

ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of General Sessions
Krista Lea Harrington, Circuit Court Judge

Appellate Case No. 2015-000720

RECEIVED
JUN 29 2016
SC Court of Appeals

THE STATE,RESPONDENT

v.

JOHN ARTHUR THOMASAPPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3922

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

300-B California Avenue
Moncks Corner, SC 29461
(843) 723-3800 Ext. 4529

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of General Sessions
Krista Lea Harrington, Circuit Court Judge

Appellate Case No. 2015-000720

THE STATE,RESPONDENT

v.

JOHN ARTHUR THOMASAPPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3922

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

300-B California Avenue
Moncks Corner, SC 29461
(843) 723-3800 Ext. 4529

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Respondent's Statement of Issues on Appeal.....	1
Statement of the Case.....	2
Statement of Facts.....	3
Argument:	
I. The trial court properly refused to instruct the jury on both second and third degree assault and battery, as it correctly charged the jury on the lesser-included charges of ABHAN and first degree assault and battery, and no evidence was presented that Appellant was guilty of any offense lesser than first degree assault and battery.....	7
II. The trial court properly refused to instruct the jury on (A) the law of citizen's arrest and (B) the defense on accident where there was no evidence at trial that Appellant was trying to effectuate a citizen's arrest when he attacked Victim, and found Appellant's fault in initiating the confrontation precluded him from requesting the jury be charged with the defense of accident.....	14
III. The trial court did not commit reversible error in refusing to issue an additional corrective instruction regarding the State's PowerPoint slides which stated that malice can be inferred from the use of a deadly weapon because: (1) the trial judge issued two corrective instructions to the jury; and (2) the jury did not find Appellant guilty of attempted murder, which required a finding of malice, and instead found Appellant guilty of the lesser-included offense of ABHAN.....	27
Conclusion	32

TABLE OF AUTHORITIES

Cases:

<u>Cabiness v. Town of James Island</u> , 393 S.C. 176, 712 S.E.2d 416 (2011).....	18
<u>Estelle v. McGuire</u> , 502 U.S. 62 (1991)	30
<u>In re Decker</u> , 322 S.C. 215, 471 S.E.2d 462 (1995)	18
<u>Lowry v. State</u> , 376 S.C. 499, 657 S.E.2d 760 (2008).....	31
<u>Miranda v. Arizona</u> , 384 U.S. 436 (1966)	20
<u>State v. Adams</u> , 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003)	26, 27
<u>State v. Belcher</u> , 385 S.C. 597, 685 S.E.2d 802 (2009).....	29, 31
<u>State v. Boswell</u> , 391 S.C. 592, 707 S.E.2d 265 (2011)	19
<u>State v. Burriss</u> , 334 S.C. 256, 513 S.E.2d 104 (1999).....	24
<u>State v. Chatman</u> , 336 S.C. 149, 519 S.E.2d 100 (1999).....	25
<u>State v. Commander</u> , 396 S.C. 254, 721 S.E.2d 413 (2011).....	18, 23
<u>State v. Ezell</u> , 321 S.C. 421, 468 S.E.2d 679 (Ct. App. 1996)	30
<u>State v. Geiger</u> , 370 S.C. 600, 635 S.E.2d 669 (Ct. App. 2006).....	10
<u>State v. Green</u> , 397 S.C. 268, 724 S.E.2d 664 (2012).....	10, 13
<u>State v. Hariott</u> , 210 S.C. 290, 42 S.E.2d 285 (1947).....	26
<u>State v. Hill</u> , 315 S.C. 260, 433 S.E.2d 838 (1993)	10
<u>State v. Holland</u> , 385 S.C. 159, 682 S.E.2d 898 (Ct. App. 2009).....	9, 17
<u>State v. Jefferies</u> , 316 S.C. 13, 446 S.E.2d 427 (1994).....	31
<u>State v. Johnson</u> , 333 S.C. 62, 508 S.E.2d 29 (1998)	17
<u>State v. Mallory</u> , 270 S.C. 519, 242 S.E.2d 693 (1978)	13
<u>State v. McAteer</u> , 340 S.C. 644, 532 S.E.2d 865 (2000)	18

<u>State v. Middleton</u> , 407 S.C. 312, 755 S.E.2d 432 (2014).....	10, 26, 27
<u>State v. Mitchell</u> , 382 S.C. 1, 675 S.E.2d 435 (2009).....	12
<u>State v. Nall</u> , 304 S.C. 332, 404 S.E.2d 202 (Ct. App. 1991).....	19
<u>State v. Peer</u> , 320 S.C. 546, 466 S.E.2d 375 (Ct. App. 1996)	10, 17
<u>State v. Rye</u> , 375 S.C. 119, 651 S.E.2d 321 (2007).....	30
<u>State v. Santiago</u> , 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006).....	10
<u>State v. Simmons</u> , 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009).....	10
<u>State v. Slater</u> , 373 S.C. 66, 644 S.E.2d 50 (2007).....	23, 24
<u>State v. Small</u> , 307 S.C. 92, 413 S.E.2d 870 (Ct. App. 1992)	16
<u>State v. Smith</u> , 315 S.C. 547, 446 S.E.2d 411 (1994).....	13, 30
<u>State v. Weaver</u> , 265 S.C. 130, 217 S.E.2d 31 (1975).....	9, 17
<u>State v. Wilson</u> , 345 S.C. 1, 545 S.E.2d 827 (2001).....	9, 17
<u>Tate v. State</u> , 351 S.C. 418, 570 S.E.2d 522 (2002)	31, 32
<u>Transp. Ins. Co. v. S.C. Second Injury Fund</u> , 389 S.C. 422, 699 S.E.2d 687 (2010)	18
<u>Unisun Ins. Co. v. Schmidt</u> , 339 S.C. 362, 529 S.E.2d 280 (2000).....	18

Statutes:

S.C. Code Ann. § 16-3-29 (2015).....	10
S.C. Code Ann. § 16-3-600 (2015 & Supp. 2015).....	12
S.C. Code Ann. § 16-3-600(A)(2) (Supp. 2015).....	11
S.C. Code Ann. § 16-3-600(B)(1)(b) (2015)	12, 13
S.C. Code Ann. § 16-3-600(B)(3) (2015).....	10
S.C. Code Ann. § 16-3-600(C)(1)(b)(i) (2015).....	13
S.C. Code Ann. § 16-3-600(C)(3) (2015).....	11

S.C. Code Ann. § 16-3-600(D)(3) (2015).....	11
S.C. Code Ann. § 17-13-10 (2014).....	passim
S.C. Code Ann. § 17-13-20 (2014).....	18, 21, 22
S.C. Code Ann. § 17-13-20(a) (2014).....	19
S.C. Code Ann. § 17-13-20(d) (2014)	19, 21

Other Authorities:

6B C.J.S. <u>Arrest</u> § 1 (2016).....	21
---	----

STATEMENT OF ISSUES ON APPEAL

1. The trial court properly refused to instruct the jury on both second and third degree assault and battery, as it correctly charged the jury on the lesser-included charges of ABHAN and first degree assault and battery, and there was no evidence that Appellant was guilty of any offense lesser than first degree assault and battery.
2. The trial court properly refused to instruct the jury on (A) the law of citizen's arrest and (B) the defense on accident where there was no evidence at trial that Appellant was trying to effectuate a citizen's arrest when he attacked Victim, and found Appellant's fault in initiating the confrontation precluded him from requesting the jury be charged with the defense of accident.
3. The trial court did not commit reversible error in refusing to issue an additional corrective instruction regarding the State's PowerPoint slides which stated that malice can be inferred from the use of a deadly weapon because: (1) the trial judge issued two corrective instructions to the jury; and (2) the jury did not find Appellant guilty of attempted murder, which required a finding of malice, and instead found Appellant guilty of the lesser-included offense of ABHAN.

STATEMENT OF THE CASE

On February 11, 2014, the Berkeley County Grand Jury indicted Appellant for attempted murder (2014-GS-08-00059) and possession of a weapon during the commission of a violent crime (2014-GS-08-00453).¹ On February 17–19, 2015, Appellant proceeded to a jury trial before the Honorable Kristi Lea Harrington. Chad D. Shelton, Esquire, and Cody J. Groeber, Esquire, represented Appellant; assistant solicitors Michael Patterson, Esquire, and Daniel B. Poulos, Esquire, represented the State. The jury found Appellant guilty of the lesser-included charge of assault and battery of a high and aggravated nature (ABHAN) and the trial judge sentenced² him to ten years' imprisonment suspended upon four years of active service and three years' probation. (R.p.256, line 17–R.p.257, line 2; R.p.299, line 20–R.p.300, line 6).

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

¹ Ultimately, the State did not pursue this charge at trial. Appellant's indictment mischaracterized his weapon as a gun, and the trial judge did not permit the State to amend the indictment.

² Appellant's sentencing hearing did not occur immediately after trial; it was held on March 23, 2015.

STATEMENT OF FACTS

Undisputed Facts

On the evening of November 4, 2013, Appellant and his roommate, Misty Watts, stopped at the Monkey Business Bar and Grill located in Cross, South Carolina. Shortly after their arrival, Kenneth Melton (Victim) and his friend Eric Singletary arrived at the bar. After Appellant and Victim had a brief discussion about an upcoming fishing tournament, Appellant left the bar. While he was gone, Appellant sent a text to Watts stating, "There will be bloodshed."³ Appellant returned a short time later, holding a knife, and approached Victim. A struggle ensued between the two men, at some point during which Appellant stabbed Victim. Both men fled the bar. Victim and Singletary drove to a nearby convenience store and called for medical assistance. When officers arrested Appellant the following day he did not resist, and officers took Appellant to get treatment for injuries he sustained during his escape from Monkey Business. (R.p.28, line 5–R.p.29, line 15; R.p.53, line 11–R.p.54, line 18; R.p.55, lines 3–16; R.p.56, lines 9–19; R.p.141, lines 3–12; R.p.145, lines 1–23; R.p.149, line 13–R.p.150, line 21).

Appellant's Testimony

During his testimony, Appellant admitted he and Victim had been friends at some point prior to the stabbing, but their friendship had deteriorated in the months leading up to the attack. Appellant stated he tried to distance himself from Victim because of several uncomfortable situations, including: (1) a situation in which a man threatened Victim with a chainsaw, and Appellant intervened; and (2) an occasion when Victim arrived on Appellant's property unannounced and armed with a rifle, demanding to hunt in the surrounding woods. Appellant also claimed Victim threatened violence following two of their disagreements, but admitted he

³ There is a slight discrepancy as to the specific wording of the text message. Watts believed the wording was something close to "There will be bloodshed." Appellant stated he was unsure of the exact wording he used in the text message, but admitted to sending a text containing very similar language.

did not call the police and that he thought it was best to just "let it go" and move on from the situations. (R.p.112, line7–R.p.128, line 10).

According to Appellant, on the night of November 4, 2013, he and Watts were eating at Monkey Business when Victim and Singletary arrived. As Appellant ate, Watts spoke with the men in a corner of the bar. The three then sat by Appellant, and Watts grabbed his car keys and exited the bar. Appellant was suspicious of Watts, claiming that two days prior to the stabbing he saw a Facebook message from Victim to Watts asking her to steal two cell phones from him.⁴ When Watts returned, she placed the keys back on the bar and tapped Victim on the shoulder. Victim then left the bar. Appellant paid his tab and attempted to follow, but Watts interfered and attempted to dissuade him from leaving. Ultimately, Appellant left and after driving past Victim's house and another bar, the Sportsman, Appellant decided to check his car to see if anything was missing. Appellant noticed his tote bag full of cell phones and electronic equipment was missing, the total value of such was approximately \$3,000. (R.p.128, line 11–R.p.136, line 15).

Appellant began text messaging with Watts, during which she appeared interested in where he was driving. Eventually, he deduced Victim had returned to Monkey Business, and told Watts that if he returned to the bar, "there would be blood." Upon arriving at Monkey Business, Appellant checked Victim's vehicle for any signs of the missing items, but only saw a rifle laying across the back seat. It was at that time Appellant decided he was going to confront Victim about the stolen property. He claimed he walked into the bar with his knife in his hands because he feared Victim would be armed. (R.p.136, line 16–R.p.140, line 20).

⁴ Appellant was the purchasing agent for his employer, L & S Electronics. He procured the company cell phones, and managed the usage plans for the company. The owner of the company allowed him to purchase cell phones using company resources and sell them personally as a side business, provided Appellant reimbursed the company for the cost of the phones. (R.p.179, lines 6–18).

Appellant confronted Victim and asked him about the location of the missing items. Appellant put his hand on Victim's shoulder, and when Victim turned around he held up the knife to show him "[he] wasn't scared." Victim then lunged at him, and during the tussle Victim was stabbed. Both men fled the bar, and Appellant injured himself when he fell in a ditch during his escape. He also lost his glasses and the knife at that time. (R.p.141, line 3–R.p.146, line 19).

Witnesses' Testimony

Appellant, Victim, Watts, and Singletary⁵ were not the only people present for the stabbing; Joe Huntley, Debbie Huntley, and Denise Gibby were at Monkey Business at the time of the attack. Other than Appellant, the testimony at trial contained relatively similar versions of the stabbing.⁶

Victim testified he did discuss an upcoming fishing tournament with Appellant that night, but that there was no argument or animosity generated from that conversation. He stated he never left the bar, but Appellant did and then returned several minutes later with a knife and stabbed him while saying "[Appellant] was going to cut . . . and kill [him]." After he was stabbed, Victim tried to escape, and threw a beer bottle at Appellant before exiting the bar. (R.p.24, line 4–R.p.28, line 14; State's Exhibit #3).

According to Watts, Appellant left the bar after discussing the fishing trip with Victim, and appeared "flustered" after the discussion. He returned ten to fifteen minutes later, at which time Watts noticed commotion in the bar, with Victim coming out of his chair. Watts observed Appellant grab Victim from behind and stab him. She noted Appellant attacked Victim without

⁵ Singletary did not testify at trial.

⁶ As noted below, Appellant was the only witness who testified Victim left the bar between the fishing trip discussing and the stabbing.

any provocation, and appeared "very angry, aggressive" and completely out of character. (R.p.54, line 6–R.p.56, line 8).

Debbie Huntley did not recall any dispute between Appellant and Victim occurring prior to the attack, but admitted the two men appeared to "have a few words" at that time, after which Appellant left. She noted Victim appeared "gregarious"⁷ that night, while Appellant appeared "upset" when he returned to the bar approximately twenty minutes later. Appellant approached Victim and leaned over his shoulder, at which time Victim "spun around and . . . fell out of his chair, approached the pool table, [and] said something about . . . dying." She recalled Appellant made some comment regarding money before attacking Victim. (R.p.61, line 1–R.p.69, line 18).

Joe Huntley did not notice the altercation before it erupted, but noted he heard a noise and that the fight "happened real fast." However, he noticed Appellant did not appear to be like his usual self and that Victim was complaining of a stab wound by the time he was able to intervene. (R.p.74, line 22–R.p.75, line 24).

Gibby did not observe any type of argument between Appellant and Victim prior to the stabbing, and noticed that when Appellant returned he went straight for Victim. She did not hear Appellant make any comments of substance during the attack. (R.p.79, line 2–R.p.80, line 8).

⁷ In his brief, Appellant erroneously claims Huntley testified Appellant appeared gregarious. (Brief of App.p.13).

ARGUMENT

I.

The trial court properly refused to instruct the jury on both second and third degree assault and battery, as it correctly charged the jury on the lesser-included charges of ABHAN and first degree assault and battery, and no evidence was presented that Appellant was guilty of any offense lesser than first degree assault and battery.

A. Factual and Procedural History

After the attack, Victim was transported to the Medical University of South Carolina (MUSC) and was treated by Dr. Steven Fann, an acute care doctor and general surgeon. Dr. Fann testified Victim sustained a stab wound to the chest, just below the collarbone.⁸ He explained that penetrating chest trauma to that part of Appellant's body could have resulted in injury to Victim's heart, the sack that contains the heart, and the great vessels around the heart, and the knife, had it hit one of those structures, could have caused life-threatening injuries. Dr. Fann claimed he had seen "direct injuries to the heart as a result of injuries [similar to Appellant's]." (R.p.81, line 16–R.p.84, line 21; R.p.86, line 17–R.p.87, line 7).

Due to the location of the injury, Dr. Fann ordered a chest x-rays and echocardiograms to monitor the fluid and air in Victim's chest, as he was concerned that Victim's lungs could collapse or that his heart had been damaged. Fortunately, the tests showed Victim was not seriously injured, and his wound was stitched up. The stiches were removed in a follow-up appointment. (R.p.86, lines 4–16; R.p.87, line 24–R.p.88, line 6; R.p.91, line 12–R.p.93, line 3).

At the conclusion of trial, Counsel requested charges for the lesser-included offenses of ABHAN, and assault and battery in the first, second, and third degrees. Counsel argued the jury

⁸ Dr. Fann's technical explanation of Victim's injury was: "Victim sustained a stab wound to the anterior chest at about the level of the midclavicular line just inferior to the clavicle, which would be the collarbone." R.p.84, lines 18–21).

could have determined Victim suffered only moderate bodily injury, and that the jury might not have believed the doctor. (R.p.195, line 11–R.p.196, line 13; R.p.198, line 23–R.p.199, line 5).

The State consented to charging the jury with ABHAN and first degree assault and battery, as Victim was stabbed in the chest with a deadly weapon. However, the State disagreed with charging the jury on second-degree and third-degree assault and battery, noting: (1) second degree assault and battery requires the victim only suffer moderate bodily injury; (2) third degree assault and battery is simple assault; and (3) based on the seriousness of the attack and injury, Appellant could not have been found guilty of the second and third degree offenses. (R.p.197, line 23–R.p.198, line 20).

The trial judge stated that she thought the definition of moderate bodily injury did not include injuries which: (1) penetrated the skin, muscles, and connective tissue and required surgical repair of a complex nature; or (2) treatment requiring the use of regional or general anesthesia. She believed she had heard testimony that anesthesia had been used, and because of that testimony she noted she was precluded from charging second and third degree assault and battery. When pressed on the issue, the State admitted it was unsure of what exactly Dr. Fann said during his lengthy testimony, but that it believed he testified Victim "received stitches and did receive some type of general anesthesia or treatment." Counsel claimed he did not hear any testimony about regional or general anesthesia, but the trial judge was unmoved by Counsel's statement. (R.p.235, line 6–R.p.201, line 2).

B. Analysis

Appellant argues the trial judge erred in failing to charge second and third degree assault and battery, as the evidence at trial showed Victim suffered only minor injuries from the stabbing and did not suffer even short term bodily impairment, which the jury could of determined was "moderate bodily injury." Appellant further argues: (1) Dr. Fann never testified that he used anesthesia while stitching Victim's wound; and (2) the trial judge was incorrect in believing that any penetrating wound or any resulting medical treatment requiring the use of anesthesia constituted the infliction of great bodily injury, and that moderate bodily injury expressly includes medical treatment requiring the use of anesthesia.

The State agrees that moderate bodily injury expressly includes medical treatment requiring the use of anesthesia, and that Dr. Fann did not testify that anesthesia was used to treat Victim. However, these points are irrelevant: (1) Appellant's attack on Victim had the potential to cause "great bodily injury," even death; and (2) 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 second or third degree assault and battery where the only evidence presented at trial showed Appellant's knife attack had the potential to kill or grievously harm Victim.

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).

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 § 16-3-29 (2015) and four degrees of assault and battery in § 16-3-600 (2015). S.C. Code Ann. §§ 16-3-29, -600 (2015). 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)

(2015). 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) (2015). 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) (2015).

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 disfigurement 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 other than the skin, muscles and 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.⁹

....

(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

⁹ 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).

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:

(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.

....

(E)(1) A person commits the offense of assault and battery in the third degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so.

....

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

The State notes that Appellant's argument is a red herring: Appellant focuses solely on the extent of Victim's actual injury and ignores the undisputed evidence that his knife attack had the potential to cause great harm to Victim, and that Victim was actually injured in the attack. 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) (2015). Appellant was armed with a knife, which is considered a deadly weapon in South Carolina. See, e.g., State v. Mitchell, 382 S.C. 1, 675 S.E.2d 435 (2009) (affirming defendant's conviction for armed robbery, finding defendant's

theft of chewing tobacco using a pocket knife and threats of violence constituted "robbery while either armed with a deadly weapon or alleging to be armed by the representation of a deadly weapon) . Moreover, Dr. Fann provided specific testimony regarding the nature of Victim's stab wound, noting that Appellant's knife narrowly missed damaging Victim's heart, the sack that contains the heart, and the great vessels around his heart, all of which could have been life-threatening injuries.

Because Appellant did not dispute that Victim was injured, and that he was carrying a knife during the incident, the only question for the jury was whether Appellant intended to injure Victim. If the jury accepted the State's evidence, Victim's and witnesses' testimonies and the video recording of the attack, then Appellant intentionally stabbed Victim. In such situation, the only lesser-included charge it could have found Appellant was guilty of ABHAN.¹⁰ If the jurors accepted Appellant's version of events, Appellant was not guilty of any crime because he acted lawfully. Accordingly, the trial judge was only required to charge the jury with ABHAN. See Green, 397 S.C. at 289, 724 S.E.2d at 674 (stating a trial judge is required to charge the jury on a lesser-included offense only if there is evidence from which it can be inferred the lesser, and not the greater, offense was committed); State v. Smith, 315 S.C. 547, 550, 446 S.E.2d 411, 413 (1994) (defining a knife as a "dangerous instrumentality"); 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

¹⁰ The State notes that although it did not object to the first degree assault and battery charge, the trial judge was not required to charge the jury on this lesser offense. Because Victim suffered an actual injury and Appellant's efforts exceeded a mere "offer[] or attempt[] to injure" Victim, the jury could not have found Appellant guilty of this offense. Compare S.C. Code Ann. § 16-3-600(B)(1)(b) (2015) (stating assault and battery is of a high and aggravated nature if a person unlawfully injures another person and the act was accomplished "by means likely to produce death or great bodily injury") with S.C. Code Ann. § 16-3-600(C)(1)(b)(i) (2015) (defining first degree assault and battery as an offer or attempt to injure another person with the ability to do so and the act was accomplished "by means likely to produce death or great bodily injury").

assault and battery." (emphasis added)); see also State v. Small, 307 S.C. 92, 94, 413 S.E.2d 870, 871 (Ct. App. 1992) ("The evidence does not warrant the charge of the lesser offense of simple assault. Small was guilty of assault and battery of a high and aggravated nature or not guilty. Accordingly, there is no merit to his claim that the court erred in refusing to give the requested charge.").

II.

The trial court properly refused to instruct the jury on (A) the law of citizen's arrest and (B) the defense on accident where there was no evidence at trial that Appellant was trying to effectuate a citizen's arrest when he attacked Victim, and found Appellant's fault in initiating the confrontation precluded him from requesting the jury be charged with the defense of accident.

A. Factual and Procedural History

While testifying at trial, Appellant admitted that when he returned to Monkey Business the night of the attack, he determined he was going to "confront" Victim about the missing items and ask him for their location. Appellant admitted he "made up [his] mind" and knew there would be a fight when he confronted Victim at the bar. Appellant did not call the police because he "really didn't know where the phones went . . .," and believed, based on his experience with police, that it would have been a "wast[e] [of his] time" to call police without knowing where Victim put the items. However, Appellant claims he planned to call the police after he confronted Victim regardless of whether Victim told him the items' location. (R.p.138, lines 13–19; R.p.161, line 20–R.p.162, line 22).

Appellant "knew" Victim carried a knife and claimed he saw that Victim had a gun in the backseat of his car. Appellant also believed Victim would be "aggressive" towards him if he tried to confront Victim and tell him to stay at the bar while he called police. Based on this belief, Appellant pulled out his knife, walked into the bar, "put [his] hand on [Victim's] shoulder and when he turned around, [he] held the knife up to show him . . . [he] wasn't scared . . . and . . . make him tell [him] where [Appellant's] stuff was and to sit still." Notably, the only statement Appellant made to Victim was, "where's my stuff." (R.p.137, lines 11–21; R.p.138, lines 7–12; R.p.141, lines 3–12).

According to Appellant, Victim responded by lunging "to go around" Appellant and attempting to escape through the door. Appellant claims he held the knife back, but during Victim's erratic movements Appellant "held the knife out," at which point Victim was stabbed. When asked whether stabbing Victim was an accident, Appellant claimed, "It was an accident in the fact that I was just trying to protect myself because I was scared." (R.p.141, lines 13–21; R.p.144, lines 18–20; R.p.166, lines 2–6).

During his escape from the bar, Appellant lost his glasses, phone, and the knife. However, he made it home. The next day, he used his tablet to contact his sister and asked her to bring him food and cigarettes, and to then take him to the hospital and eventually the sheriff's office. However, Appellant acknowledges he had no contact with police until they arrested him at his house. (R.p.145, line 15–R.p.146, line 19; R.p.172, line 11–R.p.173, line 12).

Counsel requested the trial judge charge the jury on self-defense, the defense of accident and the law on citizen's arrest. Counsel argued a charge on citizen's arrest was proper, regardless of Appellant's failure to notify Victim of the attempted arrest, because: (1) Appellant testified he intended to confront Victim and then call 9-1-1 and; (2) Debbie Huntley testified she heard Appellant make some comment regarding money immediately prior to the stabbing. Counsel further argued that because Appellant was asserting his legal right to citizen's arrest, he was acting lawfully and thus entitled to a self-defense and defense of accident charges. He argued the question of whether Appellant was acting lawfully was a question for the jury's determination. (R.p.188, line 18–R.p.195, line 9; R.p.197, lines 1–20; R.p.203, line 25–R.p.208, line 6).

The trial judge granted Counsel's request to charge self-defense. However, the trial judge found the citizen's arrest charge was improper because Appellant failed to provide any notice of

the arrest to Victim. While the trial judge made no final ruling on the defense of accident charge, she did not instruct the jury on the defense.¹¹ (R.p.204, lines 11–18; R.p.208, line 24–R.p.209, line 4).

B. Citizen's Arrest Charge

Appellant argues the trial judge erred in failing to charge the jury on the law of citizen's arrest because: (1) the evidence at trial shows Appellant intended to arrest Victim; (2) Appellant was not required to inform Victim of his intent to arrest; and (3) pursuant to § 17-13-20 (2014), Appellant was entitled to use the knife as "efficient means" to aid in the arrest. The State disagrees with Appellant's allegation of error for several reasons. Notably, Appellant failed to produce any evidence at trial that he intended to arrest Victim at the time of the confrontation. Similarly, no such evidence was presented during other witnesses. Moreover, assuming Appellant did, in fact, attempt to arrest Victim, he failed to comply with South Carolina requirements for citizen's arrest, namely: (1) Appellant failed to announce his intent to arrest; (2) Appellant had no intent to take Victim to a judge or magistrate; and (3) Appellant's use of the knife was unnecessary based on the facts of the situation.

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,

¹¹ While Counsel failed to clarify the trial judge's decision on charging accident at the time of the charge conference, the State concedes this issue is preserved for appeal because Counsel did object to the absence of an accident charge when the judge asked for motions and objections to her instructions. (R.p.253, lines 5–12). See State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998) (stating that the denial of a defendant's request for proposed a proposed charge is preserved for review if: (1) a party requests a jury charge and, after opportunity for discussion, the judge denies the charge on-the-record during the pre-charge conference; or (2) the defendant objects to the instructions as given after the judge issues her instructions).

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 commits reversible error if it fails to give a requested charge on an issue raised by the evidence only if that failure was prejudicial to the defendant. State v. Commander, 396 S.C. 254, 270, 721 S.E.2d 413, 422 (2011).

"Statutory interpretation is a question of law subject to de novo review." Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010). "The cardinal rule of statutory construction is that the intent of the legislature must prevail if it reasonably can be discerned from the words used in the statute." Cabiness v. Town of James Island, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011). "These words must be construed in context and in light of the intended purpose of the statute in a manner which harmonizes with its subject matter and accords with its general purpose." Id. (internal quotations omitted). Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." In re Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citation omitted).

In South Carolina, the right to make a citizen's arrest exists solely by statute. See State v. McAteer, 340 S.C. 644, 650, 532 S.E.2d 865, 868 (2000). Pursuant to S.C. Code Ann. § 17-13-10 (2014), any person may arrest a felon or thief and take him to a judge or magistrate upon witnessing a felony committed; certain information that a felony has been committed; or witnessing a larceny committed. (emphasis added). S.C. Code Ann. § 17-13-20 (2014) states

arresting citizens may utilize additional measures when arresting an individual at night, permitting the citizen to use "efficient means as the darkness and the probability of escape render necessary, even if the life of the person should be taken." However, this authorized use of force is reserved only for a few situations, such as when the citizen knows the person "has committed a felony" or knows that person "has, in his possession, stolen property." S.C. Code Ann. § 17-13-20(a), (d) (2014).

In State v. Nall, 304 S.C. 332, 404 S.E.2d 202, 207 (Ct. App. 1991), this Court found a citizen's arrest unlawful for multiple reasons, one of which being the citizen grabbed the arrestee without any prior warning or notice that he was making the arrest. In State v. Boswell, 391 S.C. 592, 707 S.E.2d 265 (2011), the Supreme Court of South Carolina found Lexington County police officers, acting outside of their jurisdiction, did not have the authority to effectuate a citizen's arrest. After finding officers did not have the authority to arrest the defendant pursuant to § 17-13-10 because said offense was only a misdemeanor, the Court turned its attention § 17-13-20(d). The Court found the officers did not have the authority to effectuate an arrest under § 17-13-20(d) because it was "purely speculative" for the officers to identify the defendant's items as stolen even though the items "were consistent with items that [officers] were looking for" Notably, in addition to suspected stolen goods, Appellant's items included a crowbar and a knife, which "could have been legitimately construed as burglar tools," and Appellant was arrested at the same location where officers had previously discovered suspected stolen property.

(i) Appellant Never Intended to Arrest Victim

In the instant case, there is no evidence that Appellant intended to perform a citizen's arrest. Even Appellant failed to indicate that he, at any point intended to arrest Victim. Instead, he admitted that he intended to confront Victim and, using the knife, coerce Victim into telling

him the location of the items. In fact, Appellant admitted he felt it would be a "wast[e] [of his] time" to involve police in the matter without first getting this information from Victim. This indicates Appellant had no intention to arrest Victim. Furthermore, Appellant claimed he knew that Victim would not readily comply with his demands, and that there would be a fight between the two at the bar when he returned.

Moreover, there is no evidence Appellant intended to take Victim to a judge or magistrate. If, as Appellant alleges, the sole guiding authority for citizen's arrest in South Carolina are §§ 17-13-10 to -20, then Appellant would have only been able to properly perform a citizen's arrest if he attempted to take Victim to a "judge or magistrate." Here, Appellant testified that regardless of whether Victim gave him the information he was looking for, he intended to call police and have them handle the situation. He never intended to take Victim to a judge or magistrate himself, but rather would have sought to have police perform the arrest. Accordingly, Appellant was not acting pursuant to the requirements of §17-13-10.

(ii) Failure to Give Notice of Arrest

Even if Appellant intended to perform a citizen's arrest, it was invalid for numerous procedural reasons. First and foremost, Appellant failed to announce his intention to place Victim under citizen's arrest. Appellant argues that, pursuant to McAteer, he was not required to announce the arrest because citizen's arrest is not governed by the common law. Appellant is partially right: there is no common law right to citizen's arrest. However, the "prior warning" requirement of Nall is not a question of "right," but of "procedure." The State submits that the Nall requirement that an arresting citizen give an arrestee notice of an arrest is analogous to relationship between Miranda v. Arizona, 384 U.S. 436 (1966). In Miranda, the United States Supreme Court did not create new rights; rather, it determined the process of informing an

individual of their rights against self-incrimination was a procedural protection of "principles long recognized" in the United States Constitution and American jurisprudence. Similarly Nall's requirement that an arresting citizen announce his intent to the arrestee does not create a new right, but merely states a procedural requirement that those intending to make a citizen's arrest must follow. In any event, Nall has not been abrogated or overruled by our Supreme Court, and remains the current law in South Carolina.

The State further contends that the notice/prior warning requirement is contained within §§ 17-13-10 to -20. By definition, an "arrest" requires an arresting officer or citizen make his intent known to an arrestee. 6B C.J.S. Arrest § 1 (2016) (stating, "An arrest is the taking seizing or detaining the person of another by an act which indicates an intention to take him or her into custody and subject the person to the actual control and will of the person making the arrest." (emphasis added)). By using the term "arrest," the Legislature incorporated the notice requirement into both sections.

Finally, it would defeat the legislatures intent in enacting § 17-13-20 if this Court adopts Appellant's interpretation of the statutes. The legislature enacted this section with the intent of limiting a citizen's right to make a citizen's arrest to narrow situations and to using "efficient means" to effectuate the arrest. Announcing the arrest to the arrestee and giving him the chance to cooperate would, by far, be the most "efficient means" of taking him into custody, as his compliance would eliminate any necessity of force.

(iii) Appellant Did Not Witness the Alleged Crime

Additionally, if Appellant were attempting a citizen's arrest, Appellant was not permitted to use "efficient means" to effectuate the arrest because Appellant did not witness the commission of the crime.

In general, citizen's arrests made pursuant to § 17-13-20 require the citizen making the arrest have actual knowledge of the arrestee's crime. In Boswell, the Supreme Court of South Carolina found a police officer acting outside of his jurisdiction was unable to invoke his right to citizen's arrest under § 17-13-20(d) because the officer did not have actual knowledge that the suspect had stolen property in his possession. The Court noted the items the officer saw were consistent with the missing stolen items, but that it was "purely speculative" for the officer to identify the items he saw as the missing property.

Similarly, in the instant case, Appellant had no actual proof Victim committed a felony or had, in his possession, the stolen property. Appellant's own testimony indicated he never saw Victim take the property, nor did he find any trace of the property in Appellant's vehicle. Accordingly, Appellant, at best, "certain information" which would have permitted an arrest pursuant to § 17-23-10, but had no actual knowledge Victim committed a felony or had stolen property in his possession to justify using "efficient means" to detain Victim. Compare § 17-13-10 (2014) with § 17-13-20 (2015).

(iv) Necessity

Finally, the State argues Appellant failed to show the means used (a drawn knife) were necessitated by the darkness or probability of escape in his alleged "arrest" of Victim. § 17-13-20 permits a citizen to use "efficient means" to arrest an individual at nighttime, but only the amount rendered "necessary" as determined by the darkness and arrestee's probability of escape. Here, there was no evidence the inside of the bar was dark, or that Victim attempted to leave the bar until after Appellant confronted him with the knife. Thus, at the time of the attack, there was no darkness or probability of escape and thus no necessity to arrest Appellant while utilizing a

deadly weapon. In fact, the evidence, including Appellant's testimony, indicates Victim fled the bar only because of his attack.

Moreover, it was further unnecessary to use force to effectuate an immediate citizen's arrest of Victim because Appellant knew Victim's identity, home address, and every possible way to contact him. Additionally, Appellant testified he did not see the missing items in Victim's vehicle. Thus, Appellant would have experienced no significant harm by any potential escape, because he could have easily arrested, or had police arrest, Victim at a later date. For all of these reasons, the trial court properly denied Appellants request for a jury charge on citizen's arrest.

C. Defense of Accident Charge

Appellant argues he was entitled to a jury instruction on the defense of accident because he testified he was acting lawfully at the time of the attack, alleging he accidentally stabbed Victim while attempting to retrieve his stolen property. He further contends that his argument is supported by the fact that the trial judge determined, based on the same evidence, that he was entitled to a charge on self-defense, and that accident and self-defense are "interrelated offenses." The State disagrees with Appellant's allegation of error for several reasons. First, Appellant was not acting lawfully at the time of the attack; as explained above, Appellant was not pursuing a valid citizen's arrest at the time of the attack and, contrary to the ruling of the trial judge, there was no evidence supporting self-defense charge. Moreover, Appellant did not exercise due care in handling the knife.

In South Carolina, a defendant requesting a jury charge on self-defense, a defendant must show; (1) he was without fault in bringing on the difficulty; (2) he was in actual imminent danger of losing his life or sustaining serious bodily injury, or actually believed he was in such danger;

(3) if his defense is based upon the belief of imminent danger, then he must show a reasonably prudent person of ordinary courage and firmness would have believed that he was actually in imminent danger and that the circumstances warranted the defendant striking the blow to save himself; and (4) the defendant had no other means of avoiding the danger. State v. Slater, 373 S.C. 66, 69–70, 644 S.E.2d 50, 52 (2007) (emphasis added).

To merit a jury charge of defense of accident, a defendant must show: (1) he was acting lawfully at the time of the incident; (2) the harm he caused was unintentional; and (3) that he exercised due care in handling the weapon. See Commander, 396 S.C. at 271, 721 S.E.2d at 422.

(i) Appellant's Behavior Was Not Lawful

In the instant case, Appellant was not acting lawfully at the time of the stabbing. As noted previously, Appellant's confrontation with Victim was not a valid citizen's arrest pursuant to §§ 17-13-10 to -20. Additionally, the State notes that regardless of the trial judge's decision to charge self-defense, Appellant's actions did not meet the statutory requirements for that charge.¹² In Slater, the Supreme Court of South Carolina found a defendant was not entitled to a self-defense charge because defendant's decision to approach an altercation underway with a loaded weapon by his side was the proximate cause of the ensuing gunfight which led to him "accidentally" shooting the victim. The Court specifically noted the defendant's actions "could be reasonably calculated to bring the difficulty that arose in [that] case."

Here, Appellant approached Victim with the knife in his hands, held out in a threatening manner for the purposes of coercing him into admitting he stole the missing items. Appellant could have "reasonably calculated" that such actions would have caused Victim to resist and

¹² For the reasons explained within this brief, the State contends the trial judge erred in instructing the jury on self-defense. However, because the jury rejected the charge in light of the overwhelming evidence against Appellant, the trial judge's error was clearly harmless and does not require appellate review. However, the State maintains that the erroneous self-defense charge cannot be used to justify an instruction on the law of accident.

attempt escape, as every person threatened with a knife would do. By approaching Victim with a knife, Appellant created the very situation which required him to defend himself. Additionally, Appellant's actions did not constitute a valid self-defense because Appellant had other means of avoiding the danger. Here, Appellant "knew" Victim was the person responsible for stealing the items from his car. Appellant also knew that if he went into the bar to confront Victim that a fight would erupt, and that there was a possibility Victim could arm himself if pressed into said fight. Appellant, knowing Victim was inside the bar and also knowing his name, contact information, and home address, could have and should have contacted the police and avoided the physical confrontation. Because Appellant was not acting not acting lawfully and his actions led to Victim's stabbing, he was not entitled to an accident charge. See State v. Chatman, 336 S.C. 149, 154, 519 S.E.2d 100, 102 (1999) (finding that because a defendant was not acting lawfully pursuant to a need for self-defense, he was not entitled to an accident charge).

(ii) Appellant Failed to Exercise Due Care

The State also notes Appellant failed to exercise due care in handling his knife. Appellant testified he had the knife drawn and extended towards Victim when he approached him. He specifically noted that the knife was out and near Victim as he touched him on the shoulder and got his attention. Such action could have only produced alarm from Victim and put him in a position where, even while trying to escape, he was injured. In fact, Appellant testified that Victim was injured while simply trying to get around him and head for the door. He also admitted that he held his knife out during this time. Here, there is simply no evidence that surprising an unsuspecting person with a drawn knife, and holding it out while they attempt to get around you to safety could ever constitute due care. Therefore, even considering Appellant's version of events, the State disproved Appellant was using due care. The trial court properly

concluded there was a lack of due care as a matter of law and properly refused to charge the jury on accident.

Because no evidence was presented supporting a finding Appellant was acting lawfully, exercising due care, or that the shooting was an accident, and the trial judge properly declined to instruct the jury on the defense of accident. Appellant's convictions should be affirmed.

D. Harmless Error

Errors are considered to be harmless when they could not reasonably have affected the result of the trial. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003). "It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him." State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 285, 288 (1947). When considering whether an error with respect to a jury instruction was harmless, the appellate court must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014). In making a harmless error analysis, the inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered. Id. Thus, whether or not the error was harmless is a fact-intensive inquiry. Id.

In the instant case, the evidence adduced at trial demonstrates that, notwithstanding any alleged failure to charge citizen's arrest or accident, the only possible conclusion established by the evidence is that Appellant was guilty of attempted murder or ABHAN. The State submits there is no other way to construe the evidence in this case but that Appellant's actions in stabbing the victim were not an accident. A video recording of the entire incident as well as the testimony of several eye witnesses proved Appellant made no attempt to lawfully detain Victim, but instead

walked into Monkey Business with the intent of harming him. Even Appellant admitted that he knew that if he went into Monkey Business, the only result would be a fight between himself and Victim, and that fight could escalate into a situation involving deadly weapons. Despite receiving an improper charge on self-defense, the jury decidedly found Appellant was guilty of ABHAN. Clearly, the jury concluded that Appellant was acting unlawfully at the time of the stabbing. Therefore, any error in failing to charge citizen's arrest or accident was harmless because the erroneous instruction did not contribute to the verdict beyond a reasonable doubt. Middleton, supra; Adams, supra. Appellant's convictions for ABHAN should be affirmed.

III.

The trial court did not commit reversible error in refusing to issue an additional corrective instruction regarding the State's PowerPoint slides which stated that malice can be inferred from the use of a deadly weapon because: (1) the trial judge issued two corrective instructions to the jury; and (2) the jury did not find Appellant guilty of attempted murder, which required a finding of malice, and instead found Appellant guilty of the lesser-included offense of ABHAN.

A. Factual and Procedural History

The Solicitor began his closing statement by stating, "Now, if anything I say doesn't comply with what the [trial] [j]udge tells you later, always defer to the [j]udge. She's the authority on the law." He also discussed the elements of attempted murder, which was accompanied by a PowerPoint presentation with individual slides with brief explanations of each of the State's discussion points. During its specific discussion of malice, the State claimed: "Malice can be inferred from conduct showing a total disregard for human life Malice can be inferred when the act is done with a deadly weapon. A knife sure is a deadly weapon." (R.p.212, lines 6–9; R.p.214, lines 7–11).

During its reply to Counsel's closing arguments, the Solicitor again discussed malice with the jury. This time, the Solicitor said: "Malice can be inferred from conduct showing a total disregard for human life. . . . Malice can also be inferred when the act is done with a deadly weapon. A knife[] [is] a deadly weapon. This is malice. This is what malice is." This statement was accompanied by a PowerPoint slide which similarly read that malice could be inferred from the use of a dangerous weapon. The trial judge asked the Solicitor to take the slide down, and told the jury she would "instruct [it] on the law applicable to th[e] case." The trial judge then held an off the record bench conference, after which the Solicitor continued with his argument. (R.p.209, lines 5–7; R.p.227, line 19–R.p.228, line 16).

During her jury instructions, the trial judge stated:

I . . . have the duty to charge you the law applicable to this case. As the presiding judge, I am the sole judge of the law of this case. It is your duty to accept the law and apply the law exactly as I state it to you now. If you have any idea as to what the law is or what the law ought to be and it does not agree with what I'm about to tell you, you must abandon your own ideas because you are sworn to accept the law and apply the law exactly as I state it to you now.

The trial judge's instructions omitted any reference to the implication of malice from the use of a deadly weapon. (R.p.235, line 24–R.p.236, line 8).

At the conclusion of the trial judge's instructions, Counsel objected on the record to the PowerPoint slide regarding inferred malice from the use of a dangerous weapon, arguing the Solicitor's inferred malice/deadly weapon statement violated State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), which prohibits such a charge in cases in which evidence is presented which would reduce, mitigate, excuse, or justify the attack. Counsel complained the slide was easily read by the jury, as it was prominently displayed in the PowerPoint presentation. He requested that the trial judge give the jury a curative instruction to remedy the situation, but the trial judge denied the request. She noted no further curative instruction was needed because she had already given a curative instruction to the jury, stating: "[O]nce [she] saw the slide, [she] instructed the jury, and had . . . the slide removed, [and] instructed the jury that [she] would instruct [it] on the law applicable to the case." (R.p.253, line 13–R.p.255, line 1).

B. Analysis

Appellant argues the trial judge erred in refusing to issue a curative instruction in response to the "trial court's" inferred malice/deadly weapon PowerPoint slide which was presented "contemporaneously" with the trial judge's jury charge. The State disagrees with Appellant's allegation of error; Appellant has erroneously characterized the PowerPoint slide as a part of the trial judge's instructions when, in actuality, the slide was only presented during the

Solicitor's reply to Counsel's closing. The trial judge instructed the Solicitor to remove the slide, and gave a curative instruction to the jury.

The appropriate test for reviewing a jury charge involves determining whether there is a reasonable likelihood the jury applied the charge in a way that violated the Constitution. Estelle v. McGuire, 502 U.S. 62, 71 (1991). Ultimately, "[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, 123, 651 S.E.2d 321, 323 (2007); see State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal.").

In the instant case, the Solicitor mistakenly included the implied malice/deadly weapon slide in his closing. However, the trial judge asked Solicitor to remove the slide, and immediately instructed the jury that she would instruct it on the law applicable to the case. Then, during her jury instructions, the trial judge informed jurors in no uncertain terms she was the sole authority for the law applicable to their deliberations. Moreover, the Solicitor specifically told the jury that if anything he said contradicted the trial judge's instructions, that they should defer to her because she was the sole authority on the law. Accordingly, the trial judge did not err in refusing Counsel's request for an additional curative instruction because she had already made multiple curative instructions to the jury. See Smith, 315 S.C. at 554, 446 S.E.2d at 415 ("Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error.").

C. Harmless Error

Moreover, even if, as Appellant alleges, the Solicitor's PowerPoint slide could somehow be considered part of the trial judge's jury charge, and this Court deems the judge's curative charge was not enough to cure the purported error, any such error was harmless.

"Errors, including erroneous jury instructions, are subject to harmless error analysis." Id. at 611, 685 S.E.2d at 809 (citing Lowry v. State, 376 S.C. 499, 510-11, 657 S.E.2d 760, 766 (2008)). Further, where an erroneous jury charge does not contribute to the jury's verdict, the error is harmless. See State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994).

In this case, the any error is entirely harmless and could not have contributed to the jury's verdict because the jury found Petitioner acted entirely without malice. The jury did not infer malice from the use of the deadly weapon because it found Petitioner guilty of voluntary ABHAN. The jury found Petitioner guilty of ABHAN; so, it had to find he acted without malice. An erroneous jury instruction indicating malice can be inferred from the use of a deadly weapon can have no prejudicial impact when the jury returns a verdict specifically finding Petitioner acted without malice. See e.g., Tate v. State, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002) ("An erroneous malice instruction is harmless if, based on all of the evidence presented to the jury, it did not contribute to the verdict."). Such is the circumstance of this case: Appellant was charged with attempted murder, but the jury found him guilty of the lesser-included offense of ABHAN, the most serious lesser-included charge for the crime which notably does not require that a defendant have malice aforethought

In this case, the error is entirely harmless and could not have contributed to the jury's verdict. The jury found Petitioner guilty of ABHAN; so, it had to find he acted without malice. An erroneous jury instruction indicating malice can be inferred from the use of a deadly weapon

can have no prejudicial impact when the jury returns a verdict specifically finding Petitioner acted without malice. See e.g., Tate v. State, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002) ("An erroneous malice instruction is harmless if, based on all of the evidence presented to the jury, it did not contribute to the verdict."). Such is the circumstance in this case, where the defendant was acquitted of a charge requiring a finding of malice and convicted of a crime for which malice is not an element.

Accordingly, while the Solicitor clearly erred by including the inferred malice/deadly weapon slide in his presentation, any error from the mistake is entirely harmless.

CONCLUSION

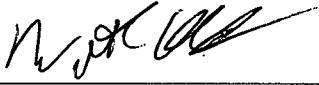
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: 

William F. Schumacher, IV
Bar # 100231
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3922

ATTORNEYS FOR RESPONDENT

June 29, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of General Sessions
Krista Lea Harrington, Circuit Court Judge

Appellate Case No. 2015-000720

RECEIVED
JUN 29 2015
SC Court of Appeals

THE STATE,RESPONDENT

v.

JOHN ARTHUR THOMASAPPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: _____


William F. Schumacher, IV
S.C. Bar No. 100231
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3922

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
June 29, 2016