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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARY CURTIS FRALEY,

APPELLANT

APPELLATE CASE NO. 2015-0017137

FINAL BRIEF OF APPELLANT

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The trial court reversibly erred by refusing to instruct the jury on the verdict form of not guilty by reason of insanity where (A) the court erroneously believed that the defense must prove to the court by a preponderance of the evidence that Appellant was legally insane before the defense was entitled to a jury instruction on the affirmative defense and (B) where there was evidence that Appellant was legally insane at the time of the offenses were committed, entitling him to the not guilty by reason of insanity verdict form.

II.

The trial court reversibly erred by refusing to instruct the jury on the three lesser-included offenses of attempted murder, where the court wrongly concluded that there was no evidence that Appellant had committed any of the lesser included offenses where Appellant had testified that he had intended to commit suicide and where the victim had testified that the gun appeared to have simply "went off" while Appellant was pointing it at the floor.

STATEMENT OF THE CASE

From October 7, 2014 through December 16, 2014, the Berkeley County Grand Jury indicted Appellant Gary Fraley for: attempted murder, unlawful conduct toward a child, unlawful neglect of a child, criminal sexual conduct with a child in the third degree, two counts of possession of a weapon during the commission of a violent crime, two counts of kidnapping, and three counts of criminal sexual conduct with a minor in the second degree, R. 868-900.

On, August 13 - 17, 2015, Appellant proceeded to trial before the Honorable Kristi Lee Harrington and a jury. Melisa Gay represented Appellant, and Assistant Solicitors Anne Williams and Daniel Poulos represented the State. The jury found Appellant guilty as charged. R. 784, l. 9 - 786, l. 19. The trial court sentenced Appellant to a total of seventy six years imprisonment. R. 812, l. 4 - 813, l. 17.

STATEMENT OF FACTS

Introduction

On August 5, 2014, Appellant Gary Fraley, looking disheveled and wearing a heavy coat in August, entered the Royal Lanes bowling alley where his then-estranged wife, Deonna Fraley, was the manager. R. 272, l. 7 - 274, l. 8. Appellant had come to believe that Deonna and the bowling alley's owner, Steven Tsafos, were having an affair. R. 302, ll. 5-22. Fraley walked into Tsafos' office, produced a revolver and held Tsafos at gun point. R. 279, l. 14 - 286, l. 4.

Appellant then began acting erratically. He demanded that Tsafos write him a check so that he could pay some bills. R. 287, ll. 20-23. Appellant accused Tsafos of having a year and half-long affair with Appellant's wife, when Deonna had only worked at Royal Lanes for a year. R. 302, ll. 8-22.

Despite allegedly fearing for his life, Tsafos berated Appellant for his unkempt appearance, writing in a later police report that he told Appellant, "look at you man, look at how you are undressed, you're not even taking care of yourself, you're messed up in the mind, you're not even rational." R. 303, ll. 22-25.

Following another argument between Tsafos and Appellant, Appellant mentioned his daughter and laid on Tsafos' office floor. Shortly after the police announced their presence, Tsafos testified that the gun simply "went off," firing into the ground. R. 286, l. 6 - 287, l. 6. Tsafos used the ensuing confusion to escape. *Id.*

Appellant then remained in the office while Officer David Adams of the North Charleston Police Department attempted to negotiate his surrender. R. 323, l. 6 - 332, l. 9. Adams eventually decided to tackle and tase Appellant after he threatened to commit suicide. *Id.* Oddly, police described Appellant as "kind of playful, jovial" about being placed under arrest. R. 352, ll. 20-21.

Near simultaneous to the standoff at the bowling alley, the police received a call from a hysterical Chad Vick explaining that his eleven year old daughter, Minor 1, had just told him that she had been raped by Appellant. R. 196, l. 6 - 197, l. 8. Law enforcement then met with Minor 1 and her parents at MUSC. *Id.*

At trial, Minor 1 and her family would testify that on August 5, 2014, Appellant, who was their neighbor, showed them what appeared to be a set of rocks while inviting Minor 1's older sister to a surprise "fossil themed" birthday party for Appellant's daughter. He claimed the party was going to be held at the Royal Lanes. R. 188, l. 1 - 189, l. 22. Minor 1's older sister was not home, so Appellant invited Minor 1 instead. *Id.*

Appellant's daughter's birthday is actually in June. R. 242, ll. 6-25. Instead of taking Minor 1 to the Royal Lanes, Appellant drove her to the EconoLodge after a brief stop at an area Publix. R. 206, l. 3 - 215, l. 25. Minor 1 would testify that Appellant had her take a shower. *Id.* He then force fed her a mixture of wine and cough syrup before raping and sodomizing her. *Id.*

Minor 1 further testified that Appellant explained that he was "getting back" at his unfaithful wife by cheating on her with Minor 1. R. 209, ll. 17-25. Appellant then drove to Royal Lanes and left Minor 1 in the car. R. 215, ll. 9-23. While pulling out of the Econolodge parking lot, Appellant backed into an on-coming car. R. 344, l. 19 - 345, l. 16. The officer investigating the accident stated at trail that, "the person pulling out of the parking lot completely disregarded" the on-coming traffic and did not stop or slow down before impact. R. 349, ll. 7-24.

Relevant Facts Prior to August 5, 2014

In the months leading up to August 5, 2014, Appellant came to suspect that Deonna was having an affair with Tsafos. R. 237, l. 9 - 245, l. 25. Acting on his suspicions, Appellant routinely visited Royal Lanes to spy on her and to publicly accuse his wife of cheating on him. *Id.*

Appellant's marital problems coincided with a rapid deterioration in his physical and mental health. Appellant, who was medically discharged from the army and on disability, suffers from numerous gastrointestinal problems: Barrett's esophagus, ulcerative colitis, acid reflux, a damaged liver, and high ammonia levels. Appellant is also an alcoholic and had been diagnosed as suffering from acute depression. R. 491, l. 11 - 498, l. 10.

At the end of May, 2014, Appellant entered into an in-patient alcohol rehabilitation program in Wilmington, North Carolina. *Id.* Shortly thereafter, Deonna Fraley left the marital residence. She initially stayed at a friend's apartment, but soon moved in with Tsafos after her friend came to believe the two were having an affair and confronted Deonna. R. 278, l. 8 - 34, l. 24. Appellant left the Wilmington facility on June 23, 2014. R. 499, l. 3- 502, l. 13. At the end of his treatment, he was administered a Vivitrol shot, designed to lessen the euphoric sensation associated with drinking.

Between June 23, 2014 and August 5, 2014, Appellant's whereabouts and activities are uncertain. At trial, Appellant testified that he experienced significant health problems after receiving the Vivitrol shot. His memory became "foggy" and he could not remember large segments of time. R. 574, l. 19 - 581, l. 25. Appellant vaguely recalled that he visited his mother in southeastern Pennsylvania and that he went to emergency rooms on two different occasions because of intestinal pains and memory problems. R. 583, l. 3 - 586, l. 7.

Appellant had no clear recollection of his return to Charleston and could not explain how he came to stay the Econolodge. R. 598, ll. 2-13. At trial, Appellant bizarrely alleged that his clearest memory of the Econolodge was an occasion when he believed his wife and Tsafos had spent the night there together after working an event at the bowling alley. R. 538, l. 7 - 540, l. 20.

Appellant further claimed that a senior North Charleston police officer had facilitated their rendezvous by driving Deonna to the hotel. *Id.* Illogically, he stated that he discovered their liaison

when he went to the hotel to retrieve Deonna's car, supposedly at her request, while she and Tsafos were still there. *Id.* On August 1, 2014, Appellant posted a menacing, but incoherent Facebook status:

> If my wife, a hole to go, or Kevin tells me they have a gun at the bowling alley at 3:00 a.m. in the morning I am going to use my fucking Leatherman to where I am going to be in the news again. Shut up. I can kick your ass with my toenail. Can't wait to prove that. Phone off. Notes guys. Third time in a least eight months, folks. I don't know who Steve is. Once my wife Deonna when she started to amp up her game.

R. 594, l. 20 - 595, l. 3 [*verbatim*].

In the time between August 5, 2014 and Appellant's departure from Wilmington, Deonna had been tracking Appellant's spending and was particularly worried that he had purchased an unknown item from a gun shop. R. 248, l. 4 - 249, l. 25. She alerted North Charleston police, but they were unable to locate Appellant before receiving calls about the incident at Royal Lanes.

Trial

Appellant proceeded to trial on August 13 - 17, 2015. The primary issue at trial was whether or not Appellant was legally insane on August 5, 2014.

Testimony of Dr. Anna Gomez

Dr. Anna Gomez, a forensic psychiatrist, testified for the State that she believed Appellant was sane when the crimes were committed. "My opinion is that Mr. Fraley did not have a mental illness that would have impaired his ability to conform his behavior to the requirements of the law." R. 140, ll. 9-14.

Moreover, she was unaware of any reported cases where Vivitrol had cause psychiatric side-effects. Dr. Gomez stressed that when evaluating whether an individual has lost touch with reality, corroboration by others that the person was acting strangely is important. R. 171, l. 5-24. She

noted the lack of corroboration by highlighting that the police reports she reviewed indicated that others believed Appellant was normally prior to the incidents. *Id.* However, this claim contradicted the later trial testimony of many of the State's witnesses, including some who statements to police she claimed to review.

Testimony of Deonna Fraley

Deonna denied having an affair with Tsafos. R. 237, l. 9 - 244, l. 13. Deonna testified about the marital difficulties that she and Appellant were having. Appellant regularly appeared at Royal Lanes and accused her of having affairs with numerous people, including Tsafos, other employees and some bowling alley regulars. *Id.*

Deonna also testified about Appellant's deteriorating health. R. 245, l. 3 - 247, l. 10. In the year leading up to August 5, 2014, Appellant had mentally and physically declined to the point where he could no longer accurately recount to her the medical advice he received from his doctors. *Id.*

Deonna recalled at trial, "[i]t was probably towards the end of the last year. Because things didn't make sense so I started going to doctor's appointments. . . I learned that his illnesses were related to his drinking. Every single doctor kept saying you need to stop drinking." R. 247, ll. 19-25. When asked by the solicitor, Deonna recollected that, right before she moved out in June, 2014, she believed Appellant exhibited "evidence of brain damage, psychosis, not knowing where he was, not knowing who he was. . ." R. 247, ll. 5-10.

Testimony of Victoria Booth

Victoria Booth was working at the front desk of the Royal Lanes on August 5, 2014. Booth testified that when Appellant first approached the entrance, she did not recognize him because he was so disheveled and unkempt. R. 268, ll. 17-25. Appellant "seemed like he wasn't fully there

and he wasn't thinking clearly." R. 273, l. 22 - 274, l. 3. She recalled that he looked confused as he walked back and forth between the alley's pro-shop, the bathrooms, the lockers, and the adjoining offices. *Id.*

Testimony of Steven Tsafos

Tsafos initially testified that Appellant barged into his office and immediately said "you are a dead man." R. 281, ll. 14-15. He later contradicted himself and claimed that Appellant barged into his office by telling him that "I need your help or something" and then sat down. R. 287, ll. 17-21.

At trial, the sequence of the conversation between Appellant and Tsafos was unclear. However, Tsafos was adamant that Appellant asked him for money so that he could pay outstanding bills. R. 285, ll. 18-23; R. 292, ll. 2-18. Tsafos was also adamant that Appellant accused him of having a year and half-long affair Deonna, despite Deonna having only worked at the bowling alley for approximately one year. R. 302, ll. 5-22.

On cross-examination Tsafso reluctantly admitted that he harangued Appellant, who was pointing a gun at him, for his slovenly appearance. R. 303, l. 3 - 304, l. 2. During his testimony, Tsafos alternated between claiming that Appellant intended to kill him and describing the gun as having simply "went off" and fired into the floor. R. 286, ll. 2-23. Tsafos' testimony also vacillated between claims that he was terrified of Appellant and boasts of how he insulted and mocked Appellant. R. 284, l. 3-24.

Testimony of Appellant

Appellant testified that he was medically discharged from the army due to mental health problems, particularly depression. Appellant received VA disability payments and admitted to being an alcoholic. R. 491, ll. 11-20. Appellant further stated that he had pre-cancerous Barrett's

esophagus and had suffered from severe, painful gastrointestinal problems most of his life. R. 493, l. 2 - 494, l. 21.

Appellant recalled that in the months leading up to the incident, he had been undergoing treatment at MUSC and that he was beginning to experience adverse effects from the myriad of drugs he was prescribed. R. 497, l. 1 - 498, l. 16. Appellant's primary care manager recommended that he enroll in an in-patient substance abuse program. *Id.*

Appellant enrolled at the Wilmington, North Carolina Treatment Center May 29, 2014 and left on June 23, 2014. Prior to leaving, Appellant received a Vivitrol injection. R. 499, ll. 10-20. Appellant was then driven back to Charleston by an unknown person. Appellant stated that he began to experience memory loss once he returned to Charleston. R. 504, l. 13-15.

He vaguely recalled celebrating a belated Father's day with his daughter and Deonna. He also seemed to remember confronting Deonna about her suspected drug use and a trip to a bowling industry conference in Orlando that she took with Tsafos and others, including Appellant's daughter. R. 503, l. 11 - 504, l. 24. Appellant could not recall how he came to be in a New Hanover, North Carolina emergency room. *Id.*

Appellant attempted to summarize what he was experiencing after receiving the Vivitrol shot: "there was so much -- there was so much going on with my -- I didn't understand. I was sick. My stomach was hurting. I didn't know if I was depressed. I wasn't drinking. So but, I didn't understand what happening." R. 505, ll. 9-18 (verbatim).

Appellant had no memory of driving to his mother's house in Pennsylvania. R. 515, l. 5 - 516, l. 25. Appellant stated that he was not eating during this time and was throwing up blood. His mental and physical deterioration continued at his mother's house where he continued throwing up

blood and was eventually taken to a local emergency room. R. 519, l. 2 - 523, l. 17. Appellant could not remember how long he stayed at the hospital.

He testified that his mother had told him that the doctors were "cauterizing all the wounds in my stomach and cleaning out my system" during his visit. *Id.* Appellant recollected that he left the hospital after he began to feel better. He also remembered that the hospital staff had asked to him stay in the psychiatric ward for longer observation. R. 525, l. 1-19.

Appellant struggled to explain why he felt compelled to leave the hospital as quickly as possible. He testified that, at the time, he believed that his daughter had a birthday coming up soon and that he wanted to take her away from Deonna because he believed she was having an affair with Tsafos. R. 530, ll. 2-25. Appellant said that he was unaware that his mother had packed a revolver in his bags when he left her house. R. 532, l. 1 - 535, l. 14.

Appellant had very little memory of the three days that he spent at the Econolodge in North Charleston. R. 541, l. 8 - 543, l. 10. When asked about Minor 1's testimony earlier in the trial, Appellant responded, "I was what y'all saw. And it was all -- this was all brand new to me. Everything was new. I was in awe. I had no clue that any of this was like this." R. 543, ll. 2-10.

He did not recall telling the Vick family that he was having a fossil themed birthday party for his daughter. R. 544, l. 13 - 545, l. 22. He had no memory of raping Minor 1. R. 552, l. 9 - 553, l. 25. In contrast to Tsafos' testimony, Appellant stated that "the only thing I remember about that day is when I told Steve that I was trying to kill myself, I was trying to hurt myself and not him." R. 546, ll. 5-9.

Appellant clarified that his first memory from August 5, 2014, was sitting in Tsafos' office. Appellant remembered coming out of a "fog" when the gun went off and shot into the ground. R. 547, l. 1 - 548, l. 24. When asked if he intended to kill Tsafos, Appellant reflected, "I don't think

so. . . I know I was there to kill myself. . . . I just wanted to lay down and [have Tsafos and Deonna] come to work every day knowing I killed myself right there." R. 550, ll. 14-23.

Testimony of Dr. Robert Bennett

Dr. Robert Bennett testified as an expert in the fields of pharmacology and toxicology. R. 642, ll. 19-24. Dr. Bennett explained that a large portion of his practice is devoted to forensic toxicology, "my job is to determine if the person that I'm involved with is experiencing a toxic effect," as a result of medication they are ingesting. R. 643, .l. 4 - 21.

Dr. Bennett then explained the "gut-brain connection" whereby problems in the gastrointestinal system - related either to diseases, malnutrition, or both - can directly impact a person's mental functions. R. 645, l. 1 - 652, l. 18. He emphasized that malnutrition and major gastrointestinal problems, such as ulcers and Barrett's Esophagus, will have a deleterious effect on a person's frontal lobe. R. 653, l. 2 - 654, l. 23.

Under these circumstances, Dr. Bennnett stated that, an individual's "rational thinking, impulse control, ability to function in a complex society" would all be negatively impacted. *Id.* Dr. Bennett also opined that a severe vitamin B-12 deficiency may cause psychosis. R. 651, ll. 4-12.

On cross-examination, Dr. Bennett conceded that Appellant was not currently psychotic. R. 660, ll. 10-11. When pressed further, Dr. Bennett reiterated that the "gut-brain connection" is well established and widely accepted in the medical community. R. 661, l. 6 - 662, l. 21. In response to the State's questioning, Dr. Bennett testified on re-direct examination that Appellant's failure to eat for several days could, given his intestinal problems, have made him psychotic. R. 679, ll. 8-24.

The State then called Dr. Todd Magro as a rebuttal witness. R. 685, l. 2 - 686, l. 20. Dr. Magro testified that he regularly prescribed Vivitrol to patients dealing with substance abuse problems and that his patients have never reported having a reaction similar to Appellant. R. 692, ll.

7-10. Dr. Magro also examined Appellant's medical records and concluded that, while Appellant was malnourished, there was no evidence that Appellant was psychotic. R. 689, l. 13 - 690, l. 24.

Conference on Jury Charges

Appellant requested jury instructions on the law of not guilty by reason of insanity and guilty but mentally ill. R. 701, l. 3 - 713, l. 19. The trial court refused to charge the jury on the law of not guilty by reason of insanity (NGRI). The court denied the requested instruction because the court believed, "[i]t is not existence or nonexistence. ***It is a threshold. It is a preponderance of the evidence***. And so that is not where we are at this stage; him saying two different things does not meet your burden." R. 707, ll. 13-16 (*emphasis added*).

In response, defense counsel reiterated that Dr. Bennett had testified that malnutrition coupled with intestinal problems could have rendered Appellant psychotic. *Id.* at ll. 17-25. Defense counsel also stressed that Appellant testified that he did not recall his actions on the day of the incident and that he did not understand what he was doing. R. 705, l. 20 - 707, l. 25. Counsel believed that this evidence was sufficient to support a charge on not guilty by reason of insanity. *Id.*

The court still refused to give the requested charge, reiterating - incorrectly - that a defendant must prove insanity to the judge by a preponderance of the evidence before the judge should submit the charge to the jury:

> "You are at ***a preponderance of the evidence burden*** . . . . which means greater weight. It doesn't mean that it has just been said, that it was in the record. And he -- I don't know that your expert linked up to your client. . . . ***You are piecing it together which would maybe be an existence or nonexistence.***"

R. 708, ll. 16- 23 *(emphasis added)*. The State, while agreeing with the court, posited - with perhaps an eye towards the correct any evidence standard - that there had been no evidence presented that

Appellant was unable to determine legal or moral wrong from right on August 5, 2014. R. 708, l. 25 - 710, l. 12.

Ignoring the State's hint, the Court repeated its ruling, "I do not find that you have met your burden of establishing insanity by a preponderance of the evidence." R. 711, ll. 3-12. After denying a charge on not guilty by reason of insanity, the Court - with the concurrence of the State - reluctantly agreed to charge the jury on the law of guilty but mentally ill. R. 711, l. 22 - 712, l. 19.

Appellant then requested jury instructions on the lesser included offenses of attempted murder, noting that there was evidence that Appellant did not have the specific intent to kill Tsafos. [1] R. 713, l. 20 - 714, l. 21. The State countered that "I don't think there is any evidence in the record that shows an assault and battery occurred or any of the lesser included." *Id.*

Before ruling, the court asked the defense attorney, "[s]o you are requesting lesser included of attempted murder; is that what you are telling me?" Counsel responded that affirmatively and reiterated that there was evidence Appellant lacked the specific intent to kill. *Id.*

The court agreed with the State and refused to charge the lesser included offenses. R. 715, ll. 1-10. The court summarily ruled that, because Appellant had a gun when he confronted Tsafos, there was no evidence from which the jury could conclude Appellant had intended to do anything other than kill Tsafos. *Id.*

Immediately prior to closing arguments, defense counsel again argued for an instruction on NGRI, citing to the Model Penal Code's definition of "pathological intoxication" as a kind of

[1] While not objected to at trial, the Court incorrectly instructed jurors that, "a specific intent to kill is not an element of attempted murder but there must be a general intent to commit serious bodily injury." R. 776, l. 25 - 777, l. 2; *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015). In addition, despite evidence of mental illness mitigating Appellant's culpability and an instruction on guilty but mentally ill, the court also instructed jurors that "inferred malice may also arise when the deed is done with a deadly weapon." R. 776, ll. 17-19. Regrettably, this improper instruction also passed without objection.

involuntary intoxication arising out of an unanticipated reaction to a voluntarily ingested substance. R. 716, ll. 13-25. The court remained unmoved. *Id.*

ARGUMENT

I. The trial court reversibly erred by refusing to instruct the jury on the verdict form of not guilty by reason of insanity (NGRI) where the court erroneously believed that the defense must prove to the court by a preponderance of the evidence that Appellant was legally insane before the defense was entitled to a jury instruction on the affirmative defense and where there was evidence that Appellant was legally insane at the time of the offenses were committed, entitling him to the not guilty by reason of insanity verdict form.

The trial court refused to charge the jury as to the potential verdict of not guilty by reason of insanity ("NGRI"). R. 711, l. 25 - 712, l. 12. The court repeatedly stated that Appellant had failed to prove insanity by a preponderance of the evidence, so the court would not charge the jury as to NGRI. *Id.*; R. 704, ll. 9-19; R. 707, ll. 13-16; R. 708, ll. 13-23. Nonetheless, the court did agree, in concurrence with the State, to charge the jury on the law of guilty but mentally ill ("GBMI"). R. 713, ll. 4-12.

Discussion

A criminal defendant is presumed to be sane. *State v. Smith*, 298 S.C. 205, 208, 379 S.E.2d 287, 288 (1989); *State v. Poindexter*, 314 S.C. 490, 431 S.E.2d 254 (1993). A defendant is insane if, "at the time of the commission of the act constituting the offense, [he], 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." S.C. Code Ann. § 17-24-10(A).

"[T]he 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.'" *Lewis*, 328 S.C. at 278, 494 S.E.2d at 117 (1997)(quoting *State v. Wilson,* 306 S.C. 498, 506, 413 S.E.2d 19, 23 (1992)). The burden is on the defendant to prove the defense of insanity by a preponderance of the evidence. S.C. Code Ann. § 17-24-10(B). However, "***when a defendant offers evidence of***

insanity, the state no longer enjoys the presumption, but must present evidence to the jury from which the jury could find the defendant sane." *Smith*, 298 S.C. at 208, 379 S.E.2d at 288.

In addition to NGRI, South Carolina law also provides for the verdict of guilty but mentally ill (GBMI). S.C. Code Ann. § 17-24-30. A defendant is GBMI if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong, but because of mental disease or defect, he lacked sufficient capacity to conform is conduct to the requirement of the law. S.C. Code Ann. § 17-24-20(A); *Poindexter*, 314 S.C. at 493, 431 S.E.2d at 255. The GBMI statute provides a guide for a jury when considering whether a defendant is not guilty, NGRI, GBMI, or guilty. *State v. Hornsby*, 326 S.C. 121, 127, 484 S.E.2d 869, 872 (1997).

Expert testimony is not necessary to prove insanity or sanity; lay testimony may be sufficient. *Id.*; *State v. Lewis*, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997). In fact, a jury may disregard expert testimony on the issue of a defendant's sanity. *Hornsby*, 326 S.C. at 127, 484 S.E.2d at 872. As with all jury instructions, whether a charge on NGRI or GBMI is warranted is to be "determined from the facts presented at trial." *Lewis*, 328 S.C. at 278, 494 S.E.2d at 117 (citing *State v. Todd*, 290 S.C. 212, 349 S.E.2d 339 (1986)).

(A) The trial court erred in ruling that Appellant had to establish proof of insanity by a preponderance of the evidence before the court could charge the jury on NGRI.

The trial court denied Appellant's request for a jury instruction as to NGRI. The court repeatedly stressed that the defense had, in her estimation, failed to prove by a preponderance of the evidence that he was legally insane on August 5, 2014. R. 704, ll. 9-19; R. 707, ll. 13-16; R. 709, ll. 13-23; R. 711, l. 25 - 712, l. 12.

The trial court appeared to believe that any affirmative defense must be proven by a preponderance of the evidence to satisfaction of the court before a jury instruction is warranted. *Id.* This is incorrect and Appellant is entitled to a new trial.

A defendant is entitled to a jury instruction if, when viewing the evidence in a light most favorable to the defendant, there is any evidence to support the charge. *State v. Geiger*, 370 S.C. 600, 635 S.E.2d 669 (Ct. App. 2006) (*emphasis added*) (lesser included offenses). This applies with equal force to the affirmative defenses, such as insanity. *State v. Curry*, 410 S.C. 46, 762 S.E.2d 721 (Ct. App. 2014) (reversing defendant's conviction due to trial court's failure to instruct on GBMI); *State v. McCaskill*, 300 S.C. 256, 387 S.E.2d 268 (1990) (self-defense and accident); *see also State v. Light*, 378 S.C. 641, 664 S.E.2d 465 (2008) (self-defense).

A preponderance of the evidence is not the burden of proof necessary for submitting the charge of NGRI to the jury. Rather, it is the burden of proof the defendant must meet to the satisfaction of the jury in order to prevail on an affirmative defense. S.C. Code Ann. § 17-24-10(B). Whether Appellant was entitled to the jury instruction should have been determined based on an any evidence standard.

Therefore, the trial court wrongly denied the requested jury instruction where, as detailed below, Appellant had submitted evidence rebutting the presumption of sanity and was, thus, entitled to a jury instruction on NGRI.

(B) Appellant was entitled to a jury charge on the verdict form of NGRI.

Appellant presented lay testimony that he exhibited bizarre behavior during both the weeks leading up to the incident and on the day of the incident. The majority of the witnesses who provided corroborating evidence of Appellant's legal insanity were called during the State's case-in-chief. For instance, Deonna Fraley testified that she observed evidence of brain damage, psychosis,

disorientation, and memory loss in Appellant in the months leading up to August 5, 2014. R. 247, ll.5-10.

Bowling alley employee Victoria Booth, stated that Appellant seemed "like he wasn't fully there and wasn't thinking clearly" when he arrived at Royal Lanes. R. 273, l. 22 - 275, l. 3. Tsafos testified that Appellant appeared disheveled, as if he was unable to take care of himself. R. 303, ll. 3-25. At trial, Tsafos reluctantly admitted that he had characterized Appellant are "not even rational" during the incident in a statement to police. *Id.*

Tsafos also testified that Appellant - in the midst of holding him at gun point - meekly asked him for money so that he could pay his bills. R. 286, l. 18-23. Tsafos further recalled that Appellant accused him of having a year and a half long affair with Deonna, despite Deonna having only known Tsafos for approximately a year. R. 302, l. 8-20. Additionally, Appellant had drafted on incoherent, angry Facebook post regarding his wife's imagined affair just days before the incident. R. 594, l. 20 - 595, l. 3.

Appellant's own testimony reinforced the testimony of the other witnesses that he was exhibiting signs of insanity or of being mentally ill. R. 612, l. 1 - 616, l. 9. Appellant claimed that he did not remember large periods of time after leaving the alcohol treatment center. *Id.*

When he did remember certain events, the recollections were, at times, nonsensical. Appellant alleged conspiratorially that senior members of the North Charleston police department had facilitated his wife's affair by drivingher to meet Tsafos at the EconoLodge. R. 537, l. 1 - 540, l. 23. Even more weirdly, Appellant claimed that he had discovered their rendezvous when Deonna called him to retrieve her car from the hotel where she and Tsafos were spending the night. *Id.* Under oath, Tsafos and Deonna denied having an affair. It seems impossible to believe, if Deonna

was having an affair, that she would ask her paranoid husband to pick-up her car from the hotel where she is committing adultery.

Appellant's hit and run accident while leaving the EconoLodge also suggests an unsound mind. R. 349, l. 16 - 351, l. 17. After being tasered and arrested Appellant was described as "kind of playful, jovial." R. 352, ll. 10-21.

Moreover, Appellant presented expert testimony that malnutrition coupled with severe gastrointestinal ailments, such as Barrett's Esophagus, can cause psychosis. Dr. Bennett, who was qualified by the trial court as an expert in pharmacology and toxicology, explained that a vitamin B-12 deficiency may likewise cause psychosis. R. 650, l. 2 - 651, l. 19.

Based on his review of Appellant's medical records Dr. Bennett determined that Appellant was malnourished. R. 665, l. 8-24. Furthermore, in response to a line of questioning pursued by the State, Dr. Bennett opined that Appellant's failure to eat for several days, in conjunction with his documented stomach ailments, could have made him psychotic. R. 679, ll. 3-24.

There was evidence to support Appellant's contention that he was NGRI. Based on this same evidence, the trial court charged the jury on the law of GBMI. The difference between these two verdicts is only one of degree, it was illogical and wrong for the court to charge only one of them. *See Hornsby*, 326 S.C. at 126, 484 S.E.2d at 872 (*citing State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992)) (the purpose of GBMI is (1) to reduce the number of defendants being completely relieved of criminal responsibility and (2) to insure mentally ill inmates receive treatment for their benefit as well as society's while incarcerated.).

Once Appellant presented evidence that he was suffering from a mental illness at the time of the incident and that he may have been legally insane, he was entitled to a jury instruction on

NGRI. Whether Appellant was legally insane or was mentally ill, but not legally insane, was a factual determination for the jury to make, not the judge. *Curry*, 410 S.C. at 53, 762 S.E.2d at 725.

In denying charges on the lesser-included offenses, the trial court not only impermissibly weighed the evidence, instead of assessing whether any evidence supported a charge on NGRI, but, also applied the wrong burden of proof. S.C. Code Ann. § 16-3-600(A)(2). Accordingly, the trial court erred and Appellant is entitled to a new trial.

II. The trial court reversibly erred by refusing to instruct the jury on the lesser-included offenses of attempted murder, where the court wrongly concluded that there was no evidence that Appellant had committed only the lesser included offenses when Appellant had testified that he had intended to commit suicide and when Tsafos had testified that the gun appeared to have simply "went off" while Appellant was pointing it at the floor

Appellant requested that jurors be charged on the lesser-included offenses of attempted murder. R. 713, l. 23 - 714, l. 20. Defense counsel argued that evidence had been presented at trial that Appellant lacked the specific intent to kill required for attempted murder. *Id.* The trial denied Appellant's request, stating only that Appellant "had the gun in his hand" when he confronted Tsafos. R. 714, l. 22 - 715, l. 10.

Discussion

The purpose of jury instructions is to enlighten the jury as to applicable law so that a just, fair, and proper verdict can be reached. *See State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987); *see also State v. Blurton*, 352 S.C. 203, 207, 573 S.E.2d 802, 804 (2002). The law to be charged must be determined from the evidence presented at trial. *Id.*; *see also State v. Lindler*, 276 S.C. 304, 307, 278 S.E.2d 335, 337 (1981).

In a criminal case, the judge must charge on all material issues raised by the evidence. *See State v. Fair*, 209 S.C. 439, 445, 40 S.E.2d 634, 637 (1946). A jury instruction on a lesser-included offense when there is ***any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed***. *State v. Watson*, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); *State v. Crosby*, 355 S.C. 47, 584 S.E.2d 110 (2003) (requested charge must be given if there is any evidence to support it; trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence); *see also Light*, 378 S.C. 641, 664 S.E.2d 465 (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).

(A) Appellant was entitled to jury instructions on the lesser-included offenses of attempted murder.

The trial court's refusal to charge the jury on any of attempted murder's lesser included offenses constituted reversible error. Contrary to the trial court's jury charge, attempted murder requires the specific intent to kill. S.C. Code Ann. R. 776, l. 25 - 777, l. 2; § 16-3-29; *King*, 412 S.C. at 411, 772 S.E.2d at 193.

There was evidence presented at trial from which a juror could conclude Appellant lacked the specific intent to kill Tsafos. It is undisputed that the gun fired into the floor. R. 286, ll. 2-18. This was corroborated by Tsafos' recollection that the gun simply "went off" without warning. *Id.* Appellant testified at trial that - to the best of his memory - he had intended to commit suicide in front of Tsafos, not to kill him. R. 550, ll. 14-23; *State v. Williams*, 400 S.C. 308, 316, 733 S.E.2d 605, 610 (Ct. App. 2012) (defendant's testimony was sufficient to present a question for the jury).

Given this evidence, Appellant was, at a minimum, entitled to instructions on (1) assault and battery of a high and aggravated nature, (2) assault and battery in the first degree, and (3) assault and battery in the third degree. S.C. Code Ann. § 16-3-600(B)(3), (C)(3), (E)(3).

All of the elements of these crimes were present in Appellant's case. Whether Appellant had the specific intent to kill Tsafos when he entered the bowling alley was a factual question for the jury. *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007) (refusal to charge lesser-included offense supported by any evidence was an error). Appellant's testimony coupled with Tsafos' corroborating recollection and the fact that the gun was fired into the floor, could have supported a finding that Appellant lacked the specific intent to kill Tsafos. *Watson,* 349 S.C. at 375, 563 S.E.2d at 337.

(B) Appellant was entitled to a jury instruction on the lesser included offense of assault and battery of a high and aggravated nature.

South Carolina defines assault and battery of a high and aggravated nature (ABHN) as occurring when a defendant "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 is defined as "bodily injury which causes a substantial risk of death or which causes serious, permanent loss or impairment of the function of a bodily member or organ." S.C. Code Ann. § 16-3-600(A)(1).

Appellant was entitled to an instruction on ABHN because there was evidence presented which would have permitted a juror to rationally infer that by confining Tsafos at gun point, Appellant had unlawfully injured him using a means that was likely to produce death or great bodily injury. *Geiger*, 370 S.C. 600, 635 S.E.2d 669 (whether a rational inference exists is determined in the light most favorable to the moving party).

The testimony from Appellant and Tsafos that the pistol likely fired into the floor accidently, provided evidence - particularly when coupled with Appellant's testimony about intending to commit suicide - from which a juror could conclude that Appellant never had the specific intent to kill Tsafos. Thus, there was evidence that Appellant had only committed the lesser-included offense of ABHN.

(C) Appellant was entitled to a jury instruction on the lesser included offense of assault and battery in the first degree.

Assault and battery in the first degree occurs when a defendant:

> [U]nlawfully: (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.

S.C. Code Ann. § 16-3-600(C)(1). Appellant was accused of having kidnapped both Tsafos and Minor 1. During his kidnapping of Minor 1, Appellant was also accused of sexually assaulting her.

Similarly, Appellant confined Tsafos at gun point and repeatedly threatened to shoot Tsafos if he attempted to flee. From the circumstances and testimony presented at trial, a jury could have concluded that Appellant had committed assault and battery in the first degree based on Appellant having injured both Tsafos and Minor 1 while kidnapping them. S.C. Code Ann. 16-3-600(C)(1).

(D) Appellant was entitled to a jury instruction on the lesser included offense of assault and battery in the third degree.

"A person commits the offense of assault and battery in the third degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so." S.C. Code Ann. § 16-3-600(E)(1). Assault and battery in the third degree is a lesser-included offense of every preceding assault and battery offense, including attempted murder. § 16-3-600(E)(3); *see also State v. Middleton*, 407 S.C. 312, 315-316, 755 S.E.2d 432, 434 (2014).

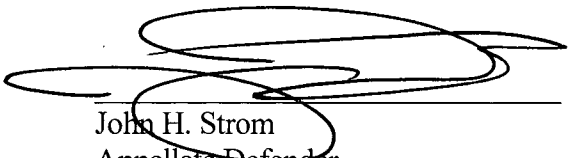
Tsafos' had no actual injuries as Appellant's pistol was fired into the floor. Assault and battery in the third degree is a sort of catch-all lesser included offense and contains no specific limitation on the victim's injuries. Thus, evidence at trial could have supported a finding that Appellant merely intended to unlawfully injure Tsafos and lacked the specific intent necessary for attempted murder.

In denying charges on the lesser-included offenses, the trial court impermissibly weighed the evidence, instead of assessing whether any evidence supported the lesser-included offenses, *Crosby*, 355 S.C. 47, 584 S.E.2d 110. Accordingly, the trial court erred and Appellant is entitled to a new trial.

CONCLUSION

By reason of the foregoing arguments, Appellant Gary Fraley's convictions should be reversed and his case remanded to the Berkeley County Court of General Sessions for a new trial.

Respectfully submitted,



John H. Strom
Appellate ~~Defender~~

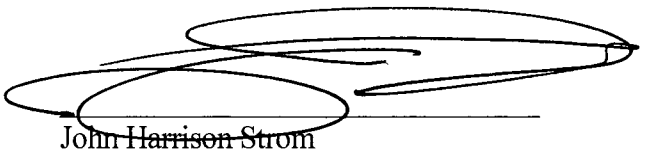
ATTORNEY FOR APPELLANT

This 15th day of September, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

September 15th, 2016



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Kristi Lea Harrington, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

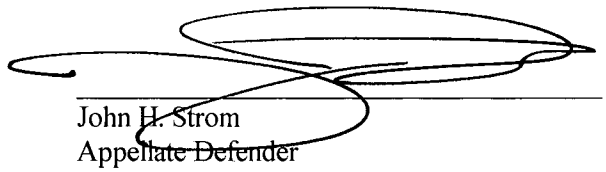
GARY CURTIS FRALEY,

APPELLANT

APPELLATE CASE NO. 2015-0017137

CERTIFICATE OF SERVICE

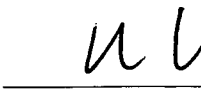
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 15th day of September, 2016.



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of September, 2016.


(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.