STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DALTON ELLIS CLARKE,

APPELLANT

APPELLATE CASE NO. 2016-000801

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Did the court err by refusing to instruct the jury on defense of others and a defendant's right to act on appearances when there was evidence Appellant was acting in defense of his friend when he threw the fatal punch and when it appeared Appellant's friend was in danger of suffering serious bodily injury at the hands of the decedent?

2.

Did the court err by refusing to direct a verdict for assault and battery of a high and aggravated nature when the state could not prove the elements of the offense where the decedent died after a single punch to the back of the head?

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant on July 7, 2015 for assault and battery of a high and aggravated nature (ABHAN). R.*. His case was called to trial on April 4, 2016 before the Honorable Benjamin H. Culbertson, and a jury. Tr. 1. Assistant Solicitors Benjamin Simpson and Ted Corvey represented the state, and Jason Thomas King represented Appellant. Tr. 1.

On April 8, 2016, the jury found Appellant guilty. Tr. 633, ll. 1-11. Judge Culbertson sentenced him to fifteen years' imprisonment. Tr. 653, ll. 21-23.

This appeal follows.

STATEMENT OF FACTS

Appellant's conviction stems from an altercation that occurred on King Street in downtown Charleston during the early morning hours of Saturday, April 26, 2014. Appellant and his friends, who were all in their early to mid-twenties, met at a bar called Midtown that night and eventually walked to Silver Dollar, where they continued to drink and socialize until the bar district began to close around 2:00 a.m. As Silver Dollar was closing, Appellant and a group of friends left and began walking down King Street towards Morris Street where Appellant's car was parked. Tr. 173, l. 16 – 175, l. 5; Tr. 209, l. 19 – 214, l. 21. There were hundreds of people in the street at this time. Tr. 94, ll. 6-8; Tr. 96, ll. 6-7.

As the group was walking, Appellant's friend, Binh Ton, and Binh's girlfriend, Regina Harding, began to lag behind. Appellant, Peter Dudinyak, and Andrew O'Hearn were several yards ahead. At the corner of King and Morris Streets, Regina, who was very intoxicated, stumbled and fell into Bradley Baker, who had also been out to the bars that night with his two friends, the decedent, Clinton Seymour, and Daniel Hennessey. For whatever reason, Bradley refused to let go of Regina after she stumbled and words were eventually exchanged between Binh and Bradley. Tr. 175, l. 1 – 17 – 177, l. 2. According to Bradley, Binh told him, "You couldn't have her [Regina] in your dreams" to which Bradley responded, "I had your mom last night." Tr. 96, l. 5 – 98, l. 8. However, Binh testified that Bradley threatened "to fuck her [Regina] and rape my mom. And asked me what I was going to do about it." Tr. 174, l. 20 – 177, l. 18.

When these threats were being made, Binh was alone with Regina and his friends were all several yards ahead of him and "across the street." Tr. 178, ll. 2-6. There were three men involved on the other side, but Binh mistakenly believed there were at least five. Tr. 177, ll. 22-23; Tr. 192,

ll. 10-12. Consequently, he perceived the "situation" as "just [him] against more than one guy" and "felt threatened." Tr. 178, ll. 7-9; Tr. 192, ll. 13-14.

Because he felt threatened and feared for his safety, Binh "yelled out for help" and Appellant, Peter Dudinyak, and Andrew O'Hearn came running to defend him. Tr. 178, ll. 12-16; Tr. 192, ll. 15-19. As they were running over, "one of the gentlemen on the other side [with Bradley] got in [Binh's] face . . . and asked [Binh] what [he] was going to do." Binh testified that, as this man was threatening him, Appellant ran up and "hit one of the dudes that was standing there in my face." Tr. 178, ll. 17-23. Binh later agreed he told an investigator a couple of days after the altercation that he (Binh) was "attacked" and that Appellant "hit a guy that was coming after" him. Tr. 194, l. 24 – 195, l. 3. Binh did not recall much of the fight because it all "happened really fast." Tr. 179, ll. 12-23.

After the altercation, law enforcement and ambulances arrived at the scene. The decedent and Daniel Hennessey were both transported to the hospital. Hennessey had a "knot" above his eye and swelling to the side of his face. Tr. 150, ll. 6-12. Bradley, while not transported to the hospital, allegedly suffered a broken nose. Tr. 148, ll. 15-16. As far as the decedent, the evidence established that he was struck once in the back of the head during the altercation. He instantly lost consciousness and fell backward onto the sidewalk. Tr. 143, ll. 17-22; Tr. 145, ll. 17-23; Tr. 105, ll. 14-22. The punch to the back of the head caused a skull fracture and ruptured one of arteries that "feeds the back part of the brain, including the cerebellum." Tr. 458, l. 17 – 459, l. 11; Tr. 460, l. 18 – 461, l. 24. The decedent was pronounced brain dead two days after his injury. Tr. 450, l. 23 – 451, l. 4.

It was heavily disputed at trial who threw the fatal punch during the altercation. Law enforcement arrested Peter Dudinyak, Appellant's friend, at the scene after he was identified by

numerous eyewitnesses as the individual who struck the decedent. Tr. 418, ll. 16-21. Three eyewitnesses identified Peter as the assailant in a "show up" immediately after he was apprehended that morning. Tr. 488, l. 11 – 491, l. 23; Tr. 507, l. 11 – 509, l. 13; Tr. 522, l. 6 – 525, l. 6. Two of these witnesses, as will be seen *infra*, said they were *one hundred percent certain* Peter was the man who punched the decedent. Tr. 488, l. 11 – 491, l. 21; Tr. 507, l. 11 – 509, l. 11.

Peter gave a statement to law enforcement shortly after his arrest. In his statement, Peter fabricated an elaborate story claiming he and his friends were attacked by "three black guys [and] about four white dudes." He said the fight started after "[s]ome guy started yelling stuff to Becca [Peter's girlfriend] and Sarah [a friend] across the street" and that he "turned around, ran back, and tried to stop people from fighting." Tr. 239, l. 23 – 241, l. 19. Peter kept repeating this story when questioned that morning. Specifically, he said, "[T]hese people were yelling at our girlfriends while they were across the street on the other side of King Street. Yelling at them. They were yelling at my girlfriend." He said the men were yelling, "[H]ey baby, hey baby, hey baby" and that they eventually "came across the street and started talking shit, started freaking out."

When asked "who threw the [fatal] punch," Peter told investigators he had "no idea" and that he "was looking at [his] girlfriend [Becca] . . . making sure she was okay." Tr. 242, l. 15 – 243, l. 25. However, Peter admitted during his testimony that Becca was not even there when the altercation took place. He also told investigators during his interview that, while he had "Asian friends, . . . none of them were with [him]" that morning. Again, Peter admitted during his testimony that Binh Ton, who is of Asian descent, was with him that morning when the fight broke out. Tr. 243, l. 17 – 244, l. 4.

About two weeks after this initial statement, Peter gave a second statement completely changing his story and implicating Appellant. That same day, the police requested the Ninth Circuit

Solicitor's Office dismiss Peter's charge and he was immediately released from the detention center. Tr. 422, l. 24 – 424, l. 6. Investigators subsequently arrested Appellant for involuntary manslaughter.[1] App. 478, ll. 11-12.

Bradley Baker and Daniel Hennessey, who were with the decedent that night, both testified they did not see who punched the decedent because they were engaged in a physical altercation with others, including Binh. Binh likewise testified that he did not see who punched the decedent. While Binh claimed he saw Appellant punch one of the men who "was standing there in my [Binh's] face," he did not know who Appellant struck. Tr. 178, l. 17 – 179, l. 11.

Peter Dudinyak, an admitted liar, was the only person who identified Appellant as the one who punched the decedent. He claimed he "saw Ellis [Appellant] run by me and swing and hit a running punch on a man that was standing there." Tr. 217, ll. 4-7. He said the man Appellant struck "hit the ground immediately" and did not brace himself for the fall. Tr. 218, l. 7 – 219, l. 12. Despite considerable evidence to the contrary, Peter claimed he never threw "a single punch" during the fight. Tr. 216, ll. 12-13.

In addition to Peter's self-interested identification of Appellant as the individual who punched the decedent, several other witnesses claimed Appellant made incriminating statements in the hours and days that followed the incident. For example, Jacob Dudinyak, Peter's brother, claimed Appellant told him in the parking lot immediately after the altercation that "he knocked some dude out." Tr. 298, ll. 1-5. Moreover, Rebecca Richards, who was Peter's girlfriend, Jamie

[1] Appellant was later direct indicted for assault and battery of a high and aggravated nature (ABHAN). This is the charge the state decided to prosecute at trial presumably because ABHAN carries a stiffer sentence than involuntary manslaughter. Specifically, ABHAN carries up to twenty years' imprisonment while involuntary manslaughter only carries up to five years' imprisonment. See S.C. Code Ann. § 16-3-600(B)(2) and S.C. Code Ann. § 16-3-60. Surprisingly, the assistant solicitor claimed the state showed "restraint" by not prosecuting Appellant for murder. Tr. 479, ll. 9-15.

Ledwell, Madison Martini, and Matthew Keppler all testified that shortly after the altercation while the group was at Madison's house, Appellant said something to the effect of he struck the man who was on the ground, and Peter had been arrested for what Appellant had done. Tr. 311, l. 18 – 316, l. 14; Tr. 345, l. 8 – 347, l. 13; Tr. 369, l. 2 – 371, l. 17; Tr. 393, l. 19 – 396, l. 5. Additionally, Andrew O'Hearn claimed Appellant told him the next day over the telephone that "he knocked a kid out." Tr. 261, l. 18 – 263, l. 25.

During its case in chief, the state presented footage from security cameras in the area of King and Morris Streets. The cameras captured most of the altercation except for the fatal punch, which occurred just off screen. Tr. 425, ll. 8-22.

Motion for a Directed Verdict

After the state rested, Appellant moved for a directed verdict. Defense counsel argued:

> Your Honor, they've charged Mr. Clarke [Appellant] with assault and battery of a high and aggravated nature, which is an unlawful injury that causes great bodily injury.[2] I don't think that's the appropriate charge. I think **great bodily injury contemplates that the person does not die. And once someone is deceased, then there's really [only] the three charges of murder, [voluntary] manslaughter, and involuntary manslaughter**, which is what he [Appellant] was originally arrested for, involuntary manslaughter.

Tr. 478, ll. 3-12 (emphasis added).

Defense counsel later argued "**there is no evidence that [Appellant is] only guilty of assault and battery of a high and aggravated nature**" since the decedent died. Counsel maintained that the state could not **"prove great bodily injury because the person is deceased.**

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[2] Under S.C. Code Ann. § 16-3-600(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." "Great bodily injury" is defined as "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." S.C. Code Ann. § 16-3-600(A)(1).

And that's different than **great bodily injury, which means you are *still alive***, but it could have caused death." Tr. 478, ll. 13-22 (emphasis added). Lastly, counsel argued the legislature did not intend "when there's a death involved" for an individual to be prosecuted for ABHAN. Instead, the legislature intended the individual be prosecuted for murder, voluntary manslaughter, or involuntary manslaughter, which all have a killing as an element. Tr. 480, ll. 16-23.

In response, the assistant solicitor stated Appellant's motion was "kind of a surprise." He first argued the state had shown "restraint" by not prosecuting Appellant for murder and that it (the state) should not "be punished for that." This argument was out of place and clearly not relevant to whether the state had presented sufficient evidence to survive a directed verdict motion. Tr. 479, l. 9 – 480, l. 14. More on point, the solicitor argued, "I believe when you look at the injuries caused in this person [the decedent], did it create substantial risk of death? Of course it did. And there's no better evidence of that, in that he [the decedent] ultimately did pass . . . I believe another part of that definition is causing severe damage to a major bodily system. Of course, these injuries did, as you heard from Dr. Tormos [the pathologist]."

Without conducting any analysis or providing any reasoning whatsoever, the court simply ruled, "I'm going to deny your motion. I think there is sufficient evidence where the jury can base [a] decision on this charge." Tr. 480, l. 24 – 481, l. 1.

The Defense

The three eyewitnesses who identified Peter Dudinyak as the person who struck the decedent testified in Appellant's defense. Jacqueline Gladden said she saw Peter Dudinyak "sucker punch" the decedent from only a couple of feet away. She was *one hundred percent certain* of her identification. Tr. 488, l. 11 – 491, l. 21. Gabrielle Lemieux testified that she saw a tall male wearing a black shirt, which matched Peter's description, punch the decedent. When she was

shown Peter that night after he was detained, she was *one hundred percent certain* he was the man who punched the decedent. Tr. 507, l. 11 – 509, l. 11. Lastly, Rosalie Frederick testified that she identified the suspect police had in custody that morning (Peter) as the man who punched the decedent. She maintained that this person is who she thought was responsible, but she told the police that morning that she was not one hundred percent positive. Tr. 522, l. 6 – 524, l. 14.

Request to Charge

After the defense rested, Appellant requested the court charge defense of others and the right to act on appearances. Tr. 554, ll. 19-21. Defense counsel argued that if the jury found Appellant struck the decedent, it could also find Appellant was acting in defense of others. Specifically, counsel stated, "I think there's some evidence that they [the jurors] might think he [Appellant] - - even if he hit this man, that he was responding to a situation where, based on the evidence [testimony] of Binh Ton, that he [Binh] was being surrounded, guys where in his face, that Mr. Clarke [Appellant] would have the right to act on appearances, defending other persons. So even if they [the jurors] thought he [Appellant] did it, then there's some evidence that it was in self-defense. . . . I just think there is evidence there [to support jury charges for defense of others and the right to act on appearances]." Tr. 555, l. 17 – 556, l. 1.

The court ultimately refused to charge defense of others and the right to act on appearances based on its erroneous conclusion that Appellant could not present alternative defenses. Essentially, the court found that since Appellant's defense was "I didn't do it, someone else did it," Appellant could not alternatively argue that he was defending others when he punched the decedent. Tr. 555, ll. 3-16; Tr. 557, l. 25 – 558, l. 18; Tr. 562, l. 24 – 563, l. 2.

The court also refused to charge defense of others based on its finding that there was no evidence the decedent was involved in the altercation. Specifically, the court stated, "I don't see

where . . . there's any evidence that [the] assault on the victim [the decedent] in this case was in defense of others. Had it been one of the other two [Bradley Baker or Daniel Hennessey, who were with the decedent that night], possibly, but all the evidence in this case basically states that the victim . . . was standing back behind everyone else and wasn't even participating in any way. So you can't have any type of an assault on this person [the decedent] to be in defense of others." Tr. 562, ll. 15-23.

Appellant renewed his objection to the court's refusal to charge defense of others and the right to act on appearances at the conclusion of the court's instruction to the jury. Tr. 623, ll. 5-6. The court again denied the request stating, "I'm going to stick with these charges. I deny the additional charge." Tr. 623, ll. 7-9.

Deliberations and Verdict

The jury deliberated for over four hours. During its deliberations, the jury requested a transcript of the trial testimony of several witnesses, including Bradley Baker, Daniel Hennessey, and Binh Ton. However, the court informed the jury that it could not produce any written transcripts. The jury subsequently requested to rehear Daniel Hennessey's testimony. Tr. 627, l. 6 – 631, l. 9.

Despite the conflicting evidence regarding who threw the fatal punch, the jury convicted Appellant of ABHAN. Tr. 633, ll. 1-11. Because the court refused to charge defense of others and a defendant's right to act on appearances, the jury never considered whether Appellant was lawfully defending Binh Ton. Judge Culbertson ultimately sentenced Appellant to fifteen years' imprisonment. Tr. 653, ll. 21-23.

ARGUMENT

1.

The court erred by refusing to instruct the jury on defense of others and a defendant's right to act on appearances when there was evidence Appellant was acting in defense of his friend when he threw the fatal punch and when it appeared Appellant's friend was in danger of suffering serious bodily injury at the hands of the decedent.

The court erred by refusing to instruct the jury on defense of others and a defendant's right to act on appearances when there was evidence Appellant was acting in defense of his friend, Binh Ton, when he threw the fatal punch, and when it *appeared* the decedent was involved in the altercation with Binh and that Binh was in imminent danger of being seriously injured. Additionally, the court clearly erred by finding Appellant was not permitted to rely on alternative defenses in support of its decision not to charge the requested instructions.

"The law to be charged to the jury is determined by the evidence presented at trial." State v. Brown, 362 S.C. 258, 261-262, 607 S.E.2d 93, 95 (Ct. App. 2004) (quoting State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993)) (internal quotation marks omitted). "A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial **should not** be refused." State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989)) (emphasis added). "If there is **any evidence** to support a jury charge, the trial judge **should** grant the request." Brown, 362 S.C at 262, 607 S.E.2d at 95 (citing State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001)) (emphasis added). Additionally, "[w]hen reviewing the circuit court's refusal to deliver a requested jury instruction, appellate courts **must** consider the evidence in a light most favorable

to the defendant." State v. Williams, 400 S.C. 308, 314, 733 S.E.2d 605, 608-609 (Ct. App. 2012) (citing State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512-513 (2000)).

Defense of Others

"Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." State v. Starnes, 340 S.C. 312, 322-323, 531 S.E.2d 907, 913 (2000) (citing State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997)). "[I]n order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others." Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307 (1998).

"To establish self-defense, the defendant must establish (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger." State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997) (citing State v. Bruno, 322 S.C. 534, 473 S.E.2d 450 (1996)).

Here, when viewed in a light most favorable to Appellant, there was evidence Appellant was acting in defense of Binh, who reasonably believed he was in danger of being seriously injured. Binh testified that he thought there were at least four other men with Bradley and that he was seriously outnumbered since his own friends were a significant distance ahead of him. Binh also explained that he was only five feet, six inches tall and a hundred and fifty pounds while the other men were much larger than him. Because he was surrounded by Bradley and his friends, Binh had no probable means of avoiding the danger. Moreover, the evidence established that Binh was not at

fault in bringing on the difficulty. Rather, it was Bradley, who refused to let go of Binh's girlfriend, Regina, and had threatened Binh, who was at fault in starting the fight. Under these circumstances, Binh was entitled to act in self-defense and, therefore, Appellant was lawfully permitted to act in defense of Binh when he struck the decedent.

Because there was some evidence to support a defense of others instruction, specifically Binh Ton's testimony, the trial court erred by refusing to give the charge. See Brown, 362 S.C at 262, 607 S.E.2d at 95 ("If there is any evidence to support a jury charge, the trial judge should grant the request."); Williams, 400 S.C. at 314, 733 S.E.2d at 609 (quoting State v. Day, 341 S.C. 410, 416–17, 535 S.E.2d 431, 434 (2000)) ("If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the [circuit court's] refusal to do so is reversible error."). Appellant was prejudiced by the court's error because the judge's failure to properly charge the jury prevented the jury from considering whether Appellant justifiably acted in defense of Binh when he struck the decedent.

Right to Act on Appearances

When acting in self-defense or in the defense of others, a defendant also has the right to act on appearances. Our Supreme Court has approved the following jury instruction: "A defendant must show that he believed he was in imminent danger, not that he was actually in such danger, because he had the right to act on appearances, and under the circumstances **as they appeared to him**, he believed he was in such danger and a reasonable prudent man of ordinary firmness and courage would have entertained the same belief." State v. Starnes, 340 S.C. 312, 320, 531 S.E.2d 907, 912 (2000) (quoting State v. Fuller, 297 S.C. 440, 443-444, 377 S.E.2d 328, 331 (1989)) (emphasis added).

In Starnes, our Supreme Court held Starnes was entitled to an appearance charge where, immediately prior to the shooting, he observed the decedent hold a gun to an acquaintance's head and threaten to shoot him. Unaware that the decedent had passed his weapon to another person before the shooting, Starnes erroneously believed the decedent was armed and intended to kill him. Under these circumstances, the Supreme Court held the trial judge should have instructed the jury that Starnes had the right to act on appearances. Starnes, 340 S.C. at 321-322, 531 S.E.2d at 912.

Here, Binh, and consequently Appellant who was defending Binh, had the right to act on appearances. Since there was evidence Binh believed he was in danger of being seriously injured by the decedent, Appellant was entitled to a jury instruction on the right to act on appearances. The testimony established that the events unfolded very quickly. Binh testified that the person he saw Appellant strike was "one of the dudes that was standing there in my face." Tr. 178, ll. 22-23. So, while there was some testimony that the decedent was not involved in the altercation, Binh believed, perhaps incorrectly, that the decedent intended to or was going to cause him serious bodily injury. As a result, Appellant was entitled to a jury instruction on the right to act on appearances.

Right to Rely on Alternative Defenses

A criminal defendant has the right to rely on alternative or conflicting defenses. See State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001). Again, "[i]f there is **any evidence** to support a jury charge, the trial judge **should** grant the request." Brown, 362 S.C. at 262, 607 S.E.2d at 95 (citing Shuler, 344 S.C.at 632, 545 S.E.2d at 819) (emphasis added).

In Knoten, the defendant's testimony at trial was inconsistent with his prior statement to law enforcement that the decedent had cut him with a knife before he hit her with a metal pipe. Knoten, 347 S.C. at 304, 555 S.E.2d at 396. At trial, Knoten raised an alibi defense and asserted his co-worker confessed to killing the decedent and threatened to kill Knoten's mother and his

sister if Knoten told police. Id. at 302, 555 S.E.2d at 394. Knoten testified that he fabricated his confessions based on cues from the interrogating officers because he feared for his family's safety. Id. Our Supreme Court rejected the state's argument that Knoten was not entitled to a charge on voluntary manslaughter because Knoten recanted the confession at trial and raised an alibi defense. Id. at 305, 555 S.E.2d at 396.

Instead, the Court cited our state's longstanding precedent that:

> In determining the issues to be submitted to the jury ... all of the testimony, both for the State and the defense, must be considered.... **The fact that the defendant interposed the defense of alibi did not deprive him of the benefit of the reasonable inferences to be drawn from the testimony relative to the degree of the offense committed, for the burden of establishing the offense charged rested upon the State.**

Id. at 308-309, 555 S.E.2d at 398 (citing State v. Moore, 245 S.C. 416, 420-421, 140 S.E.2d 779, 781 (1965) (emphasis added). Because in Knoten there was evidence introduced by the state that supported a conviction for the lesser included offense of voluntary manslaughter, even though Knoten presented an alibi defense, our Supreme Court held the trial court erred by refusing to instruct the jury accordingly. Id.

Here, Appellant was entitled to a jury instruction on defense of others and the right to act on appearances because there was evidence presented by the state, namely Binh Ton's testimony, to support both instructions. The fact that Appellant's defense at trial, like in Knoten, conflicted with these instructions was meaningless. This fact should have played no role whatsoever in the court's analysis regarding which jury instructions were supported by the evidence. Consequently, the trial court's reasoning that Appellant could not rely on alternative defenses was erroneous. The court was **required** to charge **all** requested instructions that were supported by the evidence.

Because the court erred by failing to instruct the jury on defense of others and the right to act on appearances, this Court, respectfully, should reverse Appellant's conviction and sentence and remand for a new trial.

2.

The court erred by refusing to direct a verdict for assault and battery of a high and aggravated nature when the state could not prove the elements of the offense where the decedent died after a single punch to the back of the head.

Appellant was entitled to a directed verdict when the state failed to present any evidence Appellant committed ABHAN, which requires "great bodily injury to another person" or an act "likely to produce death or great bodily injury." See S.C. Code Ann. § 16-3-600(B)(1). Because Appellant's alleged actions caused the *death* of the decedent, the state could not establish "great bodily injury." Moreover, there was no evidence presented that a single punch is an act "likely to produce death or great bodily injury."

As defense counsel argued, the underlying facts here, which involve an **unintentional killing**, instead support a prosecution for involuntary manslaughter. See State v. Gibson, 390 S.C. 347, 356, 701 S.E.2d 766, 771 (Ct. App. 2010) (defining involuntary manslaughter as "(1) *the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm* or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others. Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating.") (emphasis added) (internal citation omitted).

As mentioned, despite originally charging Appellant with involuntary manslaughter, the state prosecuted him for ABHAN presumably because ABHAN carries a much stiffer sentence.

While the solicitor claimed the state showed "restraint" by not prosecuting Appellant for murder, in reality, the state likely knew it could not prove all the elements of murder.

"A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. Brannon, 388 S.C. 498, 501, 697 S.E.2d 593, 595 (2010) (citing State v. Ladner, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007)); State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001) (citing State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916)). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001) (citing State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000) and State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000)).

"Penal statutes are strictly construed against the State and in favor of the defendant." State v. Morgan, 352 S.C. 359, 365, 574 S.E.2d 203, 206 (Ct. App. 2002) (citing State v. Fowler, 322 S.C. 157, 470 S.E.2d 393 (Ct.App.1996)). "The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." Id. (citing State v. Baucom, 340 S.C. 339, 531 S.E.2d 922 (2000) and City of Camden v. Brassell, 326 S.C. 556, 486 S.E.2d 492 (Ct.App.1997)). "The legislature's intent should be ascertained primarily from the plain language of the statute." Id. at 366, 574 S.E.2d at 206 (citing Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct.App.1996)). "Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." Id. (citing Rowe v. Hyatt, 321 S.C. 366, 468 S.E.2d 649 (1996)).

"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." S.C. Code

Ann. § 16-3-600(B)(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." S.C. Code Ann. § 16-3-600(A)(1).

Here, there was no evidence to establish "great bodily injury" under the first subsection because the decedent *died.* Great bodily injury requires the injured party be *alive*. Specifically, the definition states an "injury which causes a substantial risk of death." The plain meaning of an "injury which causes a substantial risk of death" assumes the individual did not die. Additionally, the definition also includes an injury "which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ." Again, the plain meaning of this second part requires the injured party be alive to satisfy the definition.

Moreover, there was no evidence presented that a single punch to the back of the head is an act "likely to produce death or great bodily injury" under the second subsection. While certainly possible, a single punch is not an action that one would expect would "produce death or great bodily injury."

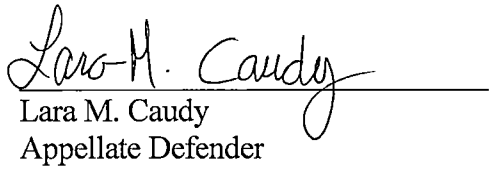
Based on the plain meaning of the statute, it is clear the legislature did not intend an individual to be prosecuted for ABHAN, which does not have "a killing" as an element, when the injured party was killed by the assailant's actions. Instead, the legislature intended the assailant be prosecuted for murder, voluntary manslaughter, or involuntary manslaughter, which all have "a killing" as an element.

Because there was no evidence of ABHAN under the plain meaning of the statute, this Court should direct a verdict in Appellant's favor.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court direct a verdict of acquittal. In the alternative, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of August, 2016.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DALTON ELLIS CLARKE,

APPELLANT

APPELLATE CASE NO. 2016-000801

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case have been served upon J. Benjamin Aplin, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201 and Mr. Dalton Ellis Clarke, #367733, Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 25th day of August, 2016.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of August, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.