STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SALUDA COUNTY
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2014-002715

THE STATE, ...RESPONDENT

v.

JOHNNY JEROME BOYD,.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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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 that only the lesser, rather than the greater, offense was committed and, to the extent the trial court erred, whether any error was harmless where the verdict precluded the possibility that the victim suffered only moderate bodily injury.

STATEMENT OF THE CASE

Johnny Jerome Boyd (Appellant) was indicted at the December 2013 term of the grand jury for Saluda County for attempted murder (2013-GS-41-358). He was represented by Assistant Public Defender Bennett E. Casto of the Eleventh Circuit Public Defender's Office. The State was represented by Assistant Solicitor H. Franklin Young of the Eleventh Circuit Solicitor's Office. (R.p.1). On December 8-11, 2014, Appellant proceeded to trial by jury before the Honorable DeAndrea Benjamin. The jury found Appellant guilty of the statutory lesser included offense of assault and battery of a high and aggravated nature (ABHAN) and he was sentenced to sixteen (16) years' imprisonment. (R.p.400-404; R.p.384-p.398). Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a brief in support of his appeal. This Brief of Respondent (the State) follows.

STATEMENT OF FACTS

After the call of the case, jury qualification, jury selection, and the trial court's ruling on Appellant's pro se motion to relieve trial counsel, the jury was sworn and the trial proceeded. (R.p.1-p.9; SROA.p.1-p.7). The State made an opening statement setting forth its theory of the case and the evidence it intended to present. As explained by the solicitor, on the night of September 15, 2013, Latoya Abney (the victim) called 911 from outside her house. At the time of the call she believed Appellant was passed out in her bedroom, bleeding-out from a cut she had inflicted while defending herself from a prolonged assault. Appellant had just finished chasing the victim around the inside of the house while striking her with objects, including a chair. With her baby in her arms, the victim retreated to the bedroom but was soon cornered by Appellant. Appellant was bleeding all over the floor and said he thought he was going to pass out. Appellant went down and the victim ran outside holding the baby and her home phone. She called a family friend named Patrick Johnson, and then called 911 and tried to find a neighbor for help. That 911 call was recorded and it captured audio of the resumption of the assault when Appellant emerged from the house. As the victim screamed for Appellant to stop and stay away from her, Appellant struck her with more objects, including a concrete block and a bicycle as he chased her around outside. At some point, Johnson arrived and got the baby. The 911 recording included a brief silence when the victim was on the ground, possibly unconscious, before she got up and retreated to the shed behind the house. Appellant soon found the victim in the shed and began striking her repeatedly with his hands. When the police arrived, one officer heard what sounded like blows being delivered to a person. The officer went to the shed where he saw Appellant raise his hand back as far as he could and strike the victim in the head.

Appellant ran out of the shed when he saw the police and ultimately was arrested before being transported to the hospital for treatment due to profuse bleeding. (R.p.10-p.16).

Next, Appellant's counsel made an opening statement. He told the jury there was indeed a horrible fight between Appellant and the victim but insisted Appellant never had the intent to murder the victim during that fight. He focused on the serious injuries suffered by Appellant, including cuts to his face, head, chest, abdomen, stomach, and neck. Counsel acknowledged Appellant physically tried to prevent the victim from getting into the shed by throwing objects at her, including a chunk of cement; however, he again insisted there was no evidence Appellant's actions constituted an attempted murder. (R.p.16-p.22).

The State presented its case, first putting Deputy Joshua Steven Price of the Saluda County Sheriff's Office (SCSO) on the stand. Price and Lieutenant Donovan Shealy arrived at the victim's house at the same time and encountered Patrick Johnson standing in the front yard holding a child who was covered in blood. Price quickly checked the child for injuries and was told an assault was taking place behind the residence. Price could hear screams from what sounded like a female and other noises from behind the house. As he came around the side, Price could hear blunt strikes coming from a wooden out-building behind the residence. As Price approached the shed, he saw Appellant standing over the victim. She was sitting in a chair with her arms to her side, palms up, defenseless. Price saw Appellant raise his right arm over his head and saw him swing downward with a closed fist, striking the victim on the left side of her face. The victim appeared to be limp. (R.p.22-p.26). Price then testified as to his efforts to arrest Appellant and investigate the scene. He described numerous photographs that

had been taken of the crime scene and the people involved. Those photos were introduced by the State. (R.p.28-p.56).

Price explained that three particular photos showed the victim's condition as she was found that night. He testified the victim had tremendous swelling to the side of her face including underneath her eye and on her head. He said the victim's eye was swollen shut, her lips and nose were swollen, and she appeared to be bleeding from her lips. Price also mentioned minor cuts on her arms. (R.p.56, line 13-p.58, line 21). On cross-examination Price testified the officers at the scene called EMS because they were concerned for both Appellant and the victim; however, he acknowledged that other than a small amount of blood from the victim's mouth, all of the blood at the scene came from Appellant. (R.p.59, lines 1-16).

Next, the State called EMT Gary Seibert to the stand. Seibert was in a second ambulance that responded to the scene after the first ambulance attended to Appellant. Seibert attended to the victim and testified she complained of severe pain to the left side of her head where he noticed a good bit of swelling. Seibert said the victim's eye was swollen and she had abrasions on her head where she claimed to have been hit with a cinder block. He said the injuries "looked pretty severe." Seibert testified that after assessing the severity of the victim's injuries, he believed she needed to be "assessed, treated and transported as soon as possible." (R.p.60-p.68). On cross-examination, Seibert referred to a written report he had prepared in regard to his initial assessment of the victim. In that report he noted no abnormalities, except in the face and eye area. (R.p.68-p.72). On redirect, Seibert testified he focused on the victim's primary injuries, which were the ones that represented the greatest risk. He said those injuries were to her

head and that the area of main concern was her left eye and the swelling on the left side of her face. Seibert said the victim described her pain level as being a "ten" on a one-to-ten scale, with ten being the most excruciating pain. (R.p.72-p.73). At the conclusion of Seibert's testimony, the trial judge described a side-bar conference that had occurred during cross examination. She said the State had raised an issue as to whether Appellant's cross examination opened the door to the State being able to ask Seibert about the severity of the victim's injuries. The judge said she ruled the State could not elicit opinion testimony as to severity but could examine Seibert in response to the questions that had been asked by Appellant during cross. (R.p.74, lines 9-18).

The State then called 911 dispatcher Brenda Teague to the stand. Teague was on duty the night of the incident and took the emergency call from the victim. She identified the audio recording of the call and it was admitted without objection. (R.p.75-p.81). Next, Deputy Michael J. Raffield of the SCSO testified for the State. He was the third officer to arrive at the scene, approximately a minute and a half after Price and Shealy. When Raffield arrived he saw Price and Shealy in the front yard with Appellant. Appellant was covered in blood and was acting "really bizarre." Raffield then went to the back of the house to see the victim. He testified she had a severe contusion to the left side of her head which included the orbit around her left eye, her jaw, and the top of her skull. Raffield testified it "looked pretty bad" and he thought the victim potentially could have a closed head injury, which is the kind of thing that would need immediate medical help. He said the victim's general appearance was serious based on the injuries but not as serious as from a car wreck. He noted that she was scared but coherent. Raffield testified the victim ultimately was given ground transportation to the hospital and he continued his

investigation at the scene. (R.p.82-p.98). He identified photographs of various items from inside and outside the house and identified several objects gathered by the police including a concrete block, a flower pot, and a box cutter. Raffield also identified a photograph of the victim that showed her condition in terms of the swelling. He testified the swelling increased after the photo was taken and that the victim's head eventually looked like a basketball on the left side. (R.p.99-p.113).

The State then called Patrick Johnson to the stand. He described responding to the victim's distressed phone call on the night of the incident, hearing screaming when he arrived, and finding Appellant on the front porch holding the baby. He took the baby and went to find the victim. She was in the shed behind the house with the lights off. Johnson took the baby inside to wait for the police. (R.p.120-p.127).

Finally, the State called the victim to the stand. She described the prolonged assault she suffered at the hands of Appellant on September 15, 2013, and how during that assault she defended herself with a box cutter she kept in her purse. Following a verbal argument, Appellant began by poking and pushing the victim in the head. He then escalated his assault by slapping her, breaking a chair across her back, throwing dead fish at her, and throwing a mason jar at her while chasing her around the kitchen. The victim had removed a box cutter from her purse and was swinging it in defense, cutting Appellant repeatedly and causing extensive bleeding. Despite his injuries, Appellant kept coming after her before finally becoming dizzy and falling down in the bedroom. (R.p.128-p.151). The victim took that opportunity to go outside seeking help, first from a neighbor, and then by calling her friend Patrick Johnson and 911. The 911 recording was played for the jury as the victim answered questions about the events captured on the

recording. She initially told the operator she did not need an ambulance; however, during the call Appellant emerged from the house and resumed the assault, chasing the victim around her father's car. During the chase she dropped the box cutter. When Appellant caught up to her, he hit the victim on top of her head with a cinder block. The victim blacked out and fell to the ground. When she started coming to, she saw Appellant standing over her with a bicycle. He hit her with the bike and told her to "get her ass up." She ended up going behind the house and hiding in the shed with the door closed and the lights off, but Appellant later discovered the victim in the shed and began punching her in the face. She was sitting in a chair trying to block the blows but became more tired with each hit, eventually becoming exhausted and completely defenseless. The victim testified she thought Appellant was going to kill her. During direct examination, the victim offered no testimony about the severity of her injuries or the treatment she received after being transported to the hospital. (R.p.152-p.170).

The trial then broke for the day and the following morning, before cross-examination started, the trial court placed the terms of a plea offer on the record. The State offered Appellant a plea to assault and battery in the first degree, which carries a maximum sentence of ten years; however, Appellant rejected the offer and the trial resumed. (R.p.171-p.173). On cross-examination, the victim testified she was taken to the hospital the night of the incident and was eventually treated and released. (R.p.174, lines 13-20). On redirect, the victim testified that though she was treated and released, she was still having problems from the incident. She explained: "The vision in my left eye is more blurry than in my right eye," but despite this problem she had not sought help

even though she was told by the hospital to follow up if needed. (R.p.175, line 25-p.177, line 1).

After the State rested, Appellant moved for a directed verdict and the trial court denied his motion. (R.p.177-p.181). The trial judge then described a side-bar objection and ruling that had occurred during the solicitor's redirect examination of the victim. Appellant had objected to questions about the victim's continuing vision problems; however, the objection was overruled because Appellant had already asked the victim about being treated and released from the hospital. (R.p.181, line 21-p.182, line 9). The trial judge then questioned Appellant outside the presence of the jury in regard to his right to testify and Appellant presented his defense. First, he called Saluda County paramedic Jacob Starnes to the stand. Starnes was qualified as an expert in emergency medical response without objection. He testified solely about Appellant's injuries on the night of the incident. (R.p.183-p.189).

Next, Appellant testified on his own behalf. He denied having any intent to kill the victim and said he did not attempt to murder her. Appellant then described his version of the incident. He admitted the initial argument and admitted throwing a piece of concrete at the victim in an attempt to keep her from getting to the shed; however, he generally described the event as one where he was defending himself from the victim's attack with the box cutter. (R.p.190-p.207). On cross-examination Appellant denied picking up the flower pot, denied hitting the victim with a cinder block, denied hitting her with the bike, denied hitting her with a chair, and denied hitting her with a mason jar; however, he admitted striking her with his hand after she was in the shed. (R.p.207-p.239). Following a motion hearing and proffered testimony from the defense, the trial

court allowed Appellant to call mutual acquaintance Ricky Harris to the stand to provide limited testimony about three prior altercations between Appellant and the victim wherein she acted as the first aggressor. (R.p.240-p.273).

After the defense rested, the trial judge held an on-the-record charge conference. The parties engaged in a lengthy discussion about various aspects of the possible charge. (R.p.273-p.308). In regard to charging lesser included offenses, Appellant first stated he only wanted a charge on attempted murder but no lesser offenses; however, when the State requested a charge on ABHAN and assault and battery in the first degree, Appellant did not object. (R.p.279-p.281). Later, while discussing whether to charge particular subsections of assault and battery in the first degree, Appellant then requested a charge on assault and battery in the second degree. He argued that because assault and battery in the second degree involves moderate bodily injury, the jury should be allowed to decide the issue of how serious the injuries were. The trial court expressed concern that there had not been evidence to support the charge but granted a brief recess so Appellant could further consider his request and point out what evidence he believed would suffice. (R.p.293-p.301).

After the break, Appellant directed the trial judge to evidence regarding the injury to the victim's eye and noted the eye is part of the central nervous system. He argued that "out of an abundance of caution" he was requesting the instruction on assault and battery in the second degree. The solicitor objected to the charge and argued any injury to the eye itself was an after-effect for which the victim herself testified she received no treatment. The solicitor further noted that even under assault and battery in the first degree, the State was proceeding under a theory that the evidence supported conviction

under the subsection dealing with an offer or attempt to injure rather than great bodily injury. The judge then recognized that the evidence could also support assault and battery in the first degree under the other subsection because, to the extent the eye was injured, the definition of great bodily injury included "protracted loss or impairment of the function" of that eye. The solicitor agreed and continued to argue the evidence did not support a charge for assault and battery in the second degree because there was no evidence to prove the eye itself merely required treatment. The trial judge explained there had been no actual evidence that the victim required treatment to an organ system of the body other than the skin, muscles, and connective tissue and ultimately denied Appellant's request for a charge on assault and battery in the second degree. (R.p.302-p.308). Specifically, the trial judge ruled:

> All right. And just to note for the record, in coming to the decision the Court considered your argument regarding her not seeking – if she were not to seek any treatment in this case, I believe the testimony is she went to the hospital, EMS took her to the hospital, but no treatment was required and that is the reason for the – the reason for – it says requiring treatment to an organ system. She was taken to the hospital. She was seen at the hospital, and I think you pointed out yesterday she was sent home with no follow up treatment suggested or required by the medical folks at the hospital.

(R.p.308, lines 9-20).

The parties then gave closing arguments, (R.p.309-p.350), and the trial court charged the law. The court charged the jury on the roles of the judge and jury, direct evidence and circumstantial evidence, credibility of witnesses, inconsistent statements, the relevance and proper consideration of prior criminal records, the State's burden of proof, the presumption of innocence, the elements of attempted murder, ABHAN, and first-degree assault and battery including the definition of great bodily injury, and self-

defense. (R.p.355-p.374). Upon completion of the jury charge, the trial judge asked if either side had objections or exceptions. Counsel for Appellant renewed prior objections, "particularly the one of assault and battery second based on the fact that it's a lesser included under Belcher." (R.p.374, lines 12-25).

After deliberating for a period of time, the jury sent out a question asking for a copy of the charge describing the charged offense and the lesser included offenses. The trial judge re-charged the elements of the crimes. (R.p.377-p.383). The jury continued deliberations and then returned a verdict finding Appellant guilty of ABHAN. Appellant renewed all motions he had previously made and the trial court renewed its earlier rulings before sentencing Appellant to sixteen (16) years' imprisonment. (R.p.404; R.p.384-p.398).

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 that only the lesser, rather than the greater, offense was committed. Furthermore, to the extent the trial court erred, any error was harmless where the verdict precluded the possibility that the victim suffered only moderate bodily injury.

Appellant argues the trial court erred in failing to charge the lesser included offense of assault and battery in the second degree because it denied the jury the option of choosing between whether the victim suffered "great bodily injury" or "moderate bodily injury." He contends there was evidence in the record from which the jury could infer the victim suffered only "moderate bodily injury," which would support a jury charge for this lesser offense rather than only the higher level offenses of ABHAN and assault and battery in the first degree, both of which he argues "require 'great bodily injury.'" The State disagrees and submits Appellant's argument is without merit.

First, contrary to Appellant's assertion, neither ABHAN nor assault and battery in the first degree requires proof of great bodily injury. Second, no evidence was presented at trial to support a charge on the lesser included offense of assault and battery in the second degree. Indeed, Appellant could not have been guilty of **only** the lesser charge where no evidence existed that the victim suffered an injury "requiring treatment to an organ system of the body other than the skin, muscles and connective tissue of the body." Finally, if the trial court's charging decision was error, it was harmless where the jury's verdict precluded the possibility it could have found the victim's injuries to constitute only moderate bodily injury. For all of these reasons, Appellant's conviction 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, -600 (Supp. 2012). 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) (Supp. 2012). 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) (Supp. 2012). 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) (Supp. 2012).

In relevant part, the statute provides:

> (A) For purposes of this section:
>
> > (1) "Great bodily injury" means bodily injury which causes a substantial risk of death or which causes serious, permanent disgifurement or protracted loss or impairment of the function of a bodily member or organ.
> >
> > (2) "Moderate bodily injury" means physical injury requiring treatment to an organ system of the body[1] other than the skin, muscles and

[1] There are eleven major organ systems of the human body. See e.g. www.encyclopedia.com/doc/1G2-3448300422.html (naming the eleven human organ systems as: integumentary, skeletal, muscular, nervous, endocrine, circulatory, lymphatic, respiratory, digestive, urinary, and reproductive); See also

connective tissues of the body, except when there is penetration of the skin, muscles, and connective tissue that require surgical repair of a complex nature or when treatment of the injuries requires the use of regional or general anesthesia.[2]

. . . .

(B)(1) A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and:

(a) great bodily injury to another person results; or

(b) the act is accomplished by means likely to produce death or great bodily injury.

. . . .

(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 of a person, either under or above clothing, 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.

. . . .

(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:

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www.brighthub.com/science/medical/articles/111960.aspx.

[2] The Legislature recently amended the definition of "moderate bodily injury." 2015 Act No. 58, § 3 (eff. June 4, 2015). The statute now provides: "'Moderate bodily injury'" means physical injury that involves prolonged loss of consciousness, or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ, or injury that requires medical treatment when the treatment requires the use of regional or general anesthesia or injury that results in a fracture or dislocation. Moderate bodily injury does not include one-time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that do not ordinarily require extensive medical care." S.C. Code Ann. § 16-3-600(A)(2) (Supp. 2015).

> (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.
>
> . . . .

S.C. Code Ann. § 16-3-600 (Supp. 2012) (emphasis added).

At trial, the court ruled:

> All right. And just to note for the record, in coming to the decision the Court considered your argument regarding her not seeking – if she were not to seek any treatment in this case, I believe the testimony is she went to the hospital, EMS took her to the hospital, but no treatment was required and that is the reason for the – the reason for – it says requiring treatment to an organ system. She was taken to the hospital. She was seen at the hospital, and I think you pointed out yesterday she was sent home with no follow up treatment suggested or required by the medical folks at the hospital or medical staff at the hospital.

(R.p.308, lines 9-20). Appellant contends this was error and that the trial judge misinterpreted the statute. He argues that the "only reasonable or logical interpretation is that moderate bodily injury is a physical injury that needs treatment" and that because there was evidence the victim had injuries that received treatment, those injuries met the definition of moderate bodily injury. (Brief of Appellant, p.14-p.15).

Initially, the State notes that Appellant's contention that ABHAN and assault and battery in the first degree both require proof of great bodily injury to another person is simply not correct. ABHAN requires an injury, but it is not necessary that it be great bodily injury. Indeed, any injury can be sufficient if "the act is accomplished by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600(B)(1)(b) (Supp. 2012). Similarly, in situations where assault and battery in the first degree does require an injury, it is not necessary that it rise to the level of great bodily injury. S.C.

Code Ann. § 16-3-600(C)(1)(a) (Supp. 2012) Additionally, a person may be guilty of assault and battery in the first degree where there is no injury at all if they "offer or attempt to injure another person with the present ability to do so and the act" either "is accomplished by means likely to produce death or great bodily injury" or "occurred during the commission of a robbery, burglary, kidnapping or theft." S.C. Code Ann. § 16-3-600(C)(1)(b) (Supp. 2012). Thus, one key premise to Appellant's argument is fatally flawed.

Regardless of whether that flaw damages the overall claim, Appellant's argument is nevertheless problematic because he seems to ignore the phrase "requiring treatment" in the statutory definition of moderate bodily injury. "Require" is a transitive verb meaning: "1. To have as a requisite; need. 2. To call for as obligatory or appropriate; demand. 3. To oblige; compel." The American Heritage College Dictionary 1160 (3rd ed. 2000). According to the "simple definition" in Merriam-Webster's online dictionary, the meaning of the word "require" is: "to need (something)" or "to make it necessary for someone to do something." See http://www.merriam-webster.com/dictionary/require. The State submits that where a particular requirement or need constitutes a definitional element for establishing a criminal offense, and that requirement or need is tied directly to medical treatment, it may only be established through properly admitted opinion testimony from an expert witness.

Here, while testimony was elicited from a number of witnesses who described the injury to the skin covering the victim's eye, the severity of that injury, the belief that it needed to be assessed and treated, and the belief that it was the kind of injury that would need immediate medical help, (R.p.56, line 13-p.58, line 21; p.60-p.68; p.72-p.73; p.82-

p.98), none of those witnesses provided medical or other expert testimony that the injury was in fact one "requiring treatment." Evidence that lay people believe an injury needs treatment, or evidence that the injured party sought or received treatment, are not equivalent to evidence that a particular injury is one actually "requiring treatment" for purposes of the statute. The only witness qualified as an expert at trial was Jacob Starns, who was called by the defense and was qualified as an expert in the field of emergency medical response. Starns offered no opinion as to whether the victim's eye injury required treatment. Indeed, he was attending to Appellant and never assessed the victim's injuries the night of the incident. (R.p.183-p.189). If the Legislature intended the definition of moderate bodily injury to mean merely "a physical injury that needs treatment" it would have chosen those words. Instead, it chose "requiring treatment" to modify physical injury. That choice was intentional and must be construed to carry a meaning. Because no evidence was presented supporting a finding the injuries to the victim were ones "requiring treatment," no evidence was presented supporting a finding the assault and battery on the victim constituted an assault and battery in the second degree, and the trial judge did not err in declining to instruct the jury on the lesser included offense.

More troubling with Appellant's argument, however, is the fact that it seems to ignore the plain statutory definition that an injury is only a "moderate bodily injury" if it is an injury requiring treatment to "an organ system of the body other than the skin, muscles and connective tissues of the body." Under Appellant's argument that moderate bodily injury is merely a "physical injury that needs treatment," any injury, including one to a person's skin, muscles, or connective tissue, would constitute a "moderate bodily

injury" as long as the person received some kind of treatment for that injury. This would render the additional language regarding "organ systems of the body" irrelevant, a result not possibly intended by the Legislature. This conclusion is also supported by the 2015 amendment whereby the Legislature clarified the types of injuries which cannot rise to the level of moderate bodily injury by explicitly stating: "Moderate bodily injury does not include one-time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that do not ordinarily require extensive medical care." S.C. Code Ann. § 16-3-600(A)(2) (Supp. 2015).

Furthermore, while there was testimony elicited from a number of witnesses that described the injury to the skin covering the victim's eye, the severity of that injury, the belief that it needed to be assessed and treated, and the belief that it was the kind of injury that would need immediate medical help, (R.p.56, line 13-p.58, line 21; p.60-p.68; p.72-p.73; p.82-p.98), none of those witnesses provided testimony that Appellant's eye, as a functioning organ, was injured in any way. A swollen eye, even one that is swollen shut, does not mean the eye itself was injured. Without such testimony, no evidence was presented supporting a finding the assault and battery on the victim constituted an assault and battery in the second degree, and the trial judge did not err in declining to instruct the jury on the lesser included offense.[3] For all of these reasons, Appellant's conviction should be affirmed.

[3] The victim's assertion, that she has had ongoing problems with her left eye being a little blurry as a result of the incident, is also not sufficient to meet the definition of moderate bodily injury without qualified medical evidence in support of that assertion. Furthermore, to the extent no such support is required, the victim's claims **only** provide evidence of "protracted loss or impairment of the function of a bodily member or organ" as described in the definition of great bodily injury and would only support a jury charge for a crime involving great bodily injury. S.C. Code Ann. § 16-3-600(A) (Supp. 2012).

Harmless Error

Even if this Court finds the trial court's charging decision was error, it was harmless where the jury's verdict precluded the possibility it could have found the victim's injuries to constitute only moderate bodily injury. 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.

Appellant's argument on appeal hinges on what he claims was the trial court effectively denying the jury the ability to assess the severity of the victim's injuries. Specifically he argues the trial court erred in failing to charge the lesser included offense of assault and battery in the second degree because it denied the jury the option of choosing between whether the victim suffered "great bodily injury" or "moderate bodily injury." He contends there was evidence in the record from which the jury could infer the victim suffered only "moderate bodily injury" and therefore should have been

charged on the lesser included offense. The State submits the jury verdict itself belies Appellant's contention.

A person commits ABHAN if the person unlawfully "injures another person" and that person suffers "great bodily injury." S.C. Code Ann. § 16-3-600(B)(1) (Supp. 2012).[4] Here, after hearing all of the evidence, the jury found Appellant guilty beyond a reasonable doubt of ABHAN. To the extent that finding was based on the severity of the victim's injury, it necessarily encompassed a finding that the victim suffered great bodily injury. Otherwise, the verdict in regard to ABHAN would have been not guilty. By comparison, a person commits assault and battery in the second degree if the person either unlawfully "injures another person" or "offers or attempts to injure another person," and either that person suffers "moderate bodily injury" or "moderate bodily injury . . . could have resulted" to that person. S.C. Code Ann. § 16-3-600(D)(1) (Supp. 2012). Again, to the extent the jury's verdict was based on the severity of the victim's injury, it could not have been based on a finding of moderate bodily injury. Otherwise, the verdict in regard to ABHAN would have been not guilty.

Based on the evidence, Appellant's theory of defense, and Appellant's argument on appeal, the jury could only find that Appellant committed attempted murder, ABHAN, 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,

[4] A person also commits ABHAN if the person unlawfully "injures another person" and the act is "accomplished by means likely to produce death or great bodily injury," regardless of the actual severity of that injury. Id.

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."). Thus, any error in the failure to charge the lesser included offense of assault and battery in the second degree was harmless because the erroneous instruction did not contribute to the verdict beyond a reasonable doubt. Middleton, supra; Adams, supra. Appellant's conviction for ABHAN should be affirmed.

CONCLUSION

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

Respectfully submitted,

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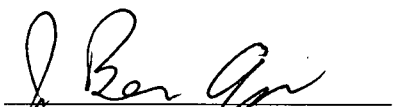
BY: 
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Columbia, South Carolina
March 3, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SALUDA COUNTY
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2014-002715

THE STATE,.....RESPONDENT

v.

JOHNNY JEROME BOYD,.....APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated March 3, 2016, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served. This 3rd day of March, 2016.

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