STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2015-001737

THE STATE,

Respondent,

v.

GARY CURTIS FRALEY,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court properly declined Appellant's request to charge the jury on the possible verdict of not guilty by reason of insanity where no evidence was presented at trial from which the jury could find Appellant was legally insane at the time he committed the offenses.

II. The trial court properly declined Appellant's request to charge the jury on the lesser included offenses of assault and battery of a high and aggravated nature and assault and battery in the first and third degrees where no evidence was presented at trial from which the jury could infer that the lesser, rather than the greater, offense was committed and where any alleged error was harmless.

STATEMENT OF THE CASE

On August 5, 2014, law enforcement officers with the Goose Creek Police Department arrested Appellant Gary Curtis Fraley following a criminal rampage that included the oral, vaginal, and anal rape of an eleven year old girl and an armed standoff with law enforcement at Royal Lanes bowling alley. During its October, November, and December 2014 terms, the Berkeley County Grand Jury indicted Appellant for attempted murder, two counts of possession of a weapon during the commission of a violent crime, unlawful conduct toward a child, third-degree criminal sexual conduct with a minor, three counts of second-degree criminal sexual conduct with a minor, and two counts of kidnapping. On July 13, 2015, Appellant proceeded to a jury trial before the Honorable Kristi Lea Harrington. On July 17, 2015, the jury convicted Appellant as indicted. The trial court sentenced Appellant to aggregate term of seventy-six years' imprisonment. Thereafter, Appellant filed a timely notice of appeal.

STATEMENT OF FACTS

On the afternoon of August 5, 2014, Appellant went to his neighbor's house to see if the neighbor's fourteen year old daughter could come to a surprise party for his daughter at the local bowling alley. (R. 188). The particular daughter Appellant desired was not home, but her brother told Appellant his eleven year old sister ("Victim") was home and could possibly attend the party. (R. 189). Victim's brother went to ask his mother's permission for Victim to attend the party and she came to talk with Appellant. (R. 189, 193). Victim's mother had known Appellant for over three years and interacted with him frequently around the neighborhood and at the bus stop, as both had daughters around the same age. (R. 192). Appellant and Victim's mother discussed the party and Appellant showed Victim's mother fossil modeling kits he had for the children to play with at the party. (R. 193-94). Victim's mother called her ex-husband, who was scheduled for visitation with Victim and her siblings that evening, to see if he would permit Victim to attend the birthday party. (R. 193-94). Victim's father gave his permission for Victim to attend the party and agreed to pickup Victim from Appellant's home after the party at 5:30 p.m. (R. 194). Victim left with Appellant in Appellant's vehicle. (R. 194, R. 206).

After leaving Victim's house, Appellant drove to a nearby Publix grocery store. (R. 206). Appellant left Victim waiting in his parked car and went inside the store. (R. 206). Once inside, Appellant quickly went through the store, deliberately picking up a bottle of cherry flavored NyQuil cold medicine, a bottle of Johnson & Johnson baby oil, and a six-pack of Natural Light Beer. (R. 469-72, 477-80). Appellant purchased these items and return to the car. (R. 206, 471-72).

Appellant then drove Victim to the EconoLodge motel on North Goose Creek Boulevard. (R. 206, 473). Appellant, who had been checked into Room 125 of the motel since August 3,

2014, told Victim he was staying at the motel rather than his house because his house was without power. (R. 206, 474). Appellant used his key to access his room and went inside with Victim. (R. 206-07). Once inside, Appellant threatened Victim with a handgun and told her not to "test" him. (R. 213-14). Appellant demanded Victim's iPod and attempted to remove the battery with a pocketknife. (R. 207). Appellant then commanded Victim take a shower, claiming she needed to remove all bacteria before she touched any fossils at the party. (R. 207-08). While Victim showered, Appellant brought Victim a white plastic cup filled with NyQuil and instructed her to drink it so she would not catch a cold from the other children at the party. (R. 208). Victim drank the NyQuil as instructed. (R. 208). Appellant then brought Victim an alcoholic beverage and demanded she drink it. (R. 208). Victim took a sip of the beverage, but poured the remaining beverage down the shower drain once Appellant left the bathroom. (R. 208). Victim finished showering and, per Appellant's instructions, did not put her clothing back on but instead came into the room wearing only her towel and underwear. (R. 209).

Appellant was waiting for Victim on the bed and directed her to sit on his lap. (R. 209). Appellant told Victim his wife was cheating on him and he was going to rape Victim to get back at his wife. (R. 209-10). Appellant then removed Victim's underwear and rubbed something on her vagina. (R. 210). He thrust his penis into Victim's mouth and forced her to perform fellatio on him. (R. 211). During the fellatio, Appellant instructed Victim to "go deeper" and pushed her head and mouth farther down on his penis. (R. 210-11).

Next, Appellant mounted Victim while she was on her back and forced her legs apart. (R. 211). Appellant penetrated Victim's vagina with his penis, causing her to scream and cry. (R. 211-12). In response, Appellant removed his penis from her vagina. (R. 211-12). He let Victim use the bathroom before forcing her back onto the bed. (R. 212). Once she returned to the

bed, Appellant anally penetrated Victim. (R. 212). Victim again screamed and cried. (R. 214). As a result of Appellant's sodomy, Victim defecated on the bed. (R. 212). Following his oral, vaginal, and anal assault of Victim, Appellant turned on the television and put on the animated cartoon SpongeBob SquarePants. (R. 214). Appellant told Victim he would most likely go to jail for raping her. (R. 468).

Appellant confided in Victim that he was going to kill "Steve," the man with whom his wife was having an affair. (R. 214-15). Appellant and Victim then left the motel and Appellant drove to the Royal Lanes bowling alley in Goose Creek, striking a car in the motel parking lot while on the way. (R. 215, 344-50). Once they arrived at Royal Lanes, Appellant left Victim in the car and instructed her to wait in the car for ten minutes before getting out. (R. 215).

Appellant entered Royal Lanes through the alley's front doors and went directly to the pro-shop. (R. 276-68). Appellant was well-known at Royal Lanes because his wife, Deonna, was the alley manager. (R. 237-39, 262, 267-68, 275). Appellant had recently been placed on trespass notice and was prohibited from entering the alley based on his disruptive and aggressive behavior towards Deonna and others, including alley owner Steve Tsafos. (R. 267-69, 277). Appellant had been accusing Deonna and Tsafos of having an extramarital affair and sending threatening text messages and Facebook postings about the alleged affair.[1] (R. 244, 251-52, 260, 293, 303). Appellant left the alley briefly, then reentered and looked around before eventually barricading himself in Tsafos's office along with Tsafos. (R. 268-70).

Once inside Tsafos's office, Appellant pointed his gun at Tsafos, who was seated at his desk, called Tsafos a dead man, and prevented Tsafos from leaving the office. (R. 281, 283-84).

[1] In response to Appellant's increasingly threatening behavior, which included sending intimidating text messages and Facebook postings, peering into Tsafos's windows at night, keying Tsafos's car, slashing Tsafos's tires, and making a purchase at a gun retailer, Deonna filed a police report with the Goose Creek Police department earlier that day. (R. 248-52, 279-81).

Appellant demanded answers from Tsafos and referenced the purported affair with Deonna and his inability to pay his bills. (R. 283-87). Tsafos feared for his life and thought Appellant was going to kill him. (R. 284-87, 288). Tsafos attempted to leave the office, but was blocked by Appellant, who still had the gun pointed directly at him. (R. 285-88). Appellant told Tsafos he should be afraid and shot the gun at Appellant.[2] (R. 286). Tsafos thought the bullet hit him, and then realized the projectile struck the floor. (R. 286). In the fracas that followed, Tsafos fled the office. (R. 287-88, 320).

While Appellant held Tsafos against his will, the Goose Creek Police Department SWAT team had surrounded the bowling alley with a concentration of officers around Tsafos's office. (R. 315-17). Goose Creek Police Department Captain David Aarons, commander of the SWAT Team, negotiated with Appellant for nearly an hour and a half before Appellant was apprehended. (R. 314, 319-32). Throughout negotiations, Appellant lay on the floor of Tsafos's office and conversed with Captain Aarons. (R. 321-28). Appellant repeatedly pled with Captain Aarons not to be shot. (R. 321-30). Appellant asked for and received a cup of red wine and was permitted to smoke a cigarette. (R. 326-31). Appellant called Captain Aarons by his first name, told Aarons that he was doing a good job, but that it would not end well because Appellant had no reason to live. (R. 329). As Appellant neared the end of his cigarette and wine, Captain Aarons made the decision to disarm and apprehend Appellant. (R. 330). After Captain Aarons secured the weapon, other officers with the SWAT team rushed the office and subdued Appellant with the use of Tasers. (R. 331-32, 339-40). Officers placed Appellant under arrest and secured him with handcuffs. (R. 340).

[2] In his brief, Appellant writes, "Shortly after the police announced their presence, Tsafos testified that the gun simply 'went off,' firing into the ground." (IBOA 7). However, this mischaracterization of Tsafos's testimony is not supported by the record. Tsafos testified he was "just before the door" when Appellant "shot at" him. (R. 286).

Law enforcement escorted Appellant to a police cruiser and called for medical treatment. (R. 351-52, 356). EMT John Lee and Paramedic Paul Clendenning from the Goose Creek Fire Department responded to the bowling alley based on a dispatch call of a possible shooting and use of a Taser on a suspect. (R. 351-52). When they arrived, Lee and Clendenning inspected Appellant for possible Taser probes and did not find any. (R. 352, 356). Additionally, Lee and Clendenning examined Appellant and reported he was devoid of any injuries or health problems. (R. 352, 356). Lee noted Appellant was "kind of playful, jovial,"[3] but otherwise lucid, rational, reasonable, and aware of what was happening. (R.352). Clendenning similarly reported Appellant was lucid, aware, and reasonable. (R. 356).

While the standoff ensued inside the bowling alley, Victim left Appellant's vehicle and sought assistance from a woman nearby, Vanessa Gilchrist. (R. 215, 264-65). Gilchrist, who worked as a cook at Royal Lanes, was sitting outside the bowling alley following her shift when Victim approached her. (R. 262-65). Victim was very jittery and was physically shaking, and Gilchrist sensed something had happened to her. (R. 265). Victim asked to use Gilchrist's phone and used a piece of paper with phone numbers to try to call her parents. (R. 215-16, 265). Victim's dad answered, spoke with Victim, and told her to wait inside the alley and he would be there soon. (R. 216, 224, 265). Concerned for Victim, Gilchrist told Victim to wait with her until her father arrived. (R. 265). Shortly thereafter, a crowd of people came running out of the bowling alley and into the parking lot. (R. 266). In the chaos, Gilchrist lost sight of Victim. (R. 266).

When Victim's father arrived at the bowling alley minutes later, the parking lot was swarming with law enforcement. (R. 216, 224-25). He found Victim and decided to take her and

[3] Appellant misattributes this testimony to a law enforcement officer describing Appellant's demeanor while being placed under arrest in his brief. (IBOA 8).

the rest of the children with him to Dairy Queen at the nearby mall. (R. 225-26). When Victim got into the car, she appeared upset, exclaimed she never wanted to attend another birthday party, and stated she needed to talk to her father alone. (R. 226). Once they arrived at the mall, Victim and her father talked privately and she disclosed Appellant raped her. (R. 226). Victim's father noted she was extremely hot, her face was flushed, and she was in shock. (R. 227). He called Victim's mother, informed her of the rape, and asked her to meet them as soon as possible. (R. 195, 227). He next called law enforcement and reported the rape. (R. 227-28). Victim's mother and the police arrived on the scene and all agreed Victim needed to be taken to a hospital with specialized sexual assault care immediately. (R. 195-96, 227).

Victim's mother and father took her to the emergency room at the Medical University of South Carolina. (R. 196-97, 227). Upon arriving, Victim was examined and treated by Karen Drozd, a specially-trained sexual assault nurse examiner. (R. 381-83). Drozd completed a full body examination of Victim, including the use of a Wood's light to illuminate fluids on the body. (R. 383-84). Drozd also collected swabs for later analysis, drew blood for toxicology and disease screening, and took photographs to evidence Victim's injuries. (R. 383-84). Drozd also documented Victim's injuries in a report, which included oozing blood, deep lacerations, and two fissures on her anus. (R. 389-91). Medical care providers also tested for Human Immunodeficiency Virus (HIV) and gave her powerful HIV medication that potentially had long-lasting implications should she been infected with the virus later. (R. 391-92). Drozd also completed a sexual assault kit on Victim. (R. 391-36).

Victim's medical records and injury documentation was also reviewed by Dr. Kendra Ham, a pediatrician and child abuse expert from MUSC. (R. 404-11). Dr. Ham noted Victim has a deep laceration to her posterior fourchette at the six o'clock position, and lacerations or fissures

to her anus at the eleven o'clock position and the six o'clock position. (R. 409-10). She also found oozing blood emanating from the posterior fourchette laceration. (R. 410).

Prior to trial, the various specimens collected from Victim were analyzed and examined. Tracy McKinnon, a forensic toxicologist with the South Carolina Law Enforcement Division (SLED) tested Victim's blood samples. (R. 398-403). McKinnon identified Doxylamine, Methorphan, Methorphanam, and Acetaminophen in Victim's blood, all which were either ingredients or byproducts of NyQuil. (R. 402-03). Dr. Daniel Demers, who was admitted as an expert in DNA analysis, tested various swabs and other items collected in the case. (R. 411-36). Dr. Demers detected blood on Victim's underwear, vaginal swabs taken from Victim, rectal swabs taken from Victim, and Appellant's underwear. (R. 414). He also detected semen on one of the pillowcases removed from Appellant's room at the EconoLodge, Victim's underwear, Appellant's underwear, and various swabs taken from Victim. (R. 414). Dr. Demers detected Victim's DNA on the NyQuil dosage cup and could not exclude Appellant as a contributor to DNA found on the NyQuil bottle. (R. 419-20). Dr. Demers detected Appellant's DNA on the handgun taken from Appellant at the bowling alley and could not exclude Victim as a contributor to a DNA mixture also found on the weapon. (R. 422). Dr. Demers detected a mixture of DNA from both Appellant and Victim on one of the pillowcases. (R. 423-28). He also detected Appellant's DNA on semen found on Victim's underwear, as well as swabs collected from Victim's vagina and anus during the sexual assault examination. (R. 431-33).

Law enforcement took Appellant's cellular phone into custody following his arrest. (R. 441-42). A search of the phone revealed Appellant had been sending threatening messages to Tsafos and the bowling alley's Facebook page. (R. 441-42). Additionally, a review of

Appellant's internet history on the phone showed he searched for Tsafos, private investigators, and GPS tracking devices prior to his criminal rampage. (R. 477).

Appellant was indicted for attempted murder, two counts of possession of a weapon during the commission of a violent crime, unlawful conduct toward a child, third-degree criminal sexual conduct with a minor, three counts of second-degree criminal sexual conduct with a minor, and two counts of kidnapping. Prior to trial and in anticipation of an insanity defense, the court ordered Appellant to undergo evaluations by the South Carolina Department of Mental Health (SCDMH) to determine his competency to stand trial pursuant to S.C. Code Ann. § 44-23-410 and his criminal responsibility and capacity to conform pursuant to S.C. Code Ann. § 17-24-10. (R. 22-33, 129-176, R. 837, 847). Both evaluations were completed by Dr. Ana Gomez, a forensic psychiatrist at the Medical University of South Carolina. (R. 22-33, 129-76, R. 837, 847, Trial Br. For the State of South Carolina). Dr. Gomez met with Appellant three times for his criminal responsibility and capacity to conform evaluation: February 9, 2015, February 17, 2015, and May 13, 2015. (R. 133, R. 847).[4] Dr. Gomez concluded to a reasonable degree of medical certainty that Appellant was criminally responsible and had the capacity to conform his conduct to the requirements of the law. (R. 129-76, R. 847).

Appellant proceeded to a jury trial on July 13, 2015. At the outset of trial, the court held a competency hearing, at which Dr. Gomez testified to a reasonable degree of medical certainty that Appellant was competent to stand trial. (R. 22-33, R. 847). The court then held hearings on Appellant's statements to law enforcement, including the voluntariness of the statement and the State's motion in limine to prevent the defense from using the statements in its case in chief. (R. 34-89). The trial court ruled the statements were voluntarily given, but granted the State's motion

[4] Dr. Gomez met with Appellant on January 9, 2015, to conduct his competency to stand trial evaluation. (Tr. 76-87, Court's Ex. No. 4). Dr. Gomez determined Appellant was competent to stand trial, evidence in her written report and testimony at trial. . (R. 22-33, R. 837).

in limine. (R. 34-142). Next, defense counsel moved in limine to prevent the State from delving into Appellant's prior bad acts, including his hit and run car accident while leaving the EconoLodge to go to the bowling alley, his comments to others about his wife having an affair, Appellant's various Facebook postings, his purchase of ammunition, and his repeated attempts to obtain access to other young girls who lived nearby. (R. 90-101). The State filed a pre-trial brief addressing this anticipated motion and also placed arguments on the record opposing defense counsel's motion, including that all acts were relevant to the case and necessary to counter Appellant's anticipated insanity defense. (R. 90-101, 815-36). The trial court denied Appellant's motion in limine. (R. 90-101).

At trial, defense counsel focused on Appellant's mental state leading up to and on August 5, 2014, in furtherance of his claims of insanity. During the State's case, Dr. Gomez testified as to her evaluations of Appellant and her conclusion to a reasonable degree of medical certainty that Appellant was criminally responsible and had the capacity to conform his conduct to the requirement of the law. (R. 129-76, R. 847). Dr. Gomez testified she consulted with a pharmacist on the possible psychiatric side effects of Vivitrol, an injectable medication prescribed to addicts to curb the euphoric effects of alcohol and opiates, as Appellant complained his behavior was a result of receiving a Vivitrol injection in June. (R. 135-38, 148-51). Dr. Gomez testified there are no known psychiatric side effects to Vivitrol and it is highly unlikely his behavior was a result of the injection. (R. 135-38, 148-51). Dr. Gomez further testified Vivitrol is typically out of the bloodstream or only remains in a very low level after twenty-eight days, making it very unlikely any of the medication was still in his system six weeks later on August 5, 2014. (R. 135-38). Dr. Gomez testified in her expert opinion Appellant was not insane at the time of his crime spree. (R. 138-40). She testified Appellant is alcohol dependent and has been diagnosed as depressive

disorder recurrent. (R. 138-40). She testified Appellant told her he had been diagnosed with Post-Traumatic Stress Disorder (PTSD), but she found no evidence of this in any of his military or medical records. (R. 138-40). She also noted numerous witnesses described Appellant's behavior during this time period as normal. (R. 129-76).

The State also presented various neighbors of Appellant, who testified regarding his efforts to gain access to other young girls in the neighborhood in the days leading up to violent sexual assault of Victim. (R. 177-90). Kimberly Tompkins, a neighbor of Appellant and Victim, testified Appellant repeatedly tried to persuade her fourteen year old daughter to help with his daughter's schoolwork or come to a surprise birthday party in early August 2014, both in person and by voice message, and offered her money. (R. 177-83). She testified Appellant's demeanor was normal, other than his repetitive insistence he take her daughter to the party. (R. 182). Victim's brother and mother also testified Appellant's behavior was normal on August 5, 2014, when he inquired about Victim's older sister coming to the party and eventually took Victim instead. (R. 187-94).

Appellant's estranged wife, Deonna, also testified during trial. (R. 237-261). She testified Appellant repeatedly accused her of having affairs throughout their marriage, including with her boss Tsafos. (R. 237-244, 259-61). She testified her marriage with Appellant was volatile and Appellant often came to the bowling alley to confront her or her co-workers. (R. 238-40). Tsafos wrote her a letter, stressing the bowling alley needed to remain professional and banning Appellant from entering the premises. (R. 239-40). She testified she moved out of the marital home in June of 2014 while Appellant was at a rehabilitation facility in North Carolina receiving treatment for his alcoholism. (R. 240-41, 245). She testified Appellant had been in treatment for his drinking several times and described his heavy drinking throughout their marriage. (R. 244-

47). She testified Appellant buried empty alcohol bottles in the backyard and hid them under his daughter's mattress. (R. 244-47). She testified Appellant had numerous health problems and she began to accompany him to his medical appointments because the things he was telling her did not make sense, including that fuel exposure to his skin caused his ailments. (R. 245-46). Deonna testified every single doctor told her Appellant's health issues were solely related to his alcohol abuse, not military service as Appellant claimed. (R. 245-46). Deonna testified despite Appellant's heavy drinking, he was able to function and would help his daughter with her homework and behave "like a normal person." (R. 247).[5]

Deonna testified she went to the police station around noon on the day of the incident after becoming alarmed upon noticing Appellant made a purchase at a gun store nearby and was heading back to the area. (R. 247-49). She also received a call from Appellant's mother that he had stolen her gun and she intended to file a police report. (R. 248-49). Deonna also recalled various alarming Facebook messages from Appellant. (R. 250-52). She testified she had filed police reports before concerning Appellant. (R. 251). Deonna testified after she filed her police report, she went to work at the bowling alley. (R. 253-54). She testified she had no interaction with Appellant until he showed up at the bowling alley after five p.m. (R. 253-54).

Appellant testified in his own defense and presented a nonsensical, disjointed and self-serving account of the weeks leading up to his August 5, 2014, crime spree. Appellant testified in the summer of 2014, he had a substance abuse problem and was drinking to help him sleep at night. (R. 766). He testified he also had a myriad of other health issues, including gastrointestinal problems prevalent since childhood, liver issues that caused his "brain to malfunction," and a

[5] Appellant attempts to misconstrue the testimony from Deonna as indicating he had "brain damage" and "psychosis" towards the end of their marriage by using a portion of a compound question asked by the prosecutor and ignoring the remainder of Deonna's testimony. (IBOA 12, 21-22). However, the record reveals Deonna testified Appellant was a functional alcoholic who knew "what he was doing on a regular basis" and was able to help his daughter with her schoolwork and other parental duties. (R. 247).

"heart virus." (R. 492-96). Appellant testified he had been diagnosed with PTSD by the VA and a private psychiatrist had challenged Dr. Gomez's prior testimony that she found no record of Appellant having PTSD. (R. 495).

Appellant testified he tried to quit drinking in March of 2014 and eventually entered an inpatient treatment program in Wilmington, North Carolina. (R. 495-98). Appellant testified he stayed at this rehabilitation center for twenty-five days and was discharged on June 23, 2014. (R. 498-99). Appellant testified prior to his discharge, he received an injection of Vivitrol and was told it would last a month. (R. 499-502). Appellant claimed the injection gave him horrid side effects. (R. 501). After leaving Wilmington, Appellant testified he drove back to the Goose Creek area before eventually returning to Wilmington and begging the rehabilitation center to readmit him. (R. 501-08). Appellant testified he was experiencing stomach pain so severe that he could not eat and eventually had to be hospitalized in Wilmington. (R. 507-13).

After being discharged, Appellant stayed at a friend's home in the Wilmington area for a few days. (R. 513-14). While at the friend's house, Appellant testified he received a call from his wife's friend informing him Deonna was having an affair with Tsafos. (R. 514). Appellant then left his friend's house and drove to his mother's house in Pennsylvania. (R. 514-15). Appellant claimed he forgot how to read a map or drive a car, making his drive to Pennsylvania all the more arduous. (R. 515-18). Appellant also claimed he was still unable to eat. (R. 517).

Once he arrived at his mother's house, Appellant testified he was so severely ill that he laid on the floor for days. (R. 518-19). Appellant testified he began drinking wine to help him sleep at his mother's insistence. (R. 520). He testified he was throwing up blood and still unable to eat, so his mother took him to the emergency room. (R. 521). Appellant testified he was "emaciated." (R. 521, 525). Appellant claimed to have no clear memory and that he was only

able to remember things as "a picture here or there." (R. 522). Appellant testified he refused psychiatric treatment at the hospital and was discharged into his mother's care. (R. 525-26, 528-29). Appellant testified he stayed at his mother's house for a few days before eventually leaving to drive back to Goose Creek. (R. 530-32). Appellant claimed his mother packed the gun into his bag unbeknownst to him, but later recanted this assertion and said he did not want to blame his mother for his procurement of the firearm. (R. 532-33, 573-74).

Appellant testified it took him four or five days to drive back to South Carolina and he could not eat during the trip. (R. 533-34). He testified when he arrived in Goose Creek, Deonna had moved out of their marital home and was living with Tsafos. (R. 537). He claimed the electricity had been turned off, so he checked into the EconoLodge motel. (R. 537, 540). Appellant testified he waited around at the motel for his electricity to be turned back on. (R. 541-42). Appellant testified he does not recall what happened after that and most of his memory is based on his reading of discovery materials for the case. (R. 542-46). He testified he did not recall sexually assaulting Victim and only recalled telling Tsafos he wanted to kill himself. (R. 545-63). Appellant never denied threatening Tsafos, pointing a loaded firearm at him, or shooting Tsafos. Appellant testified the Vivitrol shot caused him to commit his crimes. (R. 586-87).

Appellant also called Robert Bennett to testify on his behalf. Bennett, who received a pharmacy degree in 1980 and a Ph.D. in pharmaceutical sciences in 1990, was allowed to testify as an expert in pharmacology and toxicology over the State's objections.[6] (R. 623-41). Bennett testified he reviewed Appellant's case and medical records to determine if he body was experiencing any toxic effects at the time of his crime spree. (R. 642-44). Bennett discussed the

[6] During voir dire on his qualifications, Bennett admitted he has not kept his licensures up to date, had not taken any required continuing educational requirement since 1999, and had been served a cease and desist letter from the State Board of Pharmacy requesting he stop referring to himself as a pharmacist. (R. 628-34, R. 866).

possible effects on the brain and other organs from gastrointestinal issues and the various other ailments Appellant asserted he suffered. (R. 643-59). Despite testifying Appellant appeared to be malnourished based on his review, he conceded Appellant's medical records repeatedly referenced that he was well-nourished. (R. 664-67). Bennett reiterated he was basing his opinion on Appellant's self-assessment that he had not eaten in weeks and was malnourished, which Bennett opined would significantly affect internal organs and cognitive functioning. (R. 678-79).

In rebuttal, the State called Dr. Todd Magro, a medical doctor who specializes in adult psychiatry and addiction psychiatry. (R. 685-87). Dr. Magro routinely prescribes Vivitrol and was qualified as an expert in psychiatry, medicine, addiction psychiatry, and addiction medicine. (R. 686-88). Dr. Magro reviewed Appellant's medical records, including laboratory results, and concluded Appellant was "[a]t most . . . mildly dehydrated . . . one time[,] [b]ut certainly not starving."[7] (R. 688). Dr. Magro testified that based on his professional experience, there is no connection between gastrointestinal issues and psychosis. (R. 689-90). He further testified there is nothing in Appellant's records that led him to believe Appellant was psychotic at any period of time. (R. 684, 698). Dr. Magro testified Vivitrol does not cause psychosis, memory loss, or any psychiatric or cognitive problems based on his vast experience with the medicine. (R. 691-94). Dr. Magro testified that based on his review of Appellant's medical records, Appellant's primary medical problem was alcohol dependency. (R. 694-95).

Following the close of all testimony, the court asked both parties for any requests to charge. (R. 700). Defense counsel requested an instruction on involuntary intoxication based on Appellant's Vivitrol injection approximately six weeks prior to the crime spree. (R. 700-01).

[7] In his brief, Appellant states, "Dr. Magro also examined Appellant's medical records and concluded that, while Appellant was malnourished, there was no evidence that Appellant was psychotic." (IBOA 16). This is a mischaracterization of the record, as Dr. Magro testified there was absolutely nothing in Appellant's medical records to suggest that he was malnourished. (R. 688).

Defense counsel also requested jury instructions on not guilty by reason of insanity and guilty but mentally ill. (R. 701-13). Perplexingly, defense counsel abandoned her earlier case theory that the Vivitrol injection caused Appellant's psychosis and instead argued Appellant's "physical state at the time of the incident caused the psychoses," including malnourishment, gastrointestinal, blood, and liver problems. (R. 703-06). The State argued against an instruction of not guilty by reason of insanity, citing a dearth of testimony that Appellant did not know the difference between moral or legal right from wrong. (R. 708-11). Following argument from both parties, the court ruled it would not charge the jury on not guilty by reason of insanity, stating:

> There has been **no evidence** in the record that at the time the crime was allegedly committed that because of that mental disease or defect that you are alleging there – the testimony has always been that the defendant did know the alleged crime in each of the indictments was morally or legally wrong. So I will not be charging insanity, the insanity defense. Note your exception to my ruling.

(R. 712) (emphasis added). However, the court ruled it would instruct the jury on guilty but mentally ill as requested by defense counsel. (R. 712-13).

Defense counsel then requested jury instructions on the lesser included offenses of attempted murder, including assault and battery of a high and aggravated nature, assault and battery in the first degree, and assault and battery in the third degree. (R. 713-14). In support of this request, defense counsel argued Appellant did not have the requisite intent for attempted murder. (R. 714). The State objected, arguing a lack of evidence in the record to show any lesser included offense of attempted murder occurred. (R. 714). The court ruled it would not charge any lesser included offenses of attempted murder, stating:

> I must charge the law applicable as to the facts as presented. I will not be charging any lesser included's. We discussed this last evening. I do not -- there has been nothing -- the testimony has not changed since last evening, and there is nothing that would indicate that factually the lesser included's is appropriate. The

> testimony has been and even your own client's testimony was that when he came out of his fog, the white light, that he had the gun in his hand. So based upon that I will be charging -- I will not be charging any lesser included's.

(R. 714-15).

Following closing argument from both parties, the trial court charged the jury on the law and instructed the jury to begin deliberations. (R. 763-83). The jury deliberated for forty-seven minutes before convicting Appellant on all counts as indicted. (R. 783-85). The trial court sentenced Appellant to: twenty years' imprisonment for one count of second-degree criminal sexual conduct with a minor, thirty years' imprisonment for two counts of second-degree criminal sexual conduct with a minor, fifteen years' imprisonment for third-degree criminal sexual conduct with a minor, five years' imprisonment for both counts of possession of a weapon during the commission of a violent crime, ten years' imprisonment for unlawful conduct toward a child, thirty years' imprisonment for the kidnapping charge related to Tsafos with a finding that the offense was not sexual in nature, thirty years' imprisonment for attempted murder to be served consecutive to all other sentences, and thirty years' imprisonment for the kidnapping of Victim to run consecutively to all other sentences. (R. 812-13).

On July 23, 2015, the trial court reconvened to clarify its sentences and amend various scrivener's errors on the sentencing sheets. (Supp. R. 1-14). The trial court clarified its aggregate sentence was ninety years' imprisonment, with Appellant to first serve his thirty year's imprisonment for the kidnapping of Victim as the controlling sentence, followed by a consecutive sentence of thirty years' imprisonment for attempted murder, followed by a consecutive sentence of thirty years' imprisonment for the attempted murder of Tsafos to be served concurrently to all remaining sentences. (Supp. R. 1-14).

ARGUMENT

I. The trial court properly declined Appellant's request to charge the jury on the possible verdict of not guilty by reason of insanity where no evidence was presented at trial from which the jury could find Appellant was legally insane at the time he committed the offenses.

Appellant argues the trial court erred in denying his request to instruct the jury on the possible verdict of not guilty by reason of insanity. Appellant contends he offered evidence that he was legally insane at the time of his crime spree and the trial court reversibly erred by refusing to instruct the jury on the law of not guilty by reason of insanity. Appellant further argues the trial court applied the wrong standard in reaching its decision not to instruct the jury by erroneously concluding Appellant must prove to the court by a preponderance of the evidence that he was legally insane before being entitled to a jury instruction on the affirmative defense. However, Appellant's argument is without merit as Appellant failed to present any evidence that he met the legal definition of insanity at the time he committed the crimes, and therefore, the trial court properly refused to instruct the jury on the possible verdict of not guilty by reason of insanity. Appellant's convictions should be affirmed.

STANDARD OF REVIEW

"The law to be charged is determined from the facts presented at trial." State v. Curry, 410 S.C. 46, 52, 762 S.E.2d 721, 724 (Ct. App. 2014) (quoting State v. Lewis, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997)). "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). An appellate court will not reverse a circuit court's decision to deny a specific request to charge unless the circuit court committed an error of law. State v. Marin, 404 S.C. 615, 619, 745 S.E.2d 148, 151 (Ct. App. 2013); see State v. Commander, 396 S.C. 254, 270, 721 S.E.2d 413, 421–22 (2011) ("An appellate court will not reverse the [circuit court]'s decision regarding a jury charge absent an abuse of discretion.").

ANALYSIS

In every criminal case, the defendant is presumed sane. Lewis, 328 S.C. at 277, 494 S.E.2d at 117 (citing State v. Milian-Hernandez, 287 S.C. 183, 336 S.E.2d 476 (1985)). "Insanity is an affirmative defense to a prosecution for a crime." Id.

South Carolina has adopted the M'Naghten test to determine insanity, requiring "that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong." Lewis, 328 S.C. at 277-78, 494 S.E.2d at 117 (citing S.C. Code Ann. § 17-24-10 (A)). Under this test, "the key to insanity is the power of the defendant to distinguish right from wrong in the act itself—to recognize the act complained of is either morally or legally wrong." Id. (internal citations and quotations omitted). If a defendant has this ability when he commits a crime, he is legally responsible for his actions. State v. Wilson, 306 S.C. 498, 506, 413 S.E.2d 19, 23 (1992 (citations omitted).

The defendant must prove by the preponderance of the evidence that he is insane and he or she may rely on lay testimony to establish insanity. S.C. Code Ann. § 17-24-10 (B); Lewis, 328 S.C. at 278, 494 S.E.2d at 117 (citing State v. Hinson, 253 S.C. 607, 172 S.E.2d 548 (1970)).

However, where a defendant offers evidence of insanity, the State must present evidence from which the jury could find the defendant sane. State v. Smith, 298 S.C. 205, 208, 379 S.E.2d 287, 288 (1989). The State is not required to present expert testimony supporting sanity even if the defendant presents expert testimony supporting insanity. Id. Lay testimony may be sufficient to prove sanity, and a jury is free to rely on circumstantial evidence of sanity even where expert testimony favors a finding of insanity. State v. Poindexter, 314 S.C. 490, 494, 431 S.E.2d 254, 256 (1993). The existence of "any evidence" of sanity creates an issue for the jury to resolve. State v. Milian-Hernandez, 287 S.C. 183, 185, 336 S.E.2d 476, 477 (1985).

"A requested charge on insanity is properly refused where there is no evidence tending to show the defendant was insane at the time of the crime charge." Lewis, 328 S.C. at 278, 494 S.E.2d at 117. In Lewis, our Supreme Court held an insanity jury charge was not warranted, notwithstanding evidence that the defendant suffered from "severe depression," where his actions following the crime suggested that he recognized the gravity of the situation and that his conduct was wrong. Lewis, 328 S.C. at 279-80, 494 S.E.2d at 117-18. The Supreme Court noted there was no evidence the defendant was unable to distinguish between right and wrong at the time of the offense. Id. at 278-79, 494 S.E.2d at 117.

In the present case, defense counsel requested jury instructions on not guilty by reason of insanity and guilty but mentally ill. (R. 701-13). Surprisingly, defense counsel abandoned her earlier case theory that the Vivitrol injection caused Appellant's psychosis and instead argued Appellant's "physical state at the time of the incident caused the psychoses," including malnourishment, gastrointestinal, blood, and liver problems. (R. 703-06). In response, the State argued against an instruction of not guilty by reason of insanity, citing an absence of testimony that Appellant did not know the difference between moral or legal right from wrong. (R. 708-11).

Following argument from both parties, the court ruled it would not charge the jury on not guilty by reason of insanity, stating:

> There has been **no evidence** in the record that at the time the crime was allegedly committed that because of that mental disease or defect that you are alleging there – the testimony has always been that the defendant did know the alleged crime in each of the indictments was morally or legally wrong. So I will not be charging insanity, the insanity defense. Note your exception to my ruling.

(R. 712) (emphasis added). However, the court ruled it would instruct the jury on guilty but mentally ill as requested by defense counsel. (R. 712-13).

As an initial matter, the trial court used the proper standard in evaluating whether to charge the jury on not guilty by reason of insanity. After defense counsel requested the charge, the trial court specifically noted, "there has been absolutely no testimony that indicates the defendant did not know the alleged crime was morally or legally wrong." (R. 702). Following argument from both parties as to whether the charge was proper, the trial court ruled it would not instruct the jury on the possible verdict of not guilty by reason of insanity based on a complete lack of evidence presented to support the charge—the proper standard for a court to consider when determining whether to give an instruction on not guilty by reason of insanity. (R. 712). See Lewis, 328 S.C. at 278, 494 S.E.2d at 117 ("A requested charge on insanity is properly refused where there is no evidence tending to show the defendant was insane at the time of the crime charge."). Appellant's argument that the trial court erroneously used an improper preponderance of the evidence standard is without merit, as the trial court clearly applied the correct standard when making its determination.

Addressing the merits of the trial court's ruling, the trial court properly refused to instruct the jury on the law of not guilty by reason of insanity because there was **no** evidence that Appellant was unable to distinguish between right and wrong at the time of his crime spree.

Rather, all evidence presented indicated he did indeed understand his actions were legally and morally wrong at the time of commission. Following his brutal rape of eleven year old Victim, Appellant told Victim he knew he would likely go to jail for his conduct—direct evidence Appellant **was** able to distinguish between right and wrong at the time of his crime spree. (R. 467-68). Additionally, Dr. Gomez, who met with Appellant three times to evaluate his criminal responsibility and capacity to conform his conduct to the requirements of the law, concluded to a reasonable degree of medical certainty that Appellant was legally sane on August 5, 2014, was criminally responsible, and had the capacity to conform his conduct to the requirements of the law at the time of his crime spree. (R. 129-76, R. 847).

Furthermore, numerous neighbors who interacted with Appellant on the days leading up to or on August 5, 2014, testified Appellant was behaving normally. (R. 182, 190, 192-93). Appellant's wife Deonna testified despite Appellant's heavy drinking, he was able to function and would help his daughter with her homework and behave "like a normal person" in the months leading up to his August 5, 2014 crimes. (R. 247).[8] Gilchrist testified Appellant's demeanor was normal based on her prior interactions with him. (R. 263). Booth testified that although Appellant was dressed in a coat in the summer heat, this was usual behavior for him. (R. 237). Booth also testified that although she described Appellant as not "fully there," "distracted, [and] confused," he proceeded through the bowling alley deliberately as if he had a plan. (R. 273-75). Tsafos described Appellant's behavior as serious, demonstrative, and "thought out." (R. 285). He noted Appellant made eye contact with him and did not seem angry or psychotic. (R. 285). Captain Aarons, who negotiated with Appellant for nearly an hour and a

[8] As discussed prior, Appellant attempts to misconstrue the testimony from Deonna as indicating he had "brain damage" and "psychosis" towards the end of their marriage by using a portion of a compound question asked by the prosecutor and ignoring the remainder of Deonna's testimony. (IBOA 12, 21-22). However, the record reveals Deonna testified Appellant was a functional alcoholic who knew "what he was doing on a regular basis" and was able to help his daughter with her schoolwork and other parental duties. (R. 247).

half, testified Appellant was able to carry on a conversation with him, seemed rational and pleaded with Aarons not to shoot him—indicating Appellant understood the severity of the situation and the consequences of his actions. (R. 314-33). Multiple medical care providers who examined Appellant immediately after the incident described his demeanor as lucid and responsive. (R. 451-64).

Moreover, Appellant's own testimony did **not** provide any evidence that he was unable to distinguish between right and wrong at the time of his crime spree. Although Appellant's self-serving testimony established he was unable to recall large blocks of time, including the vicious rape of Victim entirely, he did not testify he was unable to distinguish between legal or moral right and wrong. Likewise, Appellant's own expert, Bennett, was unable to establish Appellant was insane or could not distinguish between right and wrong on August 5, 2014.

Similar to Lewis, Appellant failed to present any evidence he was unable to distinguish between right and wrong at the time of the offense. Therefore, the trial court properly denied Appellant's request to charge not guilty by reason of insanity. Appellant's convictions should be affirmed.

II. The trial court properly declined Appellant's request to charge the jury on the lesser included offenses of assault and battery of a high and aggravated nature and assault and battery in the first and third degrees where no evidence was presented at trial from which the jury could infer that the lesser, rather than the greater, offense was committed and where any alleged error was harmless.

Appellant argues the trial court erred in failing to charge the lesser included offenses of assault and battery of a high and aggravated nature and assault and battery in the first and third degrees because the evidence presented at trial could allow a juror to rationally conclude he lacked the specific intent to kill Tsafos. Specifically, Appellant references testimony he wanted to commit suicide at the bowling alley—not kill Tsafos, and argues the weapon discharged accidentally and the bullet hit the floor, which he argues support his claim he was entitled to jury instructions on the lesser included offense to attempted murder. However, Appellant's argument is without merit, as the only conclusion that can be reached from Appellant's conduct is an intent to kill Tsafos. Furthermore, even if the court's decision was error, it was harmless because it did not contribute to the jury's verdict. For those reasons, Appellant's convictions should be affirmed.

STANDARD OF REVIEW

The law to be charged 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. Hill, 315 S.C. at 262, 433 S.E.2d at 849.

"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). However, the charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense. State v. Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014), State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995); State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994). "The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tends to show the defendant was guilty only of the lesser offense." State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006). In reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). An appellate court will not reverse a trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006).

ANALYSIS

The Omnibus Crime Reduction and Sentencing Reform Act of 2010 substantially overhauled the state's criminal law in regard to assault and battery offenses. It codified attempted murder in section 16-3-29 and four degrees of assault and battery in section 16-3-600. S.C. Code Ann. §§ 16-3-29 & 16-3-600 (Supp. 2013). The new degrees of assault and battery are, in descending order of severity, assault and battery of a high and aggravated nature, and assault and

battery in the first, second, and third degrees. Under the statute, assault and battery of a high and aggravated nature is a lesser-included offense of attempted murder. Id. § 16-3-600(B)(3). Assault and battery in the first degree is a lesser-included offense of both attempted murder and assault and battery of a high and aggravated nature. Id. § 16-3-600(C)(3). Further, assault and battery in the second and third degree are each lesser-included offenses of every preceding offense. Id. § 16-3-600(D)(3) & (E)(3).

In the present case, Appellant requested the trial court instruct the jury on the lesser included offenses of attempted murder. (R. 713-14). Defense counsel argued Appellant did not have the requisite intent for attempted murder and referenced an in-chambers discussion the previous evening on the subject. (R. 713-14). The State objected, arguing a lack of evidence in the record to show any lesser included offense of attempted murder occurred. (R. 714). The court ruled it would not charge any lesser included offenses of attempted murder, stating:

> I must charge the law applicable as to the facts as presented. I will not be charging any lesser included's. We discussed this last evening. I do not -- there has been nothing -- the testimony has not changed since last evening, and there is nothing that would indicate that factually the lesser included's is appropriate. The testimony has been and even your own client's testimony was that when he came out of his fog, the white light, that he had the gun in his hand. So based upon that I will be charging -- I will not be charging any lesser included's.

(R. 714-15). Appellant contends this was error.

Under S.C. Code Ann. § 16-3-29,"A person who, **with intent to kill**, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." (Emphasis added). One of the requisite elements of attempted murder is an intent to kill. Id.

Pursuant to 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." (Emphasis added). Assault and battery of a high and aggravated nature is a lesser included offense of attempted murder. S.C. Code Ann. § 16-3-600(B)(3). A necessary element of assault and battery of a high and aggravated nature is an injury to the victim. Id.

S.C. Code Ann. § 16-3-600(C)(1) provides: "A person commits the offense of assault and battery in the first degree if the person unlawfully: (a) injures another person, and the act: (i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or (b) offers or attempts to injure another person with the present ability to do so, and the act: (i) is accomplished by means likely to produce death or great bodily injury; or (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft." Assault and battery in the first degree is a lesser included offense of assault and battery of a high and aggravated nature. S.C. Code Ann. § 16-3-600(C)(3).

S.C. Code Ann. § 16-3-600(D)(1) provides: "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." Assault and battery in the second degree is a lesser-included offense of assault and

battery in the first degree, assault and battery of a high and aggravated nature, and attempted murder. S.C. Code Ann. § 16-3-600(D)(3).[9]

S.C. Code Ann. § 16-3-600(E)(1) provides: "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." Assault and battery in the third degree is a lesser-included offense of assault and battery in the second degree, assault and battery in the first degree, assault and battery of a high and aggravated nature, and attempted murder. S.C. Code Ann. § 16-3-600(E)(3).

Appellate contends he is entitled to jury instructions on the lesser included offenses of attempted murder because the jury could infer from the evidence that he was guilty of any of the lesser offenses. To the contrary, the trial court properly declined to instruct the jury the lesser included offenses of attempted murder because the evidence presented during trial only supported jury instruction on attempted murder. As an initial matter, Appellant was not entitled to a jury instruction on assault and battery of a high and aggravated nature—and the trial court properly refused to give such charge—because there is no evidence in the record Tsafos was injured by Appellant. As injury is a requisite element to assault and battery of a high and aggravated nature and the record is devoid of any evidence Tsafos was injured, the trial court properly declined Appellant's request to charge it as a lesser included offense of attempted murder.

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[9] Appellant has abandoned any argument he was entitled to a jury instruction on assault and battery in the second degree as lesser included offense of attempted murder as he has failed to present any argument on this ground in his brief. Because Appellant does not challenge the trial court's refusal to charge assault and battery in the second degree as lesser included offense of attempted murder in his brief, he has abandoned any appellate challenge as to the trial court's refusal to charge assault and battery in the second degree. See Ahrens v. State, 392 S.C. 340, 357, 709 S.E.2d 54, 63 (2009) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."); see. e.g., Jones v. Leagan, 384 S.C. 1, 17, 681 S.E.2d 6, 15 (Ct. App. 2009) ("An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal. Accordingly, any argument regarding exclusivity or hostility is abandoned." (citations omitted)).

Moreover, the trial court properly refused to charge the jury on assault and battery in the first and third degrees because the evidence presented during trial only supported jury instruction on attempted murder. The only conclusion that can be reached from the evidence presented was Appellant had the intent to kill Tsafos when he stormed the bowling alley, barricaded himself and Tsafos in the office with a loaded weapon, and pointed it at Tsafos while repeatedly threatening him. Victim testified following her rape, Appellant announced he was going to kill Tsafos. (R. 214). Tsafos testified when Appellant entered his office, he pointed the gun at Tsafos and said, "You are a dead man." (R. 281, 283). Tsafos testified Appellant fully intended to kill him and kept the gun pointed directly at him throughout the ordeal. (R. 281-86). Appellant also told Tsafos he should be afraid while using both hands to point the weapon at Tsafos directly before he fired the weapon. (R. 284-86).[10] Additionally, Appellant posted threatening and cryptic messages on the Facebook page for the bowling alley Tsafos owned, which one could reasonable infer establish Appellant's intent to do grave harm to Tsafos. (R. 252-53). Based on this evidence, the jury could only find Appellant committed attempted murder or was not guilty. See State v. Mallory, 270 S.C. 519, 523, 242 S.E.2d 693, 695 (1978) ("[I]t is not error to refuse to submit the question of simple assault and battery to the jury under an indictment for assault and battery of a high and aggravated nature, unless there is testimony tending to show that the defendant is **only** guilty of a simple assault and battery." (emphasis added)); see also State v. Small, 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."). As no evidence was presented supporting

[10] Appellant's repeated assertions that "the gun simply 'went off,' firing into the ground" are an inaccurate mischaracterization of the record in an apparent attempt to minimize Appellant's culpability and actions. (IBOA 7).

a finding that Appellant's conduct was anything other than attempted murder, the trial court did not err in declining to instruct the jury on the lesser included offenses of assault and battery in the first or third degrees.

Appellant attempts to negate the only logical conclusion drawn from his actions—an intent to kill Tsafos—by arguing the weapon discharged accidentally into the floor and he was suicidal. However, these arguments are unpersuasive and without merit. As discussed previously, the record does **not** establish the weapon misfired without any act by Appellant. The uncontroverted evidence presented at trial established Appellant pointed a loaded firearm at Tsafos with both hands while threatening Tsafos's life. Additionally, Appellant's claims that he wanted to commit suicide are not exclusive to wanting to kill Tsafos, as he could have wanted to kill Tsafos **in addition** to committing suicide. When directly asked if he intended to kill Tsafos, Appellant was unable to give a concrete answer, instead equivocating as to whether he wanted to kill himself. (R. 550-51). Furthermore, Appellant told Victim he wanted to kill Tsafos and would likely be incarcerated for raping her, indicating he did not intend to kill himself. (R. 214, 468). As the only evidence presented at trial established an intent to kill, the trial court properly refused to instruct the jury on the lesser included offenses of attempted murder. Appellant's convictions should be affirmed.

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 a review of the entire record

establishes an error is harmless beyond a reasonable doubt, an appellate court should not reverse a conviction. State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003).

Any error with respect to a jury instruction is subject to a harmless error analysis. See State v. Middleton, 407 S.C. 312, 317 n. 2, 755 S.E.2d 432, 435 n. 2 (2014) (holding a trial court's refusal to give a jury charge on a lesser-included offense that is supported by the evidence is subject to harmless error analysis). "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.' " Id. (quoting State v. Kerr, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct.App.1998)). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." Id. (citation omitted). "Thus, whether or not the error was harmless is a fact-intensive inquiry." Id.

In Middleton, the appellant intentionally drove up to a stopped vehicle and shot at the two occupants at least five times. Id. at 314–15, 755 S.E.2d at 433–34. Neither passenger was struck due to the quick thinking of one, who jumped into the driver's seat and ran appellant off the road. Id. One passenger did sustain minor lacerations from the broken glass. Id. The appellant was charged with two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. Id. The trial court instructed the jury on the lesser included offense of assault and battery in the first degree as to the injured occupant, but refused to do the same as to the uninjured occupant. Id. at 315-16, 755 S.E.2d 434. Our Supreme Court found "[t]he trial judge misconstrued the statutory definition of assault and battery in the first degree as requiring an injury to the victim." Id. at 315–16, 755 S.E.2d at 434–435. However, the Court

determined that harmless error because "the only conclusion established by the evidence is that Appellant was guilty of attempted murder." Id. at 319, 755 S.E.2d at 436.

In the present case, even assuming the trial court erred in declining to instruct the jury on the lesser included offenses of assault and battery of a high and aggravated nature and assault and battery in the first and third degrees, any error was entirely harmless and did not contribute to the jury's verdict. Victim and Tsafos both testified Appellant made direct comments on his intention to kill Tsafos. Appellant pointed a loaded weapon at Tsafos while holding him hostage in a small room and further threatening him. Appellant's testimony did not contradict these statements, but merely indicated he possibly wanted to commit suicide as well. Therefore, the evidence presented in this case can only lead to the conclusion that Appellant was either guilty of attempted murder or of nothing. See State v. Battle, 408 S.C. 109, 122, 757 S.E.2d 737, 743-44 (Ct. App. 2014) (the trial court's erroneous refusal to instruct the jury on the lesser included offense was not harmless beyond a reasonable doubt because "u[n]like Middleton, the evidence does not support one clear cut conclusion" due to conflicting evidence."). Appellant's convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment and conviction of the lower court.

Respectfully submitted,

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September 8, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEREKELEY COUNTY
Kristi Lea Harrington, Circuit Court Judge

RECEIVED
SEP 08 2016
SC Court of Appeals

Appellate Case No. 2015-001737

THE STATE,

Respondent,

v.

GARY CURTIS FRALEY

Appellant.

CERTIFICATE OF COUNSEL

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

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September 8, 2016