Appellant] was asleep in the car, that's correct?

A. That's what he told me.

Q. But he also told you that Marie and Kenneth were planning – were talking about the robbery while he was in the car, that's correct?

A. Yes, sir, that, I mean they talked about it at the club. Basically it was Margaret Driggers and Walters' idea. He was just along for the ride.

Q. What I'm asking you, though, is you said they talked about it in – that [Appellant] told you that they talked about it in the car, Walters and Marie.

A. Yes.

Q. And he was passed out in the back seat?

A. That's what he said. That's what he told me.

Q. Now is it a logical conclusion that the only way he could know that is that he was told after the fact?

A. [STATE]: Objection, Your Honor.

THE COURT: Sustained as to the speculation.

MR. CORNWELL: No further questions, Your Honor.

(R. pp. 376-78.)

Tyrone Williams testified that he had been convicted of several check fraud, burglary and larceny charges. He returned voluntarily at the State's request from New York to testify in the trial and, as a result, was arrested for failure to pay child support and was in jail at the time of the trial. Williams testified that he had known Appellant about ten years. (R. pp. 387-90.)

Williams and an investigator testified that, when police arrived at his door, Williams immediately surrendered a Winchester 30-30 rifle that Appellant had given him to hold. (R. pp. 393-94, 399-400.) Tice's brother, Gregory Tice, testified that the rifle was the victim's and had belonged to their grandfather. (R. pp. 236-38.)

Williams testified that Appellant telephoned him from a hotel a few days after the murder of Tice and he picked up clothes to take Appellant, who was wearing obviously over-sized pants when he saw him. (R. pp. 395-96.) At that visit, Appellant said he "had to bust somebody in the head," which is street slang for killing someone, Williams testified. (R. p. 397.)

Williams testified that in a later conversation, Appellant said he, Driggers and Walters left a club planning to rob Tice. Appellant said the "little dude" went in the house while Appellant was asleep, and then Driggers came out and banged on the car window to awaken him because Tice was "beating the little dude down," Williams testified. (R. pp. 397-98.) Appellant said the man was a "tough cracker" and "the more he hit him, the more he kept coming." Appellant said he struck the man with a wine bottle and then grabbed a stool or chair and repeatedly struck him and he finally fell. Appellant said he just "blacked out" and could not stop hitting the man, Williams testified. (R. pp. 398-99.)

Williams testified that, in a conversation in a car with Driggers present, Driggers discussed the murder and asked Appellant why he sent that "little boy" in the house. Appellant did not deny Driggers' comments and said, "Shut the fuck up. I handled it, didn't I," Williams testified. (R. pp. 406-07.) Appellant said that he cleaned everything up and his DNA would not be at the scene, Williams testified. (R. pp. 407-08.)

Appellant requested jury charges for involuntary manslaughter, defense of others and the right to act on appearances. Appellant argued that there was evidence in the record supporting the charges. (R. pp. 459-64, 467; R. pp. 556-57, 567-78, Aff. of Drew Radeker and jury charges requested by Appellant.) The trial judge stated that he initially

concluded he might charge involuntary manslaughter, but ultimately denied the requests after concluding that there was no evidence in the record supporting the requested charges. (R. pp. 464-66.) The judge noted that Appellant's had preserved his requests on the record and Appellant again noted the requests after the jury was charged. (R. pp. 466, 534.)

ARGUMENT

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review only errors of law. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). An appellate court is bound by a trial court's factual findings unless they are clearly erroneous. Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

"Generally, the trial judge is required to charge only the current and correct law of South Carolina." State v. Brown, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Id. at 262, 607 S.E.2d at 95.

"The law to be charged to the jury is determined by the evidence presented at trial." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense. State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). Stated another way, if there is any evidence from which the jury could infer the defendant

committed a lesser rather than a greater offense, the trial judge must charge the lesser-included offense. State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004).

In determining whether the evidence requires a charge on a lesser-included offense, the Supreme Court must view the facts in the light most favorable to the defendant. State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000). The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995).

"An appellate court will not reverse the trial [court]'s decision absent an abuse of discretion." State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id. at 570, 647 S.E.2d at 166-67. "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." Id. at 570, 647 S.E.2d at 167.

I. INVOLUNTARY MANSLAUGHTER

The trial judge erred in refusing to instruct the jury on involuntary manslaughter because there existed evidence showing that Appellant had no intent to participate in a robbery planned by others. Appellant was suddenly awakened while sleeping or passed out drunk in a car during a robbery by others, and was called inside a house to defend a friend who was being attacked for reasons that arguably were unknown or uncertain to him.

Involuntary manslaughter is defined as "(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." State v. Reese, 359 S.C. 260, 597 S.E.2d 169 (Ct. App. 2004) (citing State v. Tyler, 348 S.C. 526, 529, 560 S.E.2d 888, 889 (2002); State v. Chatman, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999); see also S.C. Code Ann. § 16-3-60 (2003) (stating a person charged with involuntary manslaughter may be convicted only upon a showing of criminal negligence, defined as the "reckless disregard of the safety of others"). Involuntary manslaughter is a lesser included offense of murder. State v. Burriss, 334 S.C. 256, 264, 513 S.E.2d 104 (1999).

"It has long been the law in this State that 'to warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is *no evidence whatever* tending to reduce the crime from murder to manslaughter.'" Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991) (emphasis added) (quoting State v. Norris, 253 S.C. 31, 35, 168 S.E.2d 564, 565 (1969)). "A trial court should refuse to charge the

lesser-included offense of involuntary manslaughter *only* where there is *no evidence* the defendant committed the lesser offense." State v. Mekler, 379 S.C. 12, 664 S.E.2d 477, 479 (2008) (emphasis added).

Plumley, the jailhouse snitch and accused murderer, testified that Appellant initially "just told me that that he was involved – he was with some people that went on a robbery, and his co-defendant killed somebody." (R. pp. 366-67.) Appellant said that "Marie [Driggers] and K Dog [Walters] was planning a robbery, and he was asleep in the back seat, and that they went in there and robbed a man, and K Dog hit the man, and then they left." Although Appellant knew about the plan, he said he did not intend to participate and stayed in the car. (R. pp. 368-69.) On cross-examination, Plumley again testified that Appellant told him the robbery was solely the idea and plan of Driggers and Walters. Appellant "was just along for the ride." Appellant was asleep or passed out in the car when the plan was discussed. (R. pp. 376-78.) Although the State objected to Plumley speculating about exactly when Appellant learned of the plan, the testimony that was given nonetheless constitutes evidence that Appellant lacked the requisite intent to commit any crime. It also is inferable from these facts that Appellant was asleep or passed out when the robbery was planned and knew nothing about the details, including the identity or location of the potential victim.

Plumley testified that Appellant later said that he, Driggers and Walters were at a bar in West Columbia drinking and partying that night. At Tice's house, Driggers "ran out there [to the car] screaming for him to come help – for him to come help his friend because the victim was killing him. And he went inside and tried to pull the man off of him. The man wouldn't get off of him. And he hit the man, and then he left. He didn't

know what happened. After he left, [Driggers] came out of the house . . . with something wrapped in a sheet, and it was two rifles." (R. pp. 369-70.)

In addition, Williams testified that Appellant told him that Tice was a "tough cracker" and "the more he hit him, the more he kept coming." Appellant said he struck Tice with a wine bottle and then grabbed a stool or chair and repeatedly struck him and he finally fell. Appellant said he just "blacked out" and could not stop hitting the man, Williams testified. (R. pp. 398-99.)

The trial judge erred in refusing to charge involuntary manslaughter because this case falls within the second prong of the lesser included offense. Viewing the evidence in the light most favorable to Appellant, the evidence presented by the State through Appellant's statements to others constitutes evidence that Appellant unintentionally killed the victim without malice while engaged in the lawful activity of defending his friend, although in the end he acted with reckless disregard for the victim's safety by being criminally negligent and responding too violently.

If the jury had been given an opportunity to consider a verdict of involuntary manslaughter, Appellant could have argued that he did not intend to rob or hurt the victim and he did not want to participate in the robbery. Appellant could have argued that, suddenly awakened from a sound sleep or drunken stupor, he rushed into the house to find his friend being beaten by a much larger man. At that moment, not realizing what was going on or even that any robbery plan had been put in action, Appellant came to the defense of his friend and struck the victim with the wine bottle. When that failed to end the confrontation and the victim kept coming at him and his friend, Appellant "blacked

out" and struck the victim with the bar stool, thereby recklessly disregarding the victim's safety and acting in a criminally negligent manner by striking him more than necessary.

Appellant's case is similar to those in which a fight or confrontation resulted in death when the defendant asserted that he was trying to defend himself and did not intend to kill anyone. In such cases, the Supreme Court has recognized that an involuntary manslaughter charge is appropriate due to the lack of intent by the defendant. See State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008) (holding that an involuntary manslaughter charge was appropriate where defendant attempted to take gun from victim, and gun went off immediately after defendant jerked it away from the victim); Tisdale v. State, 378 S.C. 122, 662 S.E.2d 410 (2008) (holding that an involuntary manslaughter charge was warranted where defendant and victim fought for gun, and it "went off" while still in victim's hands); State v. Mekler, 379 S.C. 12, 664 S.E.2d 477 (reversing conviction for failure to charge involuntary manslaughter where evidence showed that defendant had cocked the gun and told victim to stop, but she did not remember pulling the trigger or intend to shoot victim); State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999) (reversing conviction for failure to charge accident and involuntary manslaughter where evidence showed that defendant shot victim accidentally while defending himself from an assault); see also State v. Sams, Op. No. 27447, S.C. Sup. Ct. filed Sept. 24, 2014 (Shearouse Adv Sh. No. 38 at 12) (stating that "when multiple charges are appropriate turns on the facts of each case, so there is no bright-line rule that can be universally applied," and recognizing that a self-defense charge and an involuntary manslaughter charge are not mutually exclusive, as long as there is any evidence to support both charges).

Although Appellant and the victim did not wrestle over a firearm, Appellant did not intend to participate in the robbery and was only trying to defend his friend, who appeared to be under attack by the victim for unknown or uncertain reasons. Just as the defendants in the cited cases allegedly fought over or brandished a firearm in an effort to protect themselves and stop further violence, Appellant only wanted to protect his friend and stop further violence, but Appellant did not intend to kill the victim. The weapon differs – wine bottle or bar stool versus a firearm – but the evidence of lack of intent and the defense-related motive are the same.

Even the trial judge appeared to concede just before sentencing that Appellant initially lacked the requisite intent to rob or hurt the victim. The judge stated:

> For what it's worth, I do believe that no one went there with the intent to kill somebody. I don't believe this was a situation that Mr. Tice was targeted to be killed or anything of that nature. Unfortunately, I think what it was, was an armed robbery that went bad. And once it went bad, things occurred that I think moved it away from simply an armed robbery and a burglary that went bad to a murder case.

(R. pp. 552-53.)

The crucial testimony that likely led to Appellant's conviction was offered by Plumley and Williams. No DNA or other physical evidence linked Appellant to the death of Tice.

However, the trial judge's refusal to instruct the jury on the lesser included offense of involuntary manslaughter deprived Appellant of any chance to explain how Appellant's criminally negligent actions which, while they resulted in Tice's death, did not constitute murder. Instead, Appellant was reduced in closing argument to attacking the credibility of the admitted criminals presented by the State. Appellant in closing argument repeatedly pointed out the witnesses' criminal nature, habitual lies and

inconsistencies in their statements, as well as emphasizing their obvious motive to lie to please a prosecutor who would have them in the crosshairs soon enough. (R. pp. 494-513.) While that was certainly appropriate, what the jury really needed to hear, and what it never got the chance to hear from Appellant, was a plausible explanation for Appellant's unintentional killing of the deceased.

II. DEFENSE OF OTHERS AND RIGHT TO ACT ON APPEARANCES

The trial judge erred in refusing to instruct the jury on defense of others and the right to act on appearances because there existed evidence showing that Appellant did not intend to participate in a robbery planned by others. Appellant was suddenly awakened while sleeping or passed out drunk in a car during a robbery by others, and was called inside a house to defend a friend who was being attacked for reasons that arguably were unknown or uncertain to him.

Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense. State v. Long, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997) (noting that evidence of self-defense was not conclusive and the issues of whether appellant actually believed he was in imminent danger of losing his life or sustaining seriously bodily injury, and whether an ordinary person would have entertained such a belief, were questions for the jury). In order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others. Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307 (1998).[1]

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[1] The focus in this case should necessarily be on Appellant and his belief about what was happening when he walked into the house, not on actions of his friend, Walters. While Walters may have been at fault in bringing on the difficulty by trying to rob the victim, there was evidence that Appellant did not intend to participate in the robbery, did not plan it and arguably did not know the reason for the fight between Walters and the victim. See Light, 378 S.C. 641, 664 S.E.2d at 469 ("To establish self-defense in South Carolina, four elements must be present: (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

continued . . .

A person has the right to act on appearances, even if the person's belief is ultimately mistaken. State v. Fuller, 297 S.C. 440, 443-44, 377 S.E.2d 328, 331 (1989) (reversing conviction where for failure to charge defendant had right to act on appearances; defendant testified that he saw victim and another person open the trunk of their car and thought a shiny object in the victim's hand was a gun). The test is not whether there was testimony of an intended attack but whether or not the defendant believed he was in imminent danger of death or serious bodily harm. The defendant is not required to show that such danger actually existed because he had a right to act upon such appearances as would cause a reasonable and prudent man of ordinary firmness and courage to entertain the same belief. State v. Jackson, 227 S.C. 271, 279, 87 S.E.2d 681, 684 (1955) (holding that defendant was entitled to charge on self-defense, including right to act on appearances, where defendant testified he shot the victim, a police officer, after being awakened in his home by the officer who had intruded into his home and even though defendant could not see anything while blinded by the officer's flashlight).

The Supreme Court has emphasized that the right to act on appearances is not limited to any particular circumstances, but the charge should be given whenever warranted by the facts. State v. Starnes, 340 S.C. 312, 321, 531 S.E.2d 907 (2000) ("right to act on appearances is not limited to the situation where the defendant testifies

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was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon 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 as 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 the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.")

he mistakenly thought he saw a weapon in the victim's hand"; Court reversed the conviction due to lack of charge).

The evidence presented by the State through Appellant's statements to others constitutes evidence that Appellant acted in defense of another based on the situation as it appeared to him at the moment. The requested charges were required because there was evidence in the record supporting them, when the evidence is viewed in the light most favorable to Appellant. If the jury had been instructed on defense of others and the right to act on appearances, Appellant could have argued that he had no intent to rob or hurt the victim, but instead acted to defend his friend. Appellant did not want to participate in the robbery. Appellant, suddenly awakened from a sound sleep or drunken stupor, rushed into the house to find his friend being beaten by a much larger man. At that moment, not realizing what was going on or even that any robbery plan had been put in action, Appellant came to the defense of his friend and struck the victim with the wine bottle and bar stool while defending his friend.

The lack of the requested charges meant Appellant was reduced in closing argument to attacking the credibility of the admitted criminals presented by the State. Appellant in closing argument repeatedly pointed out the witnesses' criminal nature, habitual lies and inconsistencies in their statements, as well as emphasizing their obvious motive to lie. (R. pp. 494-513.) While that was certainly appropriate, what the jury really needed to hear, and what it never got the chance to hear from Appellant, was a plausible explanation for Appellant's admittedly violent actions.

The jury, faced with murder or nothing, was deprived the opportunity to consider the lesser offense and to have applicable law explained to them under the evidence

adduced in this case. The fact that the evidence arose from the State's case is of no consequence. See Gourdine, 322 S.C. 396, 472 S.E.2d 241 (even when defendant does not testify, the court is "not confined to the State's version of the facts. . . . The law to be charged is determined by the evidence presented at trial. The trial judge is to charge the jury on a lesser included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed.") (citation omitted).

CONCLUSION

For the foregoing reasons, Appellant requests that the Court of Appeals reverse his convictions for murder, armed robbery and first degree burglary, and remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR, and the August 13, 2007, Order of the South Carolina Supreme Court, "RE: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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THE STATE,

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DEMETRISS GLENN,

APPELLANT

APPELLATE CASE NO. 2013-002444

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of April, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of April, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022 .