STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2016-000801

THE STATE, ...RESPONDENT,

v.

DALTON ELLIS CLARKE, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Appellant was indicted at the July 2015 term of the Grand Jury for Charleston County for assault and battery of a high and aggravated nature (ABHAN). After a jury trial, Appellant was ultimately convicted as charged. The Honorable Benjamin H. Culbertson sentenced him to fifteen years' imprisonment. Appellant timely filed a notice of appeal of his conviction and sentence and subsequently submitted a brief. Respondent's brief follows.

STATEMENT OF FACTS

In the early morning hours of April 26, 2014, two separate groups of revelers engaged in a brief altercation that left Clint Seymour, the victim in this case, in a coma, only to pass away days later. Appellant was ultimately arrested and charged with ABHAN. His case proceeded to a jury trial.

Bradley Baker testified he, Daniel Hennessey, and Clint went out to enjoy the Charleston nightlife that evening. (Tr.92.) He stated as they were passing another group of partygoers leaving the bar, a young, intoxicated girl stumbled into him and he caught her. (Tr.96.) The man with her, Binh Ton, told Bradley he "couldn't have her in [his] dreams," to which Bradley replied, "I had your mom last night." (Tr.96,98.) Binh then yelled for his friends—Peter Dudinyak, Andrew O'Hearn and Appellant—who were across the street, and they came over immediately and began fighting. (Tr.100.) Bradley explained a taller man hit him, Daniel tussled with Binh, and at some point Clint fell lifelessly to the ground. (Tr.100,105.) Bradley did not see who struck Clint.

Binh provided a slightly different version of the events, stating that when his girlfriend fell, Bradley held on to her tightly and would not let go. (Tr. 176.) He further claimed that when he told Bradley to let her go, Bradley threatened to "fuck [his girlfriend] and rape [his] mom." (Tr.177.) Binh noted that although he felt threatened, he did not believe the men were being aggressive with him. (Tr.192.) Binh then testified he yelled for Peter, Andrew, and Appellant, who were across the street, and they came over. (Tr.178.) Binh stated he saw Appellant punch one of Bradley's companions, who immediately fell to the ground. (Tr.179.) Binh further testified that the day after the altercation Appellant invited Binh over and asked if he could punch Binh in the face "[s]o it looked like self-defense." (Tr.186.)

Binh's friend Peter also testified that he was with his brother Jake, Jake's girlfriend Sarah White, Binh, Binh's girlfriend, Andrew, and Appellant on the evening of the incident. (Tr.213.) Jake and Sarah were ahead of the rest of the group, and Binh and his girlfriend were lagging behind as they turned from King Street onto Morris Street. (Tr.215.) Peter explained he then heard Binh yell for help and saw two men engaged in a verbal argument with his friend. (Tr.215.) He and Andrew went to assess the situation, but Appellant ran past them and delivered a running punch on another man standing there, who was not involved in the argument. (Tr. 217.) The man he hit fell to the ground immediately. (Tr.219.) Peter and Appellant then began to flee. (Tr.223.) However, as they were turning the corner heading towards the car, Peter heard the police yell "stop" and he immediately obeyed; he was then handcuffed and taken into police custody. (Tr.224.) Appellant, however, continued walking to his car. (Tr.224.)

Sarah testified that she and Jake were ahead of the group as they all walked back to the car. (Tr.273.) While waiting for everyone to catch up, Appellant ran up to them and said he had just knocked out someone.[1] (Tr.275.) Jake's testimony mirrored Sarah's. He also explained he and Sarah were waiting for the rest of their friends to catch up when Appellant ran up in a rush and told them he "punched someone in the face." (Tr.291.)

Dr. Marie Tormos, the forensic pathologist who performed the autopsy on Clint, testified at trial as well. She was qualified, without objection, as an expert in forensic pathology. (Tr.446.) Dr. Tormos explained Clint sustained an injury in the early morning of April 26, 2014, and was pronounced brain dead two days later. (Tr.450.) In the course of the autopsy, Dr. Tormos discovered three contusions to the back of the head—two bruises high on the skull and one along the upper neck. (Tr.451.) Examination of the skull revealed a fracture extending to

[1] Sarah was unclear as to whether he said he "knocked two dudes out" or just "knocked a guy out." (Tr.280.)

the right ear, across to the left side of the skull, and towards the front of the skull. (Tr.459.) During the autopsy, Dr. Tormos also found Clint's vertebral artery had ruptured, which led to a traumatic subarachnoid hemorrhage causing him to bleed into his neck and the base of his brain. (Tr.464, 468.) Dr. Tormos concluded the cause of death was blunt force trauma to the head and neck. (Tr.470.) She further characterized the amount of force as that typically seen with a bat or bottle. (Tr.452.)

At the close of the State's evidence, Appellant moved for a directed verdict on the grounds that he could not be prosecuted for ABHAN because Clint had ultimately died. (Tr.478.) Specifically, he stated "the State can't prove great bodily injury because the person is deceased." (Tr.478.) The trial court denied the motion.

Appellant declined to testify, but presented eyewitness testimony in his defense. Jaqueline Gladden stated she was walking home from the club when she "saw Mr. Peter attack Mr. Clinton[2] out of nowhere." (Tr.488.) She noted he "sucker punched him real hard [and Clint's] head hit the pavement and you could just hear his skull crack." (Tr.488.) Gabrielle Lemieux testified she was walking from Midtown with Jacqueline when she saw "a gentleman in a black shirt punch another guy, [Clint]."[3] (Tr.507.) She stated "[Clint] hit the ground[a]nd we all heard it and we ran towards him." (Tr.507.) Gabrielle described the assailant as six feet tall and dark skinned. (Tr.507.) Officer Jeffrey Casey testified he responded to the scene after the altercation and interviewed Gabrielle, Jacqueline, and their friend Rosalie Frederick. (Tr.542.)

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[2] Jacqueline admitted she did not know anyone involved personally, but she knew the names from information she saw "on the TV, on the news and on the Internet, Google." (Tr.488.)

[3] Gabrielle similarly noted she did not know anyone involved, but was told the victim's name. (Tr.510.)

After Peter was apprehended, Officer Casey did a "show-up"[4] identification for Rosalie and Gabrielle; both identified Peter as the party who threw a punch during the fight. (Tr.545.)

At the close of evidence, Appellant requested charges on defense of others and the right to act on appearances. During the discussion, defense counsel confessed he was "going to only argue that it's not him." (Tr.555.) Nevertheless, he argued the evidence adduced supported the self-defense charges as to Binh. (Tr.554.) The solicitor argued he did not think the charges were warranted because there was no evidence to support them; however, he noted he had "seen enough cases get reversed for failure to charge something" and he was comfortable arguing the issue to the jury if the trial court chose to give those charges. (Tr.557.) The trial court ultimately declined to give those charges, noting there was no evidence to support them and further, it was uncertain whether a defendant "is entitled to a charge that says, I didn't do it, but if I did do it, it was in defense of others." (Tr.563.) After closing arguments and jury charges, the jury returned a verdict of guilty as charged for ABHAN. (Tr.633.) The trial court sentenced Appellant to fifteen years' imprisonment. (Tr. 653.)

[4] Officer Casey explained that a show-up is when the police have a witness available and a party who has been detained. The officers "show" the party to the witness to have her identify whether the person in custody was involved in the incident. (Tr.544.)

ARGUMENTS

I.

The trial court did not err in declining to charge the jury on the defense of others and a defendant's right to act on appearances because there was no evidence to support either charge.

Relying on the testimony of Binh, Appellant argues the trial court erred in declining to charge the jury on the defense of others and the right to act on appearances. However, there is no evidence Binh would have been able to assert self-defense if he had struck the fatal blow and therefore Appellant is not entitled to any charge predicated on that theory.

"The law to be charged is determined from the evidence presented at trial." *State v. Long*, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *State v. Commander*, 396 S.C. 254, 270, 721 S.E.2d 413, 422 (2011). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010).

Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense. *Douglas v. State*, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998). A person is justified in using deadly force in self-defense where:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal

> blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Jones, 416 S.C. 283, 301, 786 S.E.2d 132, 142 (2016).

Binh's testimony does not indicate Clint placed him in actual "imminent fear" of death or serious bodily injury. As the trial court noted in declining to give the charge, there was no evidence the assault was in defense of others because "all of the evidence in this case basically states that the victim in this case was standing back behind everyone else and wasn't participating in any way." (Tr.562.) Further, Binh specifically qualified that although he felt "threatened" he did not feel the men were "aggressive." (Tr.192.) Importantly, he never stated he *was* in fear of imminent bodily harm and there is nothing in his testimony giving rise to that inference. Moreover, such fear would not be reasonable under the circumstances. At most, Binh may reasonably have assumed the argument would escalate to fisticuffs, but a fist fight is not, in and of itself, a life or death situation.

However, Appellant argues he should have been able to act on appearances in his defense of others. "A person has the right to act on appearances, even if the person's belief is ultimately mistaken." *State v. Dickey*, 394 S.C. 491, 501, 716 S.E.2d 97, 102 (2011). Yet, no evidence was presented Appellant believed Binh was in imminent fear of bodily harm. None of Binh's other friends testified they were concerned for his life. The only inference that can be drawn is that Appellant had no idea what the argument was about and whether the situation could be diffused. Instead, he ran swinging into a *verbal* altercation. Although words accompanied by hostile acts may, in some instances, give rise to a claim of self-defense, there is no evidence of a hostile act by Clint towards Binh. *See State v. Santiago*, 370 S.C. 153, 160, 634 S.E.2d 23, 27 (Ct. App. 2006) ("While we recognize that, depending on the circumstances, words accompanied by

hostile acts may establish self-defense, there was no evidence of a hostile act by [victim]."). Escalating rough words—which Appellant did not even hear—to physical violence does not allow one to claim self-defense.

Additionally, Binh had other means of avoiding the danger. He did not attempt to diffuse and exit the situation. Instead, he exacerbated a verbal dispute by calling over his intoxicated friends instead of removing himself from the pointless drunken argument. Accordingly, because Binh would not have been able to assert self-defense, Appellant was not entitled to a defense of others charge or a charge on the right to act on appearances.

II.

The trial court did not err in refusing to grant Appellant's motion for directed verdict because evidence was presented from which a reasonable juror could have found him guilty of assault and battery of a high and aggravated nature.

Appellant argues the State failed to present sufficient evidence of "great bodily injury to another person" based on its assertion that the death of the victim precludes a finding of injury. This conclusion is founded on a misunderstanding of prosecutorial discretion and a misapprehension of the statutory language.

"In the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *State v. Needs*, 333 S.C. 134, 145, 508 S.E.2d 857, 862 (1998). Pursuant to the doctrine of the separation of powers, a foundational tenet of our form of government, the power to decide when and how to prosecute a case rests definitively with the Executive Branch. *State v. Thrift*, 312 S.C. 282, 291, 440 S.E.2d 341, 346 (1994). "Both the South Carolina Constitution and South Carolina case law place the unfettered discretion to prosecute solely in the prosecutor's hands." *Id.* at 282, 291–92, 440 S.E.2d at 346. "Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety." *Id.* at 292, 440 S.E.2d at 346–47.

Although Appellant criticizes the discretionary decision made by the State in choosing to proceed on an ABHAN charge, he is not at liberty to choose how he is prosecuted and it is improper for him to suggest the Court can dictate that decision. However dim his view of the solicitor's prosecutorial decision, he directs the Court to no legal authority allowing a *defendant*

to select the crime for which he is indicted.[5] The State could have prosecuted him for murder or any homicide offense; instead, it exercised its unfettered discretion to proceed on ABHAN. Understandably, a charge of involuntary manslaughter appeals to Appellant because of the reduced maximum sentence; however, he seems to believe the fact that Clint died should inure to his benefit. He makes no argument that there is insufficient evidence of ABHAN beyond that extra fact that Clint died. Appellant therefore inferentially acknowledges had his victim endured for a few months longer—through the trial—ABHAN would have been appropriate because Clint sustained a great bodily injury. Instead, because this assault and battery was sufficiently violent to kill him in a matter of days, Appellant believes that crime is negated. As discussed *infra*, this assertion is unsupported by the language of the statute.

"A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and: (a) great bodily injury to another person results; or (b) the act is accomplished by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600(B)(1) (2015). Appellant argues his crime does not meet the elements of ABHAN because he neither acted in a manner "likely to produce death or great bodily injury" nor did he cause "great bodily injury." As to his first contention, he never presented this rationale for why directed verdict should have been granted to the trial court, and the argument is therefore unpreserved. *State v. Tucker*, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (noting a party cannot argue one ground below and then argue another ground on appeal). Moreover, it has no merit. Appellant essentially asserts it is unexpected that a person would die from a single punch. However, he fails to fully appreciate the realities of the "single punch" he inflicted.

[5] Accordingly, this conclusory argument is abandoned and should not be considered on appeal. *State v. Jones*, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011) (noting that "short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review").

Testimony was presented that Appellant was running when he dealt the full force of that blow to the tender place on the back of Clint's head. Dr. Tormos opined that the blow to the back of Clint's head was delivered with a force similar to being hit by a bat or bottle.[6] (Tr.462.) More importantly, the blow in fact caused great bodily injury and a substantial chance of death, substantial enough that Appellant's victim eventually died of that injury. Considering the force and circumstances of his battery upon Clint, it is hard to conceive that Appellant intended to do anything other than knock out his unsuspecting victim. The fact that he was overly successful is hardly a defense or mitigation of his actions.

Turning to his second argument, Appellant contends that "it is clear the legislature did not intend an individual to be prosecuted for ABHAN . . . when the injured party was killed by the assailant's action." However, to the contrary, nothing in the statutory language prevents prosecution of ABHAN in instances where the victim died. The use of the language requiring a "substantial risk of death" or that it must cause "serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ," does not suggest death as a result of this injury precludes prosecution under this statute. A living victim is not one of the elements the State is required to prove. Instead, it must demonstrate great bodily injury caused

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[6] Dr. Tormos stated the nature of the injury was one which would be seen in a sports injury, such as from boxing. (Tr.462.) Notably, this type of punch, often called a rabbit punch, is specifically prohibited in boxing and other sports that involve striking. *See USA Boxing Official Book: Technical Rules* 15, *available at* www.teamusa.org/usa-boxing/rulebook/technical-rules (listing fouls to include "[h]its landing on the back of the opponent, and especially any blow on the back of the neck or head and kidney punch"); *Unified Rules and Other Important Regulations of Mixed Martial Arts* 7, *available at* www.ufc.com/discover/sport/rules-and-regulations (listing fouls to include "[s]triking to the spine or the back of the head"); Boxing Man, *Rabbit Punch in Boxing and MMA: what is it?*, FightSaga (May 13, 2013, 12:00 am), www.fightsaga.com/tidbits/boxing-fouls/item/3044-Rabbit-Punch-in-Boxing-MMA-What-is-Rabbit-Punching ("A 'rabbit punch' is a blow or chop to the back of the opponent's head, the bottom part of the skull or to the back of the neck. Rabbit punches are **illegal** in pro and amateur boxing and in most (if not all) properly-sanctioned mixed martial arts venues.").

by the unlawful injury by another. This remains true whether the victim dies two days later or two months later.[7] Here, the State amply set forth evidence that the victim sustained a great bodily injury which is defined as "bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ." S.C. Code Ann. § 16-3-600(A)(1) (2015). From the blow Appellant administered, Clint suffered contusions to the back of his head, which caused the rupture of his vertebral artery causing a traumatic subarachnoid hemorrhage. (Tr.464.) Clint was pronounced brain dead two days later. (Tr.450–51.) Undoubtedly, the loss of brain function constitutes the loss of a function of an organ as required for an ABHAN conviction. The State is not obligated to bring charges for the most serious crime cognizable under the facts.[8] Accordingly, the trial court did not err in denying Appellant's motion for a directed verdict.

[7] Notably, where the victim of bodily injury dies over three years later, the assailant may not be prosecuted for homicide. S.C. Code Ann. § 16-3-5 (2015) ("A person who causes bodily injury which results in the death of the victim is not criminally responsible for the victim's death and must not be prosecuted for a homicide offense if at least three years intervene between the injury and the death of the victim."). In that circumstance, the State would not be able to charge anything *but* some degree of assault and battery despite the fact that the victim died.

[8] Appellant would argue involuntary manslaughter is *not* a more serious charge than ABHAN based on the sentencing range and therefore his reading is more appropriately construed in favor of a defendant. However, his proposed interpretation of the statute encompasses any homicide offense, including murder.

CONCLUSION

Based on the foregoing, the State respectfully requests that the judgment, conviction, and sentence of the trial court be affirmed.

Respectfully submitted,

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THE STATE, ...RESPONDENT

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PROOF OF SERVICE

I, Angela Bennett, Administrative Coordinator, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter*, both dated December 9, 2016, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Lara M. Caudy, Esquire
South Carolina Commission on Indigent Defense
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I further certified that all parties required by Rule to be served have been served. This 9th day of December, 2016.

Angela Bennett
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ALAN WILSON
ATTORNEY GENERAL

December 9, 2016

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Re: The State v. Dalton E. Clarke
Appellate Case No. 2016-000801

Dear Counsel:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Ranee Saunders
Assistant Attorney General
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RS/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services