STATE OF SOUTH CAROLINA
In The Court of Appeals

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S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY

Court of General Sessions
R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2015-001144

THE STATE,

Respondent,

v.

DAVID GLOVER,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court did not err in declining to recharge the jury on self-defense because the jury did not request it nor did the trial court's failure to recharge self-defense render the charge as a whole imbalanced or unduly prejudicial to Appellant.

STATEMENT OF THE CASE

Appellant was indicted at the September 2014 term of the grand jury for Aiken County for attempted murder, first-degree burglary, and possession of a firearm during the commission of a violent crime. On May 13, 2015, Appellant proceeded to trial by jury and was found guilty of attempted murder and possession of a firearm during the commission of a violent crime. He was sentenced by the Honorable R. Knox McMahon to twenty-five years' imprisonment for the attempted murder conviction and five years' imprisonment for the possession of a firearm conviction, to be served concurrently. Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a Brief. This Brief of Respondent follows.

STATEMENT OF FACTS

David Glover (Appellant) was indicted for attempted murder, first-degree burglary, and possession of a firearm during the commission of a violent crime after attacking his former paramour, Vernell Weaver. (R.11.) At trial, Weaver testified that on the day of the incident she spoke with Appellant and asked him to come pick her up from George Mackey's house so she could retrieve some clothes from their home.[1] (R.50.) Appellant agreed and after taking her home, he dropped her back off at Mackey's house. (R.52.) Once inside, Weaver began making herself something to eat when she heard a banging at the door and saw Appellant standing at the door. (R.56.) Before she could speak, Appellant drew a gun and shot her through the neck. (R.56.) Weaver turned, ran into the bedroom, and dialed 911. (R.56.) Although she shut the door, Appellant came through the wall and the two began to tussle on the bed as Weaver attempted to wrestle the gun away from him. (R.56.) However, Appellant took the gun back and attempted to shoot Weaver again in the stomach.[2] (R.57.) Weaver was able to get away from him and ran through the living room, grabbing a hammer that was on the floor as she headed out of the house towards the home of Otis and Almetha Green. (R.58–89.)

Almetha Green then testified that she was in the kitchen when she heard Weaver yelling about having been shot as she ran towards the house. (R.86.) Weaver eventually reached the porch and sat in a chair, still clutching the hammer. (R.89–90.) Appellant, who had chased Weaver to the Green's house, tried to pull the hammer from her hand. (R.90.) Almetha got her husband, Otis Green, who told Appellant to leave Weaver alone and threatened to call the police. (R.89.) Almetha eventually called the police and Appellant ran away when he heard the sirens.

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[1] Although it appeared Weaver and Appellant were not romantically involved at the time, they still shared a home. (R.50.)

[2] Appellant pulled the trigger; however, the gun did not fire. (R.57)

(R.89.) Otis similarly testified that on the day of the incident he was awakened by Almetha, and he went with her to the porch to find Weaver sitting on the porch with Appellant standing over her trying to get the hammer out of her hand. (R.100.)

Dr. Bradford Huffman testified as an expert in oral and maxillofacial trauma and treatment. (R.216.) He described how when Weaver was shot, the bullet entered her right neck, passed through the floor of her mouth and her tongue, and exited through the left side of her lip. (R.220.) He further explained that this type of injury was associated with a high level of mortality. (R.223.)

Appellant testified in his own defense. He testified Weaver called him the morning of the incident about getting something to eat at the church, and they arranged for Appellant to pick her up. (R.250.) He claimed that on the way, Weaver requested they make a stop to pick up some crack before they returned to their shared home, where Weaver smoked the crack she had acquired. (R.252–253.) After that, Appellant stated he drove Weaver back to Mackey's house and accompanied her inside where she began to smoke the remainder of her crack. (R.255.) Appellant claimed that once Weaver consumed all her crack she asked him for money so she could purchase more to smoke; when he responded he did not have any cash, she began to hit him and they began a physical altercation. (R.255–256.) Appellant maintained the fight escalated and Weaver eventually grabbed a hammer and began swinging it at him and they began to struggle over the hammer, knocking through a wall and the glass front door. (R.257–258.) Appellant testified he then withdrew a gun and shot at Weaver twice. (R.259.) He followed her into the bedroom, going through the wall because the door was locked. (R.260.) They continued to fight until Weaver left and ran to the neighbors' home. (R.264.)

The defense then rested and the trial court discussed jury charges. Ultimately, the trial court instructed the jury on burglary, attempted murder, ABHAN, first-degree assault and battery, possession of a firearm during the commission of a violent crime and self-defense. (R.311–320.) After sending the jury to deliberate, Appellant objected, citing *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *certiorari granted* (S.C. Sup. Ct. Order dated March 28, 2016), because the trial court had charged the jury it must only find a general intent to commit serious bodily harm as opposed to a specific intent to kill. (R.324.) After reviewing the case, the trial court brought the jury back in and recharged it on attempted murder, this time stating that the "State must prove specific intent to commit murder as an element of attempted murder." (R.329.) The jury returned to deliberations. (R.331.)

The jury subsequently submitted the question: "What is the difference between guilty of attempted murder and guilty of [ABHAN]." (R.331.) The trial court proposed recharging attempted murder and ABHAN, and neither party objected. (R.331.) After the court delivered its recharge and the jury exited, Appellant requested "the Court to consider re – instructing self-defense as well." (R.336.) The State objected and the court ultimately declined to recharge the jury, citing *State v. Anderson*, 322 S.C. 89, 94, 470 S.E.2d 103, 106 (1996), for the proposition that a trial court need only answer the questions asked. (R.337.)

The jury then submitted another question: "Can you give an example of guilty of [ABHAN] without reading the law." (R.337–338.) After bringing the jury back, the trial court clarified it could not provide examples for fear that could be interpreted as a comment on the facts. (Tr.400–01.) Instead, the trial court reiterated the language of the statute and reminded the jury it must determine the facts and compare them to the law. (R.339.) Finally, the trial court

reminded the jury the State must prove the elements beyond a reasonable doubt. (R.339.) The jury then returned to deliberations and neither party noted any objections. (R.340.)

Ultimately, the jury found Appellant guilty of attempted murder and possession of a firearm during the commission of a violent crime, and not guilty of burglary. (R.341.) The trial court sentenced him to twenty-five years' imprisonment on the attempted murder charge and five years' imprisonment on the possession charge, to be served concurrently. (R.352.)

ARGUMENT

The trial court did not err in declining to recharge the jury on self-defense because the jury did not request it nor did the trial court's failure to recharge self-defense render the charge as a whole imbalanced or unduly prejudicial to Appellant.

The trial court did not err in declining to recharge the jury on self-defense because the jury did not request it and the charge was not unbalanced or unduly prejudicial to Appellant.

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Brandt*, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011). "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.'" *State v. Anderson*, 322 S.C. 89, 94, 470 S.E.2d 103, 106 (1996) (alteration in original) (citing *State v. Barksdale*, 311 S.C. 210, 216, 428 S.E.2d 498, 502 (Ct. App. 1993)).

At the outset, the State notes Appellant embellishes the nature of the recharges and the character of his objections. First, the trial court recharged attempted murder *at Appellant's request* to clarify that the State must prove he acted with the specific intent to kill—a recharge that can hardly be characterized as beneficial to the State. Second, after the subsequent recharge on both ABHAN and attempted murder, it was not until the jury exited the courtroom and returned to deliberations that Appellant suggested the trial court recharge self-defense. Thus, his request was not simply that the trial court charge self-defense along with the offenses, but he asked that the jury be brought back in for the sole purpose of recharging it on a matter on which it had expressed no confusion. Finally, as to the third recharge, the trial court simply restated the elements of ABHAN and reminded the jury of the State's burden of proof. Appellant never objected to this recharge, nor did he renew his request that the trial court recharge the law of self-defense. Accordingly, in addressing Appellant's claimed abuse of discretion, the only arguably

preserved objection is his after-the-fact request that the jury be brought back in the courtroom after returning to deliberations and recharged on self-defense.

The trial court's rejection of this request can hardly be claimed an abuse of its discretion as to comply would not only be unnecessary under the law, but would threaten to be a comment on the facts by inviting the jury to focus on self-defense, thus manifesting the type of imbalance Appellant ostensibly abhors. Further, despite Appellant's protestations, he simply cannot circumvent the precedent standing staunchly against his position. The trial court adhered to well-established law in answering *only* the jury's questions. *See Anderson*, 322 S.C. at 94, 470 S.E.2d at 106 (citing the well-established law that where the jury makes a request, it is sufficient that the court recharge only those matters necessary to answer the jury's question).

Nevertheless, Appellant complains his is a special case, relying on the fact that the right to defend oneself is sacrosanct and therefore his circumstances represent the exception to settled law. However, simply because the trial court deemed a charge on self-defense appropriate does not correspondingly grant Appellant the right to an imbalanced charge in his favor, which is precisely what would result from the court injecting a self-defense charge needlessly into its response to the jury. Appellant mistakes the rationale of existing jurisprudence, assuming the substance of what is being charged should be determinative, where instead the undergirding of our case law is basic logic. The law is no more profound than allowing the trial court to answer only the questions asked of it because inserting another charge in its response, regardless of the legal substance, would needlessly and unduly emphasize that instruction. While certainly the Appellant is entitled to a fair charge, he is not entitled to a charge specifically highlighting his theory of self-defense.

Equally unpersuasive is Appellant's foray into jurisprudence from the United States Court of Appeals for the Fifth Circuit for support, as that court is in accord with South Carolina's well-established law of only requiring a trial court to answer the questions asked of it in recharging the jury. *United States v. Ehrlich*, 902 F.2d 327, 330 (5th Cir. 1990) ("A trial court generally may limit a supplemental charge to the specific instruction requested by the jury. As we have said before, there is no error if the trial judge in supplemental instructions charges exactly as he was requested." (internal quotations and citations omitted)). Appellant seems to cling to the notion that simply stating there may be exceptions proves he is an exception. However, the simplicity of his case is incontrovertible. There can be no clearer application of settled law. The jury was charged on attempted murder and ABHAN in response to its question as to the difference between the two. Again, it was not until the jury left the courtroom that Appellant considered requesting a charge on self-defense, which the trial court properly declined as neither responsive to the question asked, nor appropriate to bring up *sua sponte* while the jury was deliberating. As the case law cited by Appellant notes, "[t]he influence of the trial judge on the jury is necessarily and properly of great weight and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946) (internal citations omitted). The final sentiment the trial court offered reiterated the State's burden of proof. Therefore, despite the fact that Appellant did not object to the trial court's final recharge, it nevertheless tailored its conclusion to benefit Appellant. Furthermore, injecting an unrequested recharge on self-defense into deliberations would undermine the role of the judge as a neutral arbiter of the law. *See State v. Kennedy*, 272 S.C. 231, 234, 250 S.E.2d 338, 339 (1978) ("A fundamental concept of our system of justice is that every person charged with a crime has an absolute right to a fair and

impartial trial. Basic to this concept is the requirement of neutrality on the part of the trial judge, and it is imperative that he exercise a high degree of restraint, caution, and circumspection in making remarks or comments in the presence of the jury."). Accordingly, the trial court committed no error in declining to recharge the jury on self-defense.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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August 8, 2016

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CERTIFIATE OF COUNSEL

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

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Laura R. Baer, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 8th day of August, 2016.

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