STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN LAMAR GARY,

APPELLANT

APPELLATE CASE NO 2016-001603

AMENDED INITIAL BRIEF OF APPELLANT

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II. Whether the trial court erred in denying Appellant's request for a jury charge on the lesser included offense of second degree assault and battery where there was conflicting evidence regarding the cause and severity of the alleged victim's injuries?

STATEMENT OF THE CASE

On October 9, 2014, the Richland County Grand Jury indicted Appellant Kevin Gary for assault and battery of a high and aggravated nature. R. * (Indictment). Gary was also indicted for mayhem. Tr. 10, l. 21 - 12, l. 6.

On April 20, 2015, Gary appeared for an immunity hearing before the Honorable James R. Barber. Judge Barber denied Gary's request for immunity from prosecution under the Protection of Persons and Property Act. Tr. 75, ll. 8-10.

On July 25-27, 2016, Gary appeared for trial before the Honorable William P. Keesley and a jury. Gary was represented by Megan Eigenbrot, Rebecca Williams, and Cheslyne Brighthop. The state was represented by assistant solicitors Meghan Walker and Jeremiah Shellenberger, II. Tr. 1.

Judge Keesley granted the defense's motion for directed verdict on the mayhem charge. Tr. 430. The jury returned a verdict of guilty on the offense of assault and battery a high and aggravated nature. Tr. 507 – 508. Judge Keesley sentenced Gary to twelve years incarceration, suspended upon the service of ten years followed by two years probation. Tr. 527.

This appeal follows.

STATEMENT OF FACTS

Appellant Gary testified in his own defense. He explained to the jury that on March 25, 2015, he arrived home to his apartment to find the truck belonging to the complex's maintenance technician, Jaranamo Cone, parked at an angle in the two parking spaces in front of the apartment. Gary's girlfriend at the time, Mary Beth Hale, roommate Antonio Adams, and three small children. were all home. Gary went to the upstairs bathroom where Cone was working on fixing the toilet. Gary asked Cone to move his truck when he got a chance so that Gary could move his car into a closer parking space. Cone responded: "You expect me to stop cleaning up your shit to move my truck so you can park." Tr. 321, l. 7 – 328, l. 9. Gary asked Cone to be professional and not curse in front of the children, two of whom were standing next to Gary. Cone continued to mutter about cleaning up Gary's "shit," threw down the mop, and said "fuck it." Tr. 328, l. 10 – 329, l. 25.

Cone went downstairs. Gary thought that Cone would leave through the front door at the bottom of the stairs, but instead he went toward the downstairs bathroom. Cone continued to complain about the request to move his truck and Gary asked him to leave. Gary told Cone that he would talk to Cone's supervisor and get someone to work on the toilets. Tr. 329, l. 25 – 331, l. 19. Gary estimated that he asked Cone to leave five times before Cone moved toward the door, bumping Gary's chest with his left shoulder on the way. Cone stood face to face with Gary after bumping him. Gary's impression was that Cone was trying to see if Gary would react to him physically, but Gary did not. Tr. 331, l. 20 – 334, l. 8. Gary said he was confused as to why Cone was being so aggressive and told Cone "get the fuck out of my house." Tr. 334, l. 23 – 335, l. 11. Cone then swung the front door to the apartment open and slammed it shut. Gary's six-month old son was nearby and was hit by the door. Tr. 335, l. 11 – 336, l. 10. Gary's

roommate, Antonio Adams, had come downstairs and opened the door. Adams said "what the fuck" or "what's your problem" to Cone. Tr. 336, ll. 11-16. Gary went to step outside when Cone reached up and choked him at the doorstep. The back of Gary's head hit the post and he "started swinging" in order to get Cone off of him. Tr. 338, l. 2 – 340, l. 18. Gary estimated that they each exchanged two to three punches before Cone fell down. Cone got up several times, but fell back down, eventually falling from the sidewalk into the parking lot. When Gary heard Cone moan out in pain, he saw that Cone's eye was bleeding and sent Mary Beth Hale to the complex's office to get help. Tr. 340, l. 19 – 343, l. 4.

Both a neighbor, Vanetia Riley, and the apartment manager called 911. Tr. 190, l. 20 – 191, l. 11. Riley claimed that she heard a loud bang that shook her apartment and ran to the window, where she allegedly saw Cone walking toward the parking lot. Riley said she saw Gary attack Cone from behind, beating him and claiming Cone against her truck and the concrete. She said that Cone yelled "help" and "hurt" but could barely raise himself up. She further claimed that she heard Gary say: "You came at me about a little bit of weed." Tr. 148, l. 11 – 154, l. 23. Riley admitted that she could not see Gary's front door from her window such that she could not confirm or deny Gary's allegation that Cone choked him on the doorstep to his apartment. Tr. 161, ll. 20-22. She had also previously told police that when she looked out her window she saw Cone on the ground. Tr. 161, l. 23 – 163, l. 11. Riley also admitted she had confronted Gary previously about the smell of marijuana emanating from his apartment. Tr. 156, l. 12 – 158, l. 1.

Police responded and photographed blood on both the apartment door and in the parking lot. Tr. 135, l. 23 – 137, l. 11. They also documented an injury to Gary's hand. Tr. 115, ll. 21-24. From his first interaction with police, Gary maintained that he only responded with physical force when Cone grabbed his throat. Tr. 128, l. 7 – 129, l. 3. Antonio Adams and Mary Beth

Hale both testified for the defense and corroborated portions of Gary's testimony for which they were present. Tr. 260, l. 12 – 273, l. 6; Tr. 284, l. 1 – 293, l. 24.

The alleged victim, Jaranamo Cone, corroborated that he and Gary were in a verbal dispute about Cone moving his truck and left. Cone claimed that the last thing he remembered was walking back to his truck with his tools in his right hand. Tr. 106, l. 7 – 110, l. 16. The next thing he recalled was waking up in the hospital. Tr. 111, ll. 3-5. Cone said that he suffered injuries to his left eye, brain, shoulder, and tongue. His left eye was eventually removed and replaced with a prosthetic. Tr. 111, ll. 8-25.

ARGUMENT

I. The trial court erred in denying Appellant's request that the state be required to open in full on the law and the facts and reply only in rebuttal to matters raised in the defense's closing.

Relevant Facts

Defense's Motion Regarding Order of Closing Arguments

Prior to the presentation of closing arguments, defense counsel requested that the solicitor be required to close in full on the law and facts, followed by the defense's closing, and then any rebuttal argument from the solicitor. In addition to citing a proposed rule change at the time, defense counsel argued that the practice of allowing the solicitor to open on the law only infringed upon Gary's due process rights. Specifically, she argued that Gary had a right to know what the state was arguing against him so that he could have a meaningful opportunity to present a complete response in his defense. Tr. 434, l. 13 - 436, l. 10. The solicitor argued that no rule change had taken effect such that the current rules gave the state "the right to go last." She indicated that the state would be waiving the right to open on the law and close in full after the defense's closing. Tr. 436, ll. 13-19.

The trial judge noted that no rule change had been adopted such that "[t]he procedure is that if the defense puts up evidence, the State goes last." Tr. 436, l. 20 - 437, l. 7. He expressed that it was the state's opening on the law that caused him "more concern," but noted that solicitor's indication that she would waive such an opening. Thus, the trial judge ruled that "the procedure is the defense goes first and the State goes last. The objection is noted and overruled." Tr. 437, ll. 8-12.

Defense's Closing

In the defense's closing, counsel argued that Gary acted in self-defense. Tr. 439, l. 21 – 440, l. 15. She discussed the presumption of innocence, the state's burden to prove guilt beyond a reasonable doubt, and the state's burden to disprove self-defense beyond a reasonable doubt. Tr. 440, l. 16 – 441, l. 9. Counsel also discussed the meaning of reasonable doubt and some concepts related to self-defense. Tr. 441, l. 10 – 442, l. 15. Regarding the evidence, counsel reviewed the photographs, including blood spatter on Gary's front door and blood in the parking lot that indicated Cone was moving around, possibly injuring himself. Tr. 442, l. 16 – 443. 18. Counsel also pointed out that lack of any blood on Gary's arms or clothing, which was inconsistent with Riley's testimony that she saw Gary standing over Cone and beating him or bashing his head into the ground. Tr. 443, l. 19 – 444, l. 21.

She noted that Riley was upset about the smell of marijuana that emanated from Gary's apartment in the past. Counsel further noted the lack of urgency expressed in Riley's 911 call, despite her assertion that she was panicked, and Riley's overt statement to the operator that she did not know what happened or who did it. Tr. 444, l. 22 – 446, l. 6. She further pointed the inconsistency in Riley's testimony that she saw Gary approach Cone and begin punching him and her statement to police that when she looked out of her window, Cone was on the ground. Tr. 446, l. 7 – 447, l. 5. Counsel argued that Riley mistook Gary's attempts to keep Cone on the ground so that he did not further injury himself as Gary continuing to hit Cone, citing Riley's admission that Gary's back was to her such that her view of them in the parking lot was obstructed. Tr. 447, ll. 6-18.

Defense counsel argued that while there was a good bit of blood in the photographs, it was not a "pool of blood" as described by the emergency medical technician. She noted that the

EMT described Cone as combative, supporting Gary's testimony that Cone was not laying still. Tr. 447, l. 19 – 448, l. 8. Counsel then discussed Gary's cooperation with police and the consistency in his explanation of the events from his first interaction with police that day. Tr. 448, l. 9 – 449, l. 4. She explained that Gary's bruising was likely absent from photographs taken immediately after the incident because, as admitted by the state's investigator, it can take time for bruises to appear. Tr. 449, ll. 5-13. She also noted that only one officer who actually responded to the scene of the incident testified at trial, but there were likely others who could have confirmed Gary's cooperativeness and consistency. Tr. 449, ll. 14-24.

Counsel submitted that the solicitor would likely focus on the jail phone call where Gary said "I had to do what I had to do." She argued that Gary did do what he had to do – he had to defense himself – and is further evidence that Gary always maintained that he acted in self-defense. Tr. 449, l. 1 – 450, l. 18.

Regarding the evidence presented in the defense's case, counsel averred that Antonio Adams' admission that he left the scene to remove evidence of his marijuana use reflected his honesty. She attempted to preemptively address the solicitor's argument that there was some type of collusion between Adams and Gary by nothing that Adams did not receive the state's subpoena until after he called Gary to check on him. Tr. 450, l. 19 – 451, l. 16. Counsel admitted that Mary Beth Hale had a greater interest in the case because of the children she had in common with Gary. However, she reminded the jury that Hale never claimed to have seen the entire fight. Tr. 451, l. 17 – 452, l. 6.

Turning to Gary's testimony, counsel noted that Gary was nervous but testified because he wanted to tell the jury what happened and why it happened. Tr. 452, ll. 7-12. She argued that physical evidence corroborated Gary's version of events. Tr. 452, ll. 13-24. Counsel further

argued that the small injury to Gary's hand was further evidence that he did not continually beat Cone, as alleged by the state. Rather, his small laceration was consistent with "one solid punch." Tr. 452, l. 25 – 453, l. 5. Counsel acknowledged that Gary got defensive on the witness stand and "talked a lot." She argued that such was the product of his desire to give as much detail as possible and finally have the opportunity to explain his side of the story in full. Tr. 453, ll. 6-18.

She asked the jury to remember that whatever Gary's intent was when he walked out of the door, it was not illegal for him to step outside of his apartment. It was Cone's action of choking Gary that necessitated Gary's response in self-defense. Tr. 453, l. 19 – 454, l. 22. Even so, Gary made efforts to get Cone help by sending his pregnant girlfriend to the office to get the property manager, who called 911. Contrary to Riley's testimony that Cone did not move, the other 911 call reflects that Cone was moving around. Tr. 454, l. 23 – 455, l. 13.

In conclusion, defense counsel admitted that even the defense witnesses were not entirely consistent with one another, as they were all perceiving a very intense situation from their own point of view. Tr. 455, ll. 14-20. However, she pointed the consistent detail that never changed, which was that Cone choked Gary. Thus, she argued that Gary was innocent because he acted in self-defense. Tr. 455, l. 21 – 456, l. 9.

Solicitor's Closing

Unlike the defense, the solicitor had the opportunity to refute every argument made in the defense's closing. She did so with specificity, often quoting defense counsel and referring to her by name. See Tr. 459, ll. 21-25; Tr. 460, ll. 4-11; Tr. 461, ll. 3-4; Tr. 461, l. 20 – 462, l. 3; Tr. 467, ll. 3-10; Tr. 471, ll. 10-13; Tr. 472, ll. 8-11; Tr. 473, ll. 10-14; Tr. 474, ll. 2-4; Tr. 475, ll. 20-22. Additionally, the solicitor misrepresented the defense's argument, asserting the defense was multi-layered and included: "[T]he victim's a jerk, so who cares? He was loud. He was in

my home. He was cursing. He was disrespectful. He slammed the door." Tr. 459, ll. 1-6. Even the solicitor acknowledged that she was going to discuss a matter not addressed in the defense's closing, saying: "Before I get to self-defense, I want to talk to you about something that Ms. Eigenbrot neglected to even mention, and she didn't mention it because it's not helpful to her case. It's called proximate cause." Tr. 463, ll. 6-10. The solicitor then discussed the law related to proximate cause and an unrelated example, before stating: "I think that is clear in this case that but for the beating suffered at the hands of Mr. Gary, there would have been no falling down on the part of Mr. Cone." Tr. 464, ll. 20-23.

The solicitor then moved on to a discussion of self-defense, telling the jury: "In order to be able to be found not guilty based upon self-defense, you have to meet each and every single prong of self-defense. If you fail on one of them, you fail on them all." Tr. 464, l. 24 – 465, l. 5. She never mentioned the state's burden to disprove the elements of self-defense beyond a reasonable doubt. The solicitor averred that Gary was making up an innocent reason for going outside because if it was to engage in another confrontation, he would be at fault in bringing on the difficulty. Tr. 465, l. 6 – 466, l. 4. Regarding the second element, she argued that there was no physical evidence that Gary was attacked by Cone and that his corroborating witnesses were inconsistent. Tr. 466, ll. 5-15. She argued that, regardless, Gary's was not in reasonable fear that "he was about to die" once he was able to "smack" Cone's hand away. Tr. 466, l. 16 – 467, l. 2.

As to the third element that a reasonable prudent man of ordinary firmness and courage would have entertained the same belief of imminent danger, the solicitor cited Riley's testimony that Gary bashed Cone's head into the pavement of the parking lot. She opined: "This isn't about self-defense. This is about male pride. This is about ego. This is about a temper that got out of

control, flashes of which we saw on that witness stand today." Tr. 467, l. 22 – 468, l. 9. Lastly regarding self-defense, the solicitor argued that Gary had a duty to retreat since the incident occurred outside of his home. Tr. 468, ll. 10-21. Thus, she claimed that Gary did not "meet a single element of self-defense, much less all four." Tr. 469, ll. 2-4.

The solicitor then discussed the credibility of the witnesses. Tr. 469, ll. 5-21. In discussing Cone's testimony, she argued:

> He [Cone] said he left and that he doesn't really remember anything after that. And that's actually part of their defense. Part of their defense is he doesn't remember what happened, so you have to believe Kevin Gary because he actually did a good job of literally erasing that man's memory.

Tr. 470, ll. 12-19. The solicitor further alleged, based on Riley's testimony, that the incident had something to do with marijuana. However, she averred: "We can't ask Mr. Cone if he ever mentioned any issues with marijuana to the defendant in this case because he has no memory left." App. 473, ll. 3-9. Notably, however, Cone claimed to have remembered everything that occurred inside of the apartment and walking back to his truck. Tr. 110, ll. 1-16.

The solicitor attempted to discredit Hale by arguing that her jail calls to Gary belied her testimony that there were no minutes are on his cell phone to call 911 herself. Tr. 474, ll. 11-19. She further said: "[M]aybe Ms. Hale doesn't know this, but you don't need minutes to call 9-1-1, that call [is] going to have to go through." Tr. 474, ll. 19-21. With respect to Adams, she said: "I mean, as much prodding as Ms. Brighthop did of him, he never said, I saw him choke him." Tr. 475, ll. 8-10. She went on to argue:

> But you have to remember during those eight minutes when Kevin Gary and Mary Beth Hale are together before the police arrive, Mr. Adams is getting rid of weed and weed products because his main concern in this case is his freedom, which is why we don't call these witnesses to the stand. We don't call witnesses whose main concern in a case is their freedom. We don't call witnesses to the stand who have a bias that makes them want to tell not the truth, but their truth.

> We call credible, independent witnesses to the stand, which is what we did in this case.

Tr. 475, ll. 13-24. The defense was never allowed an opportunity to respond.

With respect to Gary's testimony, the solicitor said: "Ms. Eigenbrot was right, he talks a lot. It was kind of like almost a filibuster at times. At other times, it was clear that he had talking points that he was going to stick to and no matter the question asked, he was going to say certain things." Tr. 475, l. 25 – 476, l. 5. She also brought up the other statement that Gary referenced during his testimony, wherein he was asked if his actions were excessive and he said "no." Despite Sullivan's testimony that Gary was asked "Do you feel like you went a little too far? He answered, No, sir," the solicitor argued that Gary was lying. Tr. 476, l. 19 – 477, l. 2; Tr. 385, l. 21 – 386, l. 12, Tr. 408, ll. 21-22.

Discussion

Our Supreme Court recently held in State v. Beaty, No. 2015-000718, 2016 WL 7474479, at *2 (S.C. Dec. 29, 2016), *petitions for rehearing granted* Mar. 28, 2017, that "in a criminal trial where the party with the "middle" argument requests, the party with the right to the first and last closing argument must open in full on the law and the facts, and in reply may respond in full to the other party's argument but may not raise new matter." Beaty argued that the trial court erred in failing to require the State to open fully on the law and facts in its closing argument, and to limit the State's reply to matters raised by appellant's counsel in his "middle" closing argument. 2016 WL 7474479 at *2. Like defense counsel's argument in the present case, Beaty argued that without such a rule, his procedural due process rights were offended. Id. (citing State v. Legg, 416 S.C. 9, 785 S.E.2d 369 (2016) (procedural due process requires a fair hearing)). In adopting this rule, the Beaty Court noted the Delaware Supreme Court's holding that due process is offended when the state is permitted to "sandbag" by making perfunctory

opening statement and then argue in full in reply, thereby depriving defendant the opportunity to counter state's arguments. See Bailey v. State, 440 A.2d 997 (Del. 1982).

This Court acknowledged Beaty's holding in State v. Hughes, 419 S.C. 149, 796 S.E.2d 174 (Ct. App. 2017), but similar to the Beaty Court, found a lack of prejudice such that any error in the order of the closing arguments was harmless beyond a reasonable doubt. Though the state's opening on the law in Hughes was "perfunctory at best," this Court reviewed the record and determined that "the bulk of the State's closing argument was confined to content that had already been raised in Hughes's closing argument." 419 S.C. at 149, 796 S.E.2d at 180-81. Here, there was no initial closing by the solicitor. Though the trial judge seemed to think it was the state's ability to open on the law that was problematic, it is the inability of the defendant to respond to the state's argument that is offensive to due process. Thus, the lack of any closing argument by the solicitor prior to the defense's closing left the defense with no opportunity to respond to any portion of the solicitor's closing.

The present case is further distinguishable from Beaty and Hughes in that Gary can demonstrate prejudice. Defense counsel did her best to anticipate the solicitor's arguments based on the co-solicitor's opening statement, cross-examination, and other statements made by the solicitors during trial. That does not mean that Gary was not prejudiced by the defense's lack of opportunity to respond to the solicitor's closing argument. Specifically, the defense did not get an opportunity to respond to the solicitor's (1) mischaracterization of self-defense as meaning that the defense was "the victim's a jerk, so who cares?"; (2) argument regarding the proximate cause of Cone's injuries; (3) failure to acknowledge the state's burden regarding self-defense; (4) improper focus only upon a fear of death rather than serious bodily injury, as it related to the elements of self-defense; (5) inaccurate assertion that Cone could not recall anything about the

incident; (6) assertion that witness Hale was lying about lacking minutes on her cell phone; (7) assertion that defense counsel was "prodding" witness Adams; (8) assertion that the state only calls "credible, independent witnesses to the stand;" (9) assertion that Gary had talking points for his testimony; and (10) assertion that Gary lied about his statements to police.

While none of these matters alone likely demonstrates prejudice, in combination they reveal the necessity for the requirement for the solicitor to open in full on the law and facts and be limited to only rebuttal argument after the defense's closing. Here, defense counsel's only opportunity to address the jury and counter the solicitor's arguments was done with no concrete notion of what the solicitor intended to focus upon in argument. Yet, the solicitor was given a full opportunity to counter each and every argument made by the defendant. Thus, Gary's right to due process was violated in this case and he has shown that the violation was prejudicial. Gary is accordingly entitled to a new trial.

II. The trial court erred in denying Appellant's request for a jury on the lesser included offense of second degree assault and battery where there was conflicting evidence regarding the cause and severity of the alleged victim's injuries.

Relevant Facts

Gary maintained that he acted in self-defense. As far as he was concerned, the verbal argument inside of the apartment and Cone's physical aggression toward him were over when Cone slammed the door. He went outside to ask for an apology from Cone and report Cone to the apartment manager in the office. As Gary walked out of the door, Cone put his hand on Gary's neck and began choking him. Gary responded by punching Cone to get him off of him. The two exchanged a few punches and Cone ended up in the parking lot. Both Gary and his roommate, Antonio Adams, testified that Cone got up and fell down repeatedly, potentially exacerbating Cone's injuries. Tr. 321, l. 7 – 343, l. 4; Tr. 260, l. 12 – 273, l. 6.

Cone testified the before the incident, he could see out of both of his eyes but that his left eye was removed after the incident. Tr. 111, ll. 8-17. He said that he bleeding in his brain, that his left shoulder was "shattered," and that his tongue was lacerated to the point that it was almost off. Cone said that he can no longer taste with that part of his mouth. Tr. 111, ll. 18-25.

Cone's treating physician, Dr. Mark Jones, testified that Cone could breathe on his own but was placed on a ventilator due to medications that sedated him. Dr. Jones said that Cone had two bleeds in his brain – a subdural hematoma and subarchnoid hemorrhage. Additionally, his left eyeball was ruptured an eventually removed due to chronic pain. He said that the injuries could have been fatal had medical treatment were not provided. Tr. 227, l. 3 – 232, l. 6. Dr. Jones opined that the injuries were not consistent with a low-level fall, but admitted on cross-examination that they could be from combination of a fight and fall. Tr. 234, l. 19 – 237, l. 11. He also admitted that Cone's medical records reflected that he suffered from congenital

blindness in his left eye and that Cone's wife said that Cone was blind in that eye prior to the incident. Tr. 237, l. 12 – 240, l. 13. However, he agreed on redirect that "blind" can mean full or partial blindness. Tr. 240, l. 20 – 241, l. 7.

At the charge conference at trial, defense counsel requested that the trial judge instruct the jury on the lesser-included offenses of assault and battery first, second, and third degrees, arguing that the extent of Cone's injuries was an issue of fact for the jury to decide. Tr. 431, l. 22 - 432, l. 5; Tr. 432, ll. 21-25. The solicitor argued that the evidence was uncontroverted that Cone's injuries were severe and life threatening. Tr. 432, ll. 16-19.

The trial judge ruled that assault and battery first degree was wholly inapplicable. Tr. 433, ll. 4-6. After reciting the definition of moderate bodily injury, applicable to assault and battery second degree, the trial judge noted that there was evidence that Cone suffered injuries less than great bodily injury. However, he denied the request to charge any other lesser-included offenses based on the evidence that Cone lost an eye and the treating physician's testimony regarding the risk of death. Tr. 433, l. 1 - 434, l. 7.

Following closing arguments but prior to the jury charge, defense counsel renewed their request for the charges on the lesser-included offenses. Tr. 479, l. 3 – 480, l. 16.

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).

"The trial judge is to charge the jury on a lesser-included offense if there is ***any evidence*** *from which it could infer 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) (emphasis added); see also 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).

The evidence must allow "a rational inference" that the defendant committed the lesser offense. State v. Geiger, 370 S.C. 600, 635 S.E.2d 669 (Ct. App. 2006). In determining whether such a rational inference exists the court examines the totality of evidence **in the light most favorable to the moving party**. Id. "In order to justify a charge of a lesser-included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts." State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999).

In the present case, the trial court only charged the jury on the indicted offense of assault and battery of a high and aggravated nature ("ABHAN"). ABHAN requires that the defendant unlawfully injured another person, and either great bodily injury to another person resulted, or that the ac was 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 disfigurement or protracted loss or impairment of the function of a bodily member or organ." S.C. CODE ANN. § 16-3-600(A)(1).

The trial judge refused to instruct the jury as to assault and battery in the second degree because the court believed that there was no moderate injury because Cone lost an eye and in light

of the doctor's testimony that Cone could have died. Tr. 433, l. 1 - 434, l. 7. S.C. CODE ANN. § 16-3-600(D)(1)(a) provides, in relevant part:

> 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 ***moderate bodily injury to another person results or moderate bodily injury to another person could have resulted.***

(emphasis added). "Moderate bodily injury" is defined under the statute as:

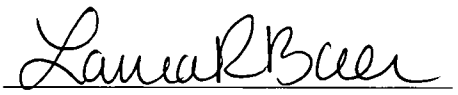
> [P]hysical injury that involves prolonged loss of consciousness, or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ, or injury that requires medical treatment when the treatment requires the use of regional or general anesthesia or injury that results in a fracture or dislocation. Moderate bodily injury does not include one-time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that do not ordinarily require extensive medical care.

S.C. CODE ANN. § 16-3-600(A)(2) (emphasis added).

All of the elements of assault and battery in the second degree were present in Gary's case. The severity of the injury was a question for the jury. See State v. Murphy, 322 S.C. 321, 325-26, 471 S.E.2d 739, 741 (Ct. App. 1996) (finding that question of severity of assault required the charging of a lesser-included assault offense). Here, there was some evidence presented that Cone's left eye was not functioning prior to the incident such that it was not any punch from Gary that caused his eye to lose its function. Relatedly, it was a question of fact for the jury to determine if the removal of the non-functioning eye and its replacement with a prosthetic constituted "serious, permanent disfigurement" or "moderate disfigurement." See S.C. CODE ANN. § 16-3-600(A)(1) and (A)(2). Further, the treating physicians' testimony that Cone's injuries could have caused death if left untreated is not dispositive, as the statutory requirement to constitute "great bodily injury" is that the injury "causes *a **substantial risk** of death.*" See S.C. CODE ANN. § 16-3-600(A)(1). It was up to the jury to weigh the testimony and determine the severity of Cone's injury.

CONCLUSION

Based on the foregoing, Appellant Kevin Lamar Gary respectfully requests that this Court reverse his conviction and grant him a new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of March, 2017.