ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Aiken County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID GLOVER,

APPELLANT

APPELLATE CASE NO 2015-001144

Opinion No. 2017-UP-025

PETITION FOR REHEARING

On January 11, 2017, this Court affirmed Appellant David Glover's convictions for attempted murder and possession of a firearm during the commission of a violent crime. Glover respectfully petitions this Court for a rehearing of its Opinion No. 2017-UP-025. Pursuant to Rule 221(a), SCACR, Glover avers that the following points were overlooked or misapprehended by the Court:

As this Court will recall, the trial judge denied the defense's request to recharge the jury on self-defense where the jury was charged on both attempted murder and assault and battery of a high

and aggravated nature three times during the course of the trial court's original jury charge and re-charges. It is ordinarily sufficient for a judge to recharge only the law necessary to answer the question of the jury. State v. Anderson, 322 S.C. 89, 94, 470 S.E.2d 103, 106 (1996) ("It is well established in South Carolina that '[w]hen a jury requests an additional charge, it is sufficient for the court to charge only those matters necessary to answer the jury's request.'" (quoting State v. Barksdale, 311 SC 210, 216, 428 S.E.2d 498, 502 (Ct. App. 1993))). However, **the present case involved three recharges – one at the request of the defense due to an error in the judge's original charge and two more in response to jury questions.** R. 327, l. 24 – 330, l. 12 (recharge on attempted murder and specific intent); R. 332, l. 24 – 335, l. 19 (recharge on attempted murder and ABHAN); R. 339, ll. 5-23 (recharge on ABHAN statute). Thus, this is an exceptional case where the repeated recharging of the elements of two of the offenses, without any additional reference to the defense properly raised at trial, resulted in an unbalanced jury charge prejudicial to the defendant. See United States v. Meadows, 598 F.2d 984, 990 (5th Cir. 1979) ("It is well-established that in giving additional instructions to a jury; particularly in response to inquiries from the jury, a court must be especially careful not to give an unbalanced charge.").

Respectfully, this Court's unpublished opinion fails to recognize the due process concern that arises when the repeated recharging of a jury creates an unbalanced charge. "[A] trial court ***generally*** may limit a supplemental charge to the specific instruction requested by the jury." United States v. Ehrlich, 902 F.2d 327, 330 (5th Cir.1990), *cert. denied,* 498 U.S. 1069, 111 S.Ct. 788 (1991) (emphasis added). **"In giving additional instructions to a jury — particularly in response to inquiries from the jury — the court should be especially careful not to give an unbalanced charge."** United States v. Sutherland, 428 F.2d 1152, 1157 (5th Cir. 1970) (emphasis added).

> If the Judge chooses to give any additional charge and elects not to repeat the entire original charge, he should remind the jury of the burden and quantum of proof and presumption of innocence or remind them that all instructions must be considered as a whole or take other appropriate steps to avoid any possibility of prejudice to the defendant.

Id. at 1557-58.

In Ehrlich, the jury was initially charged orally but was later given a partial written recharge in response to a request for a recharge. 902 F.2d at 330. In such a circumstance, the Ehrlich Court found "there is no error unless, under the totality of the circumstances, the court's written response creates an unbalanced charge prejudicial to the defendant." Id. There is a concern that giving supplemental, partial written instructions to the jury "creates a risk that the jury will perceive the writing as embodying the more important instructions, inviting greater attention to the principles that are repeated in writing than those simply recited orally." Rickman v. Georgia, 587 S.E.2d 596, 598 n. 5 (Ga. 2003); see also State v. Wright, 630 A.2d 772 (N.H. 1993) ("recogniz[ing] the potential for prejudice inherent in any charge in which some oral instructions are repeated to the jury in written form, while others are not."). Our Supreme Court has gone further, holding that while it is within the trial judge's discretion to submit its instructions on the law to the jury in writing, "[i]t is **never** appropriate . . . to give only part of the [written] charge to the jury . . . ." State v. Covert, 382 S.C. 205, 210, 675 S.E.2d 740, 743 (2009) (emphasis added); see also State v. Turner, 373 S.C. 121, 129, 644 S.E.2d 693, 697–98 (2007).

Regardless of whether the supplemental instructions are given orally or in writing, the same risk of creating an unbalanced charge is present. In United States v. Meadows, 598 F.2d 984, 990 (5th Cir. 1979), the Court wrote that "the particular significance of a supplemental charge when a jury has been unable to reach a decision on the basis of all it has heard up until

that time demands an exacting sensitivity on the part of the trial court to give an accurate and balanced instruction." In United States v. Carter, the Court wrote:

> When after an hour and 40 minutes of deliberation a jury returns, not with a verdict, but with a request for clarification of a particular point of law, it must be recognized that the jury has been unable to reach a decision on the basis of all it has heard up until that time. Under those circumstances a trial judge must be acutely sensitive to the probability that the jurors will listen to his additional instructions with particular interest and will rely more heavily on such instructions than on any single portion of the original charge. **Thus, the court must exercise special care to see that inaccuracy or imbalance in supplemental instructions do not poison an otherwise healthy trial.**

491 F.2d 625, 633 (5th Cir. 1974) (emphasis added); see also Bollenbach v. United States, 326 U.S. 607, 612, 66 S.Ct. 402 (1946) ("Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.").

In the present case, the jury sent its first question to the Court a little less than one hour after they began deliberations. The jury was still requesting guidance from the court after approximately two and half hours of deliberation, such that there was a heightened potential that the supplemental charge could cause an imbalance in the jury charge. At the conclusion of the first recharge on attempted murder and specific intent, the trial judge said:

> So I've recharged you as to the charge of attempted murder. [E]ncapsulate that, of course, with my previous charge of attempted murder, assault and battery of a high and aggravated nature and assault and battery in the first-degree.
>
> With that being said, again if you would are return to your jury room momentarily. Do not discuss the case until you're instructed to do so.

R. 330, ll. 8-15. These remarks did not constitute a reminder "of the burden and quantum of proof and presumption of innocence" or "that *all* instructions must be considered as a whole." See Sutherland, 428 F.2d at 1157-58 (emphasis added).

In the second recharge, the trial judge mentioned "[a]s far as attempted murder -- and keep in mind my previous charge as to issue of intent" before recharging the jury on the elements of attempted murder and assault and battery of a high and aggravated nature. R. 333, ll. 2-3. It was after the second recharge that defense counsel asked the trial judge to recharge on self-defense. R. 336, ll. 16-17. The judge initially stated that he would bring the jury back out and "tell them the entire charge," which would include the self-defense charge but the state objected. R. 336, ll. 18-25. After reviewing case law, the trial judge said that he "answered the jury's question and rely on State versus Anderson." R. 337, ll. 1-18.

The third recharge of the jury was in response to its request for an example of guilty of assault and battery of a high and aggravated nature. The trial judge responded that he could not provide an example because to do so would be a comment on the facts. However, he told the jury that the ABHAN statute provides: "[O]ne person unlawfully injures another person and either great bodily injury, as defined by the statute, is also present or the act was accomplished by means likely to present death or great bodily injury." R. 388, l. 11 – 339, l. 10. The trial judge concluded by telling the jury:

> You determine the facts as you, the jury, find them to be and you then compare that to the standards of the law, both the offense as listed in the indictments and of course the lesser-included offense or offenses.
>
> If you find that the State has proved those elements or has not proved those elements beyond a reasonable doubt, based on your facts and the law as I told you, you would find the defendant not guilty. If you find the State has met its burden of proof and you compare those facts to the standard of the law and you found the State has proven its case beyond a reasonable doubt as to that charge or whatever charge, you would find the defendant guilty.

R. 339, ll. 11-23. While this was a reminder of the state's burden of proof as to the offenses, it did not include any reference to the presumption of innocence. <u>See</u> <u>Sutherland</u>, 428 F.2d at 1157-58. Further, the judge made no mention of self-defense or the state's responsibility to

disprove the elements of self-defense beyond a reasonable doubt in this final recharge to the jury. See State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) ("[W] hen a defendant claims self-defense, the State is required to disprove the elements of self-defense beyond a reasonable doubt.").

In affirming Glover's conviction, this Court relied upon our Supreme Court's holding that "[i]t is well established in South Carolina that '[w]hen a jury requests an additional charge, it is sufficient for the court to charge only those matters necessary to answer the jury's request.'" State v. Anderson, 322 S.C. 89, 94, 470 S.E.2d 103, 106 (1996) (quoting State v. Barksdale, 311 SC 210, 216, 428 S.E.2d 498, 502 (Ct. App. 1993)). Notably, however, neither Barksdale nor Anderson involved **repeated recharges** on the elements of the offenses.

In Barksdale, after the trial court charged the jury and it began deliberations, the jury requested a recharge on lynching and self-defense. 311 SC at 216, 428 S.E.2d at 502. The court recharged the statutory definition of lynching and asked the jury if it needed to be read the statutory definition of a mob. Id. The jury replied in the negative. Id. The appellants claimed that the failure to recharge the definition of a mob placed emphasis on the act of violence without emphasizing that the act had to be done by an assemblage with the premeditated purpose and premeditated intent of committing the act. Id. The Barksdale Court found no error in the refusal to recharge the definition of "mob," holding "[w]hen a jury requests an additional charge, it is sufficient for the court to charge only those matters necessary to answer the jury's request." Id.

One of Barksdale's co-defendants, McKinney, whose case was consolidated on appeal, argued that the trial judge also erred in its charge on self-defense because it did not instruct the jury "that any reasonable doubt as to whether the defense had been established should be resolved in his favor." 311 SC at 216-17, 428 S.E.2d at 502. The Barksdale Court again found no

error because the court recharged the elements of self-defense when requested by the jury and had already charged the jury on reasonable doubt. Id.

In Anderson, our Supreme Court found no error in the court's refusal to give a second King[1] charge where a King charge was given in the original instructions and the jury only asked to be recharged on the definitions of murder, malice, and involuntary manslaughter. 322 S.C. at 94, 470 S.E2d at 106. The Court ruled that "the recharge was properly limited to answering the jury's question." Id. Our Courts have long recognized that a charge on self-defense has a special status, separate from a King charge or charges on lesser-included offenses, in part because of an individual's right to defend himself. See, e.g. Dickey, 394 S.C. at 499, 716 S.E.2d at 101 ("[W] hen a defendant claims self-defense, the State is required to disprove the elements of self-defense beyond a reasonable doubt."); State v. Hendrix, 270 S.C. 653, 660-61, 244 S.E.2d 503, 507 (1978) ("Once the appellant's right to fire in self-defense arose, he was not required to wait until his adversary was on equal terms or until he fired or aimed his weapon."); State v. McGee, 185 S.C. 184, 193 S.E. 303, 305 (1937) ("Self defense is a plea that any person charged with murder may plead. It is a right that has come to us from time immemorial to defend yourself against serious bodily harm or death."); State v. Fuller, 297 S.C. 440, 443, 377 S.E.2d 328, 330 (1989) ("In charging self-defense, we instruct the trial court to consider the facts and circumstances of the case at bar in order to fashion an appropriate charge.").

In a case like this, where Glover admitted that he fired the weapon that shot Weaver, his assertion of self-defense was of paramount importance. Considering the original charge and three additional recharges as a whole, the trial court overemphasized the offenses of attempted murder

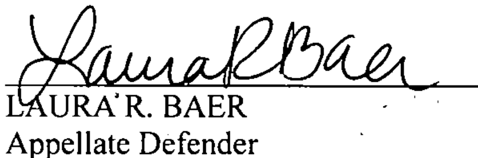
[1] State v. King, 158 S.C. 251, 155 S.E.409 (1930) (holding that trial court should instruct the jury that if they had any reasonable doubt as to whether unlawful killing was murder or manslaughter, it was jury's duty to convict defendant of the lesser offense, manslaughter).

and ABHAN by charging them both three times. He did not sufficiently mitigate the partial recharges by reminding the jury "of the burden and quantum of proof *and* presumption of innocence or . . . that *all* instructions must be considered as a whole." <u>See</u> <u>Sutherland</u>, 428 F.2d at 1157-58. This created an unbalanced charge prejudicial to Glover, who is accordingly entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Appellant David Glover respectfully requests that the Opinion of the Court of Appeals be withdrawn and that this Court reverse his convictions.

Respectfully Submitted,



LAURA R. BAER
Appellate Defender

This 24th day of January, 2017.

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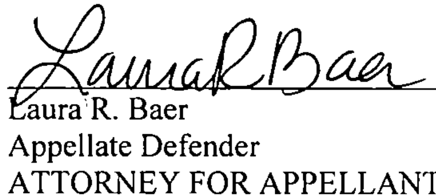
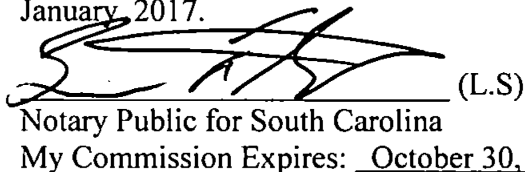
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Ranee Saunders, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and David Glover, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 24th day of January, 2017.



Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 24th day of January, 2017.



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