STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Saluda County
Honorable Thomas A. Russo, Circuit Court Judge

Opinion No. 5572

THE STATE,

Respondent,

v.

STEVEN OTTS,

Appellant.

Appellate Case No. 2014-000274

PETITION FOR REHEARING

In its June 27, 2018, opinion, this Court found error in the trial court's jury instruction in the trial of Steven Otts for the murder of Hydrick Burno after Burno tried to intervene in a domestic dispute between Otts and his girlfriend Saca Jawea Coleman. Specifically, the Court found error in the trial judge's explanation on the "defense of others" at the conclusion of its charge on self-defense. The State requested the charge in response to the defense's argument Otts was justified in fatally striking the victim in the head because the victim held Otts in a bear hug and then grabbed his jacket as Otts advanced toward Coleman again. In reversing the conviction, this Court found it was improper for the trial court to charge the jury on the "offensive 'defense of others,' at the request of the State, to address the victim's behavior."[1] The Court also said the instruction was improper for failing to include the State's burden of proof and failing to guide the jury on the "actions and status of the defender or the person being defended."

[1] *See State v. Otts*, 2018 WL 3131007, at *5 (Ct. App. June 27, 2018).

Respondent respectfully submits the Court misconstrued the purpose of jury instructions when, as a matter if first impression, it held the State could not request a "defensive charge" for purposes of instructing the jury on the victim's status. This was error. The purpose of jury instructions is to enlighten the jury and aid it in arriving at a correct verdict. *State v. Leonard*, 292 S.C. 133, 355 S.E.2d 270 (1987); *see also State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000) ("The law to be charged must be determined from the evidence presented at trial.") By erroneously labeling the charges as offensive or defensive, rather than as correct statements of law required by the evidence presented at trial, this Court created a limitation on the use of jury instructions unsupported by South Carolina precedent. The Court further misconstrued the burden of proof concerning the "defense of others" explanation and, accordingly, misapplied the harmless error analysis. For these reasons, rehearing is appropriate.

STANDARD OF REVIEW

"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). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Mattison*, 388 S.C. at 479, 697 S.E.2d at 583. If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction. *State v. Smith*, 391 S.C. 408, 706 S.E.2d 12 (2011). The court has a duty to charge the jury as to the law applicable to the facts brought out in the testimony. *State v. West*, 138 S.C. 421, 136 S.E. 736 (1927).

DISCUSSION

The Court Misconstrues the Purpose of the Jury Instruction

As a matter of policy, the federal courts have recognized the primary purpose of the jury instruction as a framework for the jury to consider the facts in dispute. "The primary purpose of jury instructions is to define with substantial particularity the factual issues, and clearly instruct the jurors as to the principles of laws which they are to apply in deciding the factual issues involved in the case before them." *See U.S. v. Cronn*, 717 F.2d 164, 170 (5th Cir. 1983) (quoting *U. S. v. Gilbreath*, 452 F.2d 992, 994 (5th Cir. 1971)). Although federal law is not binding upon this Court, this principal is certainly recognized by our common law. "The purpose of a jury instruction is "to enlighten the jury and to aid it in arriving at a correct verdict." *State v. Blurton*, 352 S.C. 203, 207, 573 S.E.2d 802, 804 (2002). A jury charge provides a framework for the jury to consider the facts in dispute, and the evidence presented at trial determines the charged jury instruction. *See State v. Lee*, 298 S.C. 362, 380 S.E.2d 834 (1989).

The jury instruction is not without limitation, however. The trial court must carefully craft the instruction to the evidence presented, without running afoul of the South Carolina Constitution, which prohibits the judge from commenting on the facts of the case. *See* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). It is not within the province of the court to express an opinion to the jury on its view of the facts. *State v. Stukes*, 416 S.C. 493, 499, 787 S.E.2d 480, 483 (2016). In some instances, the evidence requires the court to instruct the jury on distinctions between charges, even when the defendant is not charged with one of the crimes, because the jury needs to understand another principle in order to make a determination of the facts. *See. e.g., State v. Collins*, 266 S.C. 566, 571, 225 S.E.2d 189, 192 (1976) (finding that without a meaningful instruction to distinguish

two crimes, one of which was not charged, the jury could have assessed criminal liability erroneously); *but see State v. Good*, 315 S.C. 135, 138, 432 S.E.2d 463, 465 (1993) (finding the trial court's refusal to instruct on accessory after the fact not error, stating "If accessory after the fact is not charged in the indictment, but is instructed to clarify mere presence, a finding of accessory after the fact is the equivalent to a finding of not guilty.") Thus, from a reading of the case law and the Constitution, the courts must favor instructions of neutrality, carefully tailored evidence presented by both parties, but without any risk of commenting on the facts.

Further, very often the theory of the defense shifts as the evidence develops at trial. As the case law shows the court cannot ignore facts in evidence and only charge what it is requested by the State or the defense. The judge cannot determine who is entitled to what charge simply because one party claims entitlement to the charge. That would be an abuse of discretion. Instead, the judge must determine the appropriate charge based on the evidence presented at trial -- any evidence presented at trial. Jury charges are not the propriety right of one party or the other, so the Court's determination of an "offensive" use of a "defensive charge" misses the point entirely. Respectfully, the Court's categorization of the jury charge as either defensive or offensive, or to the inurement or benefit of either party, is error.

Otts' Claim of Self-Defense Invited a "Defense of Others" Explanation

The evidence at trial supported four competing theories of the case: murder, voluntary manslaughter, involuntary manslaughter, and self-defense. However, all four theories involve different actors and different factual scenarios which must be proven by the State beyond a reasonable doubt. For example, murder has very little to do with the victim's actions, but in voluntary manslaughter, the victim must have provoked the defendant. Similarly, for involuntary manslaughter to occur, the actions of the victim are not necessarily as significant as the reckless

actions of the defendant. In a self-defense case, the actions of the victim are central to the defense's case. Because the evidence supported multiple theories of liability, and because Otts argued self-defense, the jury was required to scrutinize the actions of the victim.

During the discussion on the charges, the defense clearly intended to defend Otts' actions as justified. In arguing for a self-defense charge, Otts said the following:

> Because objectively, whenever someone comes up to you, bear-hugs you, and then grabs you again when you try to escape, you have the right to defend yourself. I mean, that's -- I mean, you have the right to do that. As an objective person, you might think that that person's going to hurt you.

(R. p. 272 lines 19-24.) Otts also denied the evidence supported a charge of voluntary manslaughter, claiming there was no evidence of heat of passion. (R. p. 284, lines 5-11.) Otts argued:

> Your Honor, I -- I apologize. I -- I – I'm — I -- what I was trying to say is I think it's evidence of possibly malice. I don't believe it's evidence of enraged, incapable of cool reflection, or acting under an incontrollable impulse to do violence, Your Honor.

(R. p. 294, lines 9-13.) Otts declined to address the question of whether the evidence supported the other element of voluntary manslaughter – that the defendant had sufficient legal provocation from the actions of the defendant.

The solicitor asked for a "defense of others" explanation in response to Otts request for self-defense ("Your Honor, I think it's consistent in this case especially if you're talking about self-defense.") (R. pp. 301, line 24 – p. 302, line 1.) The solicitor continued, arguing:

> And I think a defense-of-others charges is significant. Your Honor, for two reasons: One, if he enters her shoes in this case, clearly, for voluntary manslaughter — I was looking at the language in voluntary manslaughter. And, you know, you have to be without fault in bringing on the difficulty, and there has to be sufficient legal provocation. He would be able to do anything that he needed to, Mr. Hydrick in this case, standing in her shoes, coming to the aid of a relative in this case.

(R. p. 302, line1 13-22.) The solicitor then said "And even out of the defendant's own concession in this came, he came to her aid. He stood in her shoes. I think it's vitally important, especially where they're trying to assert a self-defense, I think it totally negates that." (R. p. 303, line 25 – p. 304, line 3.)

The trial court agreed that if it was going to instruct the jury on the law of self-defense, it was necessary to instruct the jury on the "defense of others" so the jury could appropriately decide the issues in the case, including those raised by Otts and which the State must disprove beyond a reasonable doubt. (R. pp. 301-15, 316-17.) As the trial court properly concluded, the jury could not evaluate the elements of self-defense without knowing whether the victim had any right to place his hands on Otts. The defense certainly was not claiming mistaken identity or disputing the cause of death. Instead, the sole basis for the defense's theory was that Otts was defending himself from the larger man's assault. To deprive the jury of the consideration of the victim's status because of his defense of Coleman would be to accept the defense's theory of the case as true.

In his closing argument, Otts was adamant the evidence did not support a voluntary manslaughter charge because there was no heat of passion. Otts said the following:

> And that one thing is that in no way, shape, or form is this a case of voluntary manslaughter. He said that; I agree. No way, shape, or form is this a case for voluntary manslaughter. Because in order to for it to be a case of voluntary manslaughter, he has to be mad. He has to be enraged by something that Hydrick did. There's absolutely no evidence that he was enraged by something Hydrick did.

(R. p. 356, lines 9-17.) Although Otts avoided the topic of sufficient legal provocation, the jury, however, was required by the instruction on voluntary manslaughter to consider whether Burno sufficiently provoked Otts. Otts also insisted the blow was not involuntary manslaughter, arguing he was not reckless in his actions nor was he engaging in unlawful activity **because he was**

justified in defending himself: "Unintentional killing, now, that sounds mighty good for this case, you would think. You would think. But it's not. Because this is a case of self-defense." (R. p. 359, lines 16-18.) Again, to consider whether Otts actions were justified, the jury was required to consider the actions of Burno immediately before he was struck by Otts. Although the trial court properly charged the lesser included offenses because the at least some form of evidence supported it, the court recognized the jury needed some instruction on evaluating Burno's behavior, not just Otts. The State was required to disprove the first element of self-defense—that Otts was without fault in bringing on the difficulty. *See State v. Bryant*, 336 S.C. 340, 344, 520 S.E.2d 319, 321 (1999)("A self-defense charge is not required unless the evidence supports it. To establish self-defense in South Carolina, four elements must be present. First, the defendant must be without fault in bringing on the difficulty") (citation omitted); *State v. Santiago*, 370 S.C. 153, 161, 634 S.E.2d 23, 27 (Ct. App. 2006) ("If the defendant provokes or initiates the assault, he cannot invoke self-defense").

In this case the "defense of others" explanation was offered because the defense claimed the fatal blow was justified from the victim's allegedly unprovoked attack on Otts. In instructing the jury what they could consider in making its factual findings, the court properly instructed the jury it could consider the victim's actions within the context of Otts' domestic dispute with Coleman. In other words, whereas the defense sought to sever the events from each other, clearly preferring to frame the blow as the result of the altercation between the two men, the jury was entitled to know it could consider Otts' altercation with Coleman as part of its assessment of the first element of self-defense. Otts could have defended this charge by arguing to the jury he was guilty of only the lesser offense of involuntary manslaughter – a defense that would have focused the jury's attention almost exclusively on Otts' actions. Instead, he attempted to completely

absolve himself of liability, a claim by which he required the jury to consider Burno's actions. **The jury could not properly determine this defense without being instructed on the "defense of others".** Contrary to the Opinion's assertion "the instruction provided no framework for the application of the self-defense elements necessary," the instruction's placement following the self-defense charge clearly referred to the jury's evaluation of those elements. The explanation did not confuse the jury; it directed the jury to consider the interaction among the actors in its entirety. As a result, the trial judge did not abuse his discretion in correctly instructing the jury on a recognized principle of South Carolina law.

Any Failure to Instruct on the Burden of Proof Was Harmless

The Court also misses the point by focusing on whether the burden of proof accompanied the jury instruction on the "defense of others". *See, e.g. Otts*, 2018 WL 3131007, at *5 n. 6. ("Curiously, the State has repeatedly argued that neither State nor the defendant bore the burden of proof, asserting 'I don't think anyone has the burden of proof on that issue. It's just a correct principle of law.'") Respectfully, the State always has the burden of proof – that was not in dispute, nor was that the basis for the objection at trial. *See State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (stating a party cannot argue one theory at trial and a different theory on appeal). As the trial court informed the jury at least twelve times[2] by Respondent's count, the State is required to prove its case beyond a reasonable doubt. The jury was specifically told it must disprove self-defense beyond a reasonable doubt. (R. p. 403.) At no time did the trial judge ever instruct the jury it was Otts' burden of proof for any reason. Yet, this Court found the explanation confusing for failure to instruct, again, on the State's burden of proof at the end of

[2] R. p. 392, 393, 396, 397, 398, 399, 400, 401, 403.

the "defense of others" charge. Why would the jury confuse the State's burden of proof at this point, after being repeatedly informed of the State's burden throughout the entire instruction?

At oral arguments, the Court asked the State the following question: "The charge of defense of others — who had the burden of proving that Mr. Burno was acting in defense of Ms. Coleman?" (April 20, 2016, Oral Argument, Audio at 19:25-19:32) The State responded, "Well, as the judge charged the jury on page 403, he said, 'The defendant is asserting self-defense, the State has the burden of disproving self-defense beyond a reasonable doubt.'" (Audio at 19:49) The State went on to point out, "There is no dispute in this case. The jury knew exactly what he was talking about." (Audio at 20:20.) Again, the Court asked, "Who had the burden of proving that he was entitled to the status of Ms. Coleman?" (Audio at 20:45.) The State correctly pointed out that this is not a burden of proof question, but "it's just a correct principle of law." (Audio at 21:40.) Respectfully, the State was correct.

The South Carolina Supreme Court has determined that an actor is entitled to step into the shoes of the victim by operation of law in a "defense of others" scenario. *State v. Long*, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997). ("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.") *see also State v. Hays*, 121 S.C. 163, 113 S.E. 362 (1922); *State v. Cook*, 78 S.C. 253, 59 S.E. 862 (1906). As the State argued, the State does not have a burden to prove the victim stepped into the shows of Coleman when he came to her defense because once the jury determined as a matter of fact Burno was defending Coleman, Burno stepped into Coleman's shoes as a principle of law. However, the State always has the burden to disprove Otts claim of entitlement to self-defense.

The explanation of the "defense of others" as a principle of law is helpful to the jury because it gives them a framework by which to consider the evidence. The explanation does not require its own burden of proof charge. This is analogous, for example, to the portion of the voluntary manslaughter charge in which the jury is told the following about the cooling off period: "In deciding whether a reasonable person would've had enough time to cool off, you should consider all of the circumstances surrounding the killing. You may consider the nature of the provocation, if any; the defendant's mental and physical state; and the circumstances and relationships between the parties." (R. p. 400.) Similarly, there are numerous other charges that do not require findings on the elements of the offense charged, but are structural in nature and guide the jury in making factual determinations. For example, the instruction on the credibility of the witnesses, circumstantial evidence, and the requirement of a unanimous verdict all inform the jury about the decision making process. The jury is told how they may consider the evidence presented in determining guilt, but not again instructed on the State's burden of proof.

Even if a charge on the burden were required, what would the jury have been confused about in the context of "defense of others"? Whether Burno was acting on Coleman's behalf? The jury did not need to be instructed it was the State's burden to prove Burno was acting in defense of Coleman because there was no question he injected himself into the on Coleman's behalf. In its Opinion, the Court said the "only evidence presented during the State's case in chief"[3] of Burno's defense of Coleman was the testimony of Lakeisha Stallworth, but even the defense did not dispute why Burno approached Otts or on whose behalf he attempted to intervene. Coleman acknowledged Burno "came out to try to save" her. (R. p. 186, lines 18-22.) Otts himself testified he believed Burno came outside and approached him "in defense of"

[3] See *Otts,* 2018 WL 3131007, at *3.

Coleman. (R. p. 239, lines 1-9.) Thus, the jury was never confused as to who Burno sought to defend when he approached Otts.

Because the factual scenario in this case was not seriously in dispute, any failure to instruct on the burden was harmless beyond a reasonable doubt. *See Lowry v. State*, 376 S.C. 499, 510–11, 657 S.E.2d 760, 766 (2008) ("Errors, including erroneous jury instructions, are subject to harmless error analysis.") 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. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000); *State v. Harrison*, 343 S.C. 165, 539 S.E.2d 71 (Ct.App.2000). Because Otts was not prejudiced by a failure to instruct on the State's burden of proof again, the instruction was harmless beyond a reasonable doubt. *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("Errors, including erroneous jury instructions, are subject to harmless error analysis.") and *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) ("When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict"). The "defense of others" explanation, which followed a thorough instruction on self-defense, did nothing to shift the burden to the defense or otherwise mislead the jury about the State's obligation to prove its case. The Court misconstrued the State's argument on harmless error and found the explanation confusing despite the consistency of the testimony. Respectfully, this Court is in error.

The Court of Appeals ignored the standard of review when the charge was substantially correct and, when read as a whole, adequately covered the law. The charge was supported by the evidence and responsive to the defense's theory of the case. The Court also created new law in holding the State could not request a jury instruction ordinarily requested by the defense, without

citing any support for why this would constitute error. Respondent respectfully submits the Court's opinion misconstrues or misapprehends important facts of record and erroneously construes and improperly applies well-established Supreme Court precedent. Therefore, pursuant to Rule 221(a), SCACR, Respondent, State of South Carolina, seeks modification of the erroneous opinion to be consistent with our State Supreme Court.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted Petition for Rehearing be granted and that the judgment, conviction, and sentence of the trial court should be affirmed. Further, in the opinion, because the Court of Appeals reversed and remanded for a new trial due to the trial court explanation to the jury on "defense of others", it declined to address Ott's remaining issues, citing *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address an appellant's remaining issues when its determination of a prior issue is dispositive). Should rehearing be granted, the three remaining issues also need to be addressed.

Respectfully submitted,

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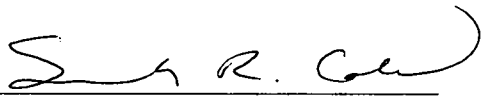
BY: 

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July 12, 2018.

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CERTIFICATE OF SERVICE

I Susannah R. Cole, hereby certify that I have served the Petition for Rehearing in the foregoing action by depositing two copies of same in the InterAgency Mail to Susan B. Hackett, Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201 this 12th day of July, 2018.

SUSANNAH R. COLE
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ATTORNEY GENERAL

July 12, 2018

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: ***The State v. Steven Otts***
Appeal from Saluda County
Appellate Case No. 2014-000274

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the *Return to Petition for Rehearing,* and Certificate of Service in the above-captioned matter for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Susannah R. Cole
Assistant Attorney General

SRC/csm
Enclosures
cc: Susan B. Hackett, Esq., Appellate Defense
The Honorable S.R. Hubbard, III, Solicitor, Eleventh Judicial Circuit
Trisha Allen, Director, Victim Advocacy Division