STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS



APPEAL FROM HORRY COUNTY
Court of General Sessions
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2017-002168

THE STATE, .....RESPONDENT,

v.

PHILIP DAVID GUDERYON,.....APPELLANT.

# INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

Cases



Statutes

Other Authorities

## STATEMENT OF ISSUES ON APPEAL

I. The trial judge properly denied Appellant's motion for a directed verdict of acquittal because the State presented substantial circumstantial evidence of his guilt.

II. The trial judge properly instructed the jury on the requirements for self-defense and the level of intent required for a conviction of assault and battery of a high and aggravated nature under South Carolina law. (Appellant's Issues II and III)

## STATEMENT OF THE CASE

On January 21, 2016, the Horry County Grand Jury indicted Appellant for assault and battery of a high and aggravated nature (ABHAN). On October 9–12, 2017, Appellant proceeded to a jury trial before the Honorably Benjamin H. Culbertson. J. Eric Fox, Esquire represented Appellant; Assistant Solicitors Joshua D. Holford, Esquire, and Cara J. Walker, Esquire, represented the State. The jury found Appellant guilty as charged. The trial judge sentenced Appellant to ten years' incarceration.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

## STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

## ARGUMENT

### I.

**The trial judge properly denied Appellant's motion for a directed verdict of acquittal because the State presented substantial circumstantial evidence of his guilt.**

Appellant argues the trial judge erred in denying trial counsel's motion for a directed verdict because the state failed to present any evidence that Appellant's conduct caused Victim's injuries. The State disagrees with this allegation of error. The State presented substantial evidence Appellant punched Victim and that the punch itself or Victim's collision with the ground after the punch caused Victim's severe head trauma.

Statement of Facts

Mariah Stevens, Victim's then-girlfriend, was at the bar known as Carlos 'n Charlie's with Victim on the night of October 16–17, 2015. They went there to play pool and meet up with some friends when she ran into her friend "Jimer."[1] Jimer touched Stevens inappropriately on her breast, so she told Victim about incident and he went over and talked to Jimer. Everything appeared peaceful between Victim and Jimer afterwards, with Jimer joining the couple for a game of pool. Stevens never witnessed any aggression from either of the men. At some point, she went to the restroom but when she returned, Victim was gone. (Tr.p.174, line 12–Tr.p.179, line 20).

According to Jimer's recollection of events, he was at the club with Appellant and a few other friends. He met Victim for the first time that night. After he touched Stevens's breasts, Victim approached him, grabbed his arm, and told Jimer that Stevens was his girlfriend. The two men shook hands and made peace; Jimer never felt threatened or scared throughout his interaction with Victim. Jimer turned his head and "felt some wind come [from] over his

[1] Jimer's legal name is James J. Petrocine, Jr. (Tr.p.188, line 22–Tr.p.189, line 3).

shoulder" and heard a hit. When he looked at Victim, he noticed he was on the ground. He did not see who hit Victim. While he spoke with Victim, Jimer believed Appellant was standing next to the bar, and learned after the attack, "either [from the police] or [Appellant]" that Appellant was the person who hit Victim. (Tr.p.188, line 22–Tr.p.204, line 14).

In the days after the crime, Sergeant Hugh Jones of the Myrtle Beach Police Department investigated the crime with a detective out of his office. They interviewed several individuals, including Jimer, and reviewed the security footage of the event. Based on the information provided by Jimer, they believed Appellant was the man who hit Victim. On October 17, 2015, they arrested Appellant and brought him to the police department where he was interviewed by the officers. He admitted to hitting Victim, but claimed he felt threatened and acted in self-defense. (Tr.p.205, line 5–Tr.p.221, line 7; State's Exhibits 7–10).

Dr. Joseph Cheatle, the neurosurgeon who treated Victim, was qualified as an expert in his field and testified about Victim's injuries and treatment. He was at the hospital when Victim first arrived and discovered his was in a coma. Further testing revealed Victim had a "very large subdural hematoma" which in turn caused his brain to swell. According to Dr. Cheatle, The rear of Victim's head, near the base of his skull, was the site of impact for the force which caused his brain to collide with the front of his skull, causing the hematoma near his frontal lobe. Further, it appeared a single blow, which could have been a punch, caused the trauma. (Tr.p.130, line 14–Tr.p.138, line 12; Tr.p.143, lines 2–11; Tr.p.144, line 13–Tr.p.145, line 17).

To treat Victim's severe condition, Dr. Cheatle performed an emergency craniotomy to open up a "skull flap" and relieve pressure on the brain. However, after several days, Victim's brain began swelling again and Dr. Cheatle removed his frontal lobe in a last-ditch effort to save his life. (Tr.p.138, line 13–Tr.p.141, line 22).

On cross-examination, Dr. Cheatle testified Victim's injury could also have been caused by contact with an object, such as a bat, pipe, wrench, or even a hard surface, and that the medical staff working at Victim had no specific knowledge as to what injured him. (Tr.p.146, line 12–Tr.p.152, line 3).

At the close of the State's case, trial counsel moved for a directed verdict, claiming the State failed to meet its burden of proving Appellant caused Victim's injuries. He conceded Appellant told police he hit Victim in the face and that it was possible Victim suffered his severe brain trauma as a result of falling and striking his head on the floor. However, because there was uncertainty as to what specifically caused Victim's injury, the State failed to prove its theory of the case. (Tr.p.224, line 9–Tr.p.226, line 3; Tr.p.230, line 17–Tr.p.232, line 22)

In response, the State argued the circumstantial evidence, including the video recording of the battery, indicated Appellant struck Victim in the back of the head with a sucker-punch. When the trial judge asked whether the State was "shifting gears" and arguing Appellant could have punched Victim in the front of his head, the State claimed it was not arguing such as the lack of bruising or other indicator of a frontal blow, along with Dr. Cheatle's testimony, supported its theory of the case. However, the State eventually conceded the jury could determine Victim was hit from the front and his wound resulted with his collision with the ground. Further, the State noted there was no dispute that however Victim was hit by Appellant, the result of the attack was great bodily injury. (Tr.p.226, line 5–Tr.p.230, line 15).

While he claimed it was a "close call," the trial judge denied trial counsel's motion for a directed verdict. He believed there was sufficient evidence of Appellant's guilt, but not pursuant to the State's theory of the case that Appellant punched the back of Victim's head. Instead, it

was more likely Appellant punched the front of Victim's head and the latter's collision with the ground caused his injuries. (Tr.p.240, line 24–Tr.p.242, line 8).

Trial counsel presented evidence Appellant did not needlessly attack Victim, but instead was responding to a serious threat against himself or Jimer. Ambrose Heavener, who met Appellant while the two were incarcerated, testified he was at Carlos 'n Charlie's the night of the attack.[2] He recalled some type of altercation which occurred between two men, and progressed from a loud argument. The two men stood chest-to-chest, with fist clenched when Appellant approached the situation, and got in between them and tried to separate the two men. At that point, the "taller" man quickly turned towards Appellant as if he was going to hit him, so Appellant hit the man in the face, causing him to fall down. (Tr.p.287, line 18–Tr.p.310, line 14).

Steven Sumpter, another individual incarcerated with Appellant and also claimed he was at Carlos 'n Charlie's the night of the assault. He testified he was sitting at the bar when he saw Appellant approach some commotion occurring on the dance floor. Appellant approached an ongoing verbal argument and "seemed to step in between two people." The larger of the two men threw a punch at Appellant and the latter responded in kind and made contact with the large man's face and appeared to knock him out, causing him to fall straight backwards. (Tr.p.310, line 23–Tr.p.326, line 19).

At the conclusion of the defense's case, trial counsel renewed his motion for a directed verdict. Again, the trial judge denied the motion. (Tr.p.327, line 14–Tr.p.Tr.p.328, line 13).

Standard of Review

On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston,

[2] Notably, the State presented evidence circumstantial evidence Heavener was not in Myrtle Beach the night of the attack. Heavener possessed a North Carolina driver's license and permanent residence, and was various parts of North Carolina in the days before and after the crime. (Tr.p.302, line 1–Tr.p.303, line 16).

367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. Weston, 367 S.C. at 292–93, 625 S.E.2d at 648; State v. Cherry, 361 S.C. 588, 593–94, 606 S.E.2d 475, 477–78 (2004). The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling or if the ruling is based on an error of law. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002); State v. Dantonio, 376 S.C. 594, 603, 658 S.E.2d 337, 342 (Ct. App. 2008). Indeed, "unless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Curtis, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004); State v. Condrey, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002). Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements of the crime beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)). The task of the trial court is to simply determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016). The reviewing court should affirm if in viewing the evidence in the light most favorable to the State, "the evidence

could induce a reasonable juror to find [the defendant] guilty." See State v. Pearson, 415 S.C. 463, 474, 783 S.E.2d 802, 808 (2016); also State v. Richburg, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968) ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury.").

Section 16-3-600 provides:

> (B)(1)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) (Supp. 2011). Further, the statute defines "great bodily injury" 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) (Supp. 2011).

Analysis

Appellant argues the State failed to provide evidence that Appellant's punch caused Victim's injury, citing to State v. Greene, 423 S.C. 263, 814 S.E.2d 496 (2018) to support this proposition. However, similar to Greene, the State presented evidence which, viewed in the light most favorable to it, supported presenting the charge to the jury. In Greene, the defendant was convicted of homicide by child abuse, involuntary manslaughter, and unlawful conduct toward a child for the death of her infant daughter (Daughter) when she died from morphine poison when she was forty-six days old. The record showed Greene, a former nurse was addicted to numerous drugs, including morphine, at the time of Daughter's death and the State's theory of the case was

that Greene poisoned Daughter through breastfeeding. The Supreme Court of South Carolina affirmed Greene's conviction, noting the evidence showed: (1) Appellant continuously took morphine and other drugs while pregnant with and breastfeeding Daughter; (2) Appellant took more morphine than her doctors proscribed; (3) Appellant exclusively breastfed Daughter until at least a week prior to her death, with some of Appellant's statements to police going as far as to say she "extensively" breastfed her during the two nights preceding her death. Considering the evidence in its entirety, particularly the expert testimony of a toxicologist, the Court found the evidenced provided "a substantial basis from which a reasonable juror could conclude [Greene]'s breast milk was the source of the morphine that killed [Daughter]."

Here, similar to Greene, there was substantial evidence Appellant's attack caused Victim's injuries. The State presented numerous pieces of evidence, including Appellant's own statements to police, which demonstrated he was the individual who hit Victim. Appellant's own "witnesses" agreed with this assertion. Further, Dr. Cheatle testified a powerful punch to the head, or the collision with the floor, caused Victim's head trauma; the former possibility was the State's primary theory of the case, but the evidence presented also supported the possibility that the latter killed Victim. In either situation, Victim's injuries were proximately caused by Appellant's punch. See State v. Des Champs, 126 S.C. 416, 416, 120 S.E. 491, 493 (1923) (describing the "proximate cause" of an injury as a cause which, "in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred). Further, Appellant's argument that the bouncers moving Victim could have caused his injuries is not supported by the record. The record lacks any evidence indicating the bouncers who removed Victim mishandled him. Regardless, Dr. Cheatle

testified Victim's injuries originated from a single, powerful impact and not repeated, minor blows as alleged by Appellant.

Ultimately, the only element of the offense disputed at trial was whether Appellant's actions were unlawful. The surveillance video and Jimer's testimony both demonstrated Victim was not involved in an altercation with Jimer or Appellant at the time of the attack; thus, pursuant to this evidence, Appellant's actions could not be considered lawful and/or self-defense. In light of this substantial evidence of Appellant's guilt, the trial judge did not err in denying trial counsel's motion for a directed verdict. See Cherry, 361 S.C. at 593–94, 606 S.E.2d at 477–78. (finding that any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused supports the denial of directed verdict).

## II.

**The trial judge properly instructed the jury on the requirements for self-defense and the level of intent required for a conviction of assault and battery of a high and aggravated nature under South Carolina law. (Appellant's Issues II and III)**

Appellant argues the trial judge erred in its instructions to the jury, claiming the trial judge improperly instructed the jury: (1) Appellant had to be in fear of "great bodily injury or death" before he could act in self-defense; and (2) regarding Appellant's "criminal intent," the State had only to prove Appellant intended to injure Victim without any regard for whether Appellant intended the level of injury which actually occurred. The State disagrees with these allegations of error. First, the State notes the trial judge did not instruct the jury that Appellant had to be in fear of "great" bodily injury, but that he had to be in fear of "serious" bodily injury. Further, the trial judge accurately and adequately explained these concepts to the jury. As demonstrated below, the trial judge did not err in either regard.

Statement of Facts

Prior to closing arguments, the trial judge allowed the parties to submit proposed charges. Trial counsel, although he agreed with "99 percent of the self-defense charge," objected to the language stating that Appellant had to be in fear of death or great bodily injury in order to response. He "[could not] imagine that [South Carolina] courts think that it is the law that a person that is assaulted with something less than deadly force, a fist, does not have a right to defend himself." He noted he felt it would be improper if he could go up to someone a punch him in the face that such a victim could not respond. The trial judge conceded he understood trial counsel's concerns. In response, the State argued that a person is not entitled to act in self defense for just any injury, but noted trial counsel's concerns were unfounded in the instant case

because a person fearing a punch from another person would be in imminent danger of great bodily injury. Neither of the parties presented the trial judge with case law regarding this specific issue, so the trial judge denied the motion and informed trial counsel that he might have ground for appeal as to whether a defendant fearing moderate bodily injury had the right to defend himself. (Tr.p.340, line 23–Tr.p.350, line 10).

During his instructions to the jury, the trial judge explained that for the State to prove criminal liability it had to prove Appellant possessed a "criminal intent." It explained criminal intent as follows:

> Now, in order to establish criminal liability, criminal intent is required. For example, the mental state required to be proven by the State for a particular crime might be purpose, intent, knowledge, recklessness or criminal negligence. Criminal intent must be proven by the State beyond a reasonable doubt. Criminal intent is always a matter that must be determined by the jury from the circumstances surrounding the situation. Intent cannot be proven to a mathematical certainty. Medical science cannot dissect a person's brain and determine what the person had in mind. So, the law says that criminal intent may be inferred from the circumstances shown to have existed. This is how you make a determination of whether or not the element requiring intent was present. Intent does not have to be proven by direct and positive evidence, but intent may be established by inference in the same way as another fact, by taking into consideration the acts of the parties and all the facts and circumstances of the case. Criminal intent is a mental state, a conscious wrongdoing. You must determine what [Appellant] intended to do based on the circumstances show to have existed. Criminal intent can arise from an action or a failure to act. It may arise from negligence, recklessness, or [] indifference to duty or to consequences that is considered by the law to be the equivalent of criminal intent.

(Tr.p.389, line 25–Tr.p.390, line 23).

The trial also explained that to find Appellant guilty of ABHAN, it would have to prove "beyond a reasonable doubt that [Appellant] unlawfully injured another person and either great bodily to that person resulted or the act was accomplished by means likely to produce death or

great bodily injury." He noted "great bodily injury" meant 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 body member or organ. The trial judge further explained the lesser-included offenses of second and third degree assault and battery also involved unlawful injuries to a victim but were distinguishable from ABHAN and each other by the severity of the actual or potential injury suffered. (Tr.p.392, line 7–Tr.p.394, line 12).

The judge also instructed the jury on self-defense, stating:

> [Appellant] raises the defense of self-defense. Self-defense is a complete defense and, if it is established, you must find [Appellant] not guilty. The State has the burden of disproving self-defense by proof beyond a reasonable doubt. If you have a reasonable doubt of [Appellant]'s guilt after considering all of the evidence, including the evidence of self-defense, then you must find [Appellant] not guilty. On the other hand, if you have no reasonable doubt of [Appellant]'s guilt after considering all of the evidence, including the evidence of self-defense, then you must find [Appellant] guilty.
>
> The following elements are required to establish self-defense. First, [Appellant] must be without fault in bringing on the difficulty. If [Appellant]'s conduct was the type which was reasonably calculated to and did provoke an assault resulting in death or great bodily injury, [Appellant] would be at fault for bringing on the difficulty and would not be entitled to an acquittal based on self-defense. The second element of self- defense is that [Appellant] was actually in imminent danger of death or **serious bodily injury** or that [Appellant] actually believed he was in imminent danger of death or **serious bodily injury**. If [Appellant] was actually in imminent danger, self-defense requires that the circumstances warranted a person of ordinary firmness and courage to strike the fatal blow to prevent death or **serious bodily injury**. If [Appellant] believed he was in imminent danger of death or **serious bodily injury**, self-defense requires that a reasonably prudent person of ordinary firmness and courage would have had the same belief. In deciding whether [Appellant] actually was or believed he was in imminent danger of death or **serious bodily injury**, you should consider all the facts and circumstances surrounding the crime including the physical condition and characteristics of [Appellant] and [Victim]. [Appellant] does not

> have to show that he was actually in danger. If [Appellant] believed he was in imminent danger and a reasonably prudent person with ordinary firmness and courage would've had the same belief, then [Appellant] has the right to act on appearances, even though [Appellant]'s beliefs may have been mistaken. You must decide whether [Appellant]'s fear of immediate danger of death or **serious bodily injury** was reasonable and would have been felt by an ordinary person in the same situation. Words accompanied by hostile acts may, depending on the circumstances, establish self-defense. However, mere words, no matter how abusive, insulting, vexatious, or threatening they may be, will not justify an assault and battery unless accompanied by an actual offer of physical violence. The relative sizes, ages and weights of [Appellant] and [Victim] may be considered in [] deciding the apparent or actual need for force in self-defense and the amount of force needed.
>
> The final element of self-defense is that [Appellant] had no other probable way to avoid the danger of death or serious bodily injury and to act as [Appellant] did in this particular instance. A person cannot be required to make an exact calculation as to the degree or amount of force which may be needed to avoid death or serious bodily harm. Therefore, in self-defense, [Appellant] has the right to use the force needed to avoid death or **serious bodily harm.** The force used in self-defense does not have to be limited to the degree or amount of force used by [Victim]. **[Appellant] has the right to use so much force as appeared to be necessary for complete self-protection and which a person of ordinary reason and firmness would've believed to be needed to prevent death or serious bodily harm.**

(emphasis added). Additionally, the trial judge added additional instructions based upon the evidence presented in the case, including: (1) Appellant had the right to act in the defense of others; (2) Appellant was entitled to act on appearances; (3) Appellant was not required to wait for a person to be actually attacked before acting. However, following the trial judge's instructions, trial counsel requested the language pertaining to the defense of others be removed from charge, and the State stipulated to the request. Accordingly, the trial judge informed the jury to disregard that portion of his charge. Trial counsel did not request any additional language be added or removed to the self-defense charge. (Tr.p.394, line 13–Tr.p.409, line 11).

During the jury's deliberations, it submitted a question regarding whether it should consider Appellant's intent or the resulting harm when determining whether his actions constituted criminal action. The trial judge informed the parties that he would explain that to prove the various offenses, the State would have to show, beyond a reasonable doubt, that Appellant intended to unlawfully injury Victim, and that each degree of assault and battery charged differed only in the degree of harm which did, or could have, resulted from Appellant's actions. He specifically noted ABHAN required actual great bodily injury or the possibility of great bodily injury based upon the means used to accomplish the battery, second-degree assault and battery required moderate bodily injury or the use of means which could have caused such, and third-degree assault and battery required only an unlawful injury or an offer or attempt to do such. The State agreed with the trial judge's suggested modification of the charges, but trial counsel objected to adding "intent" to the wording of each charge and believed the trial judge should instead include "the general charge on intent as a general proposition." Trial counsel claimed he was concerned the trial judge's new charge would emphasize "intent" and suggest an answer to the jury's question "without addressing their final question, which is, is the resulting harm the deciding factor." The trial judge denied trial counsel's request and decided to give copies of the charges to the jury. He then summoned the jury to the courtroom and instructed it that each degree of assault and battery with which Appellant was charged required the State prove: (1) Appellant "intended to unlawfully injure" Victim, and (2) the level of injury or the potential thereof based upon the means used by Appellant. (Tr.p.411, line 19–Tr.p.420, line 3; Court's Exhibits 1–3).

Standard of Review

The conduct of a criminal trial is left largely to the sound discretion of the presiding judge and the appellate court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way. State v. Commander, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (quoting State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982)).

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). In reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). "A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused." State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989). "It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge." State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005) (quoting Clark v. Cantrell, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000)).

When reviewing the trial judge's jury instructions, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Wharton, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). A jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996). So long as the jury instructions

presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996).

Under South Carolina's assault and battery statute, "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."

To establish self-defense in South Carolina, four elements must be present: (1) the defendant was without fault in bringing on the difficulty; (2) the defendant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonable, prudent person of ordinary fitness and courage would have entertained the same belief; and (4) the defendant had no other probable means of avoiding the danger of losing his life or sustaining serious bodily injury other than to act as he did. State v. Santiago, 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006) (citing Jackson v. State, 355 S.C. 568, 57–71, 586 S.E.2d 562, 562 (2003); State v. Day, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000)). If any one of the four elements required by law is not present, a defendant is not entitled to a self-defense instruction. State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010).

An "injury" is defined as "[a]ny harm or damage." Black's Law Dictionary (10th ed. 2014) (emphasis added). A "bodily injury" is described as "physical damage to a person's body." Id. Black's Law Dictionary further defines "serious bodily injury" as "serious physical impairment of the human body[,] [especially a] bodily injury that creates a substantial risk of death or that causes serious, permanent disfigurement or protracted loss or impairment of the function of any body part or organ." Id. Finally, "deadly force" is defined as "[v]iolent action known to create a substantial risk of causing death or serious bodily harm." Id.

"General intent" is the "intent to perform an act even though the actor does not desire the consequences that result." Black's Law Dictionary (10th ed. 2014). Battery is a general intent crime, "and thus the required mental state entails only an intent to do the act that causes the harm." 6A C.J.S. Assault § 86 (2018). "It has [] been held that a prosecutor need only prove that the defendant actually intended to commit a willful and unlawful use of force or violence upon the person of another to show that defendant committed battery." Id. "A specific intent is not required [to prosecute a] battery [when it] is committed in the intentional performance of an unlawful act, where the act is directly perilous to human life . . . ." Id.

Self-Defense

Initially, the State notes the alleged error in instructing the jury that self-defense requires a fear of "great bodily injury or death" did not occur. Instead, the trial judge, in accordance with South Carolina law, informed jurors that fear of serious bodily injury or death is required for such a finding. Distinguishing these concepts is critical, because while a serious bodily injury includes great bodily injury, it also includes much less serious behavior. For example, an eye swollen shot would be impaired and thus a serious bodily injury, yet not death or "permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ" contemplated as "great bodily injury" in the assault and battery statute. See S.C. Code Ann. § 16-3-600 (A)(1). Thus, a person fearing a punch to the face which could cause an eye to swell shut would be entitled to use self-defense.

Moreover, contrary to Appellant's belief, his fist was, in fact, "deadly force." As noted above, "deadly force" is any violent action which creates a substantial risk of serious bodily harm or death. The act of punching someone, while not as extreme as the use of a gun or knife, still has the potential to kill or cause serious bodily harm. The best example of is this very case;

Appellant's punch caused Victim's death. Dr. Cheatle testified a punch was capable of causing Victim's head trauma.

Finally, contrary to Appellant's assertions, the trial judge did provide a specialized self-defense charge. See State v. Fuller, 297 S.C. 440, 444–45, 377 S.E.2d 328, 331 (1989) (trial judges must "consider the facts and circumstances of the case at bar in order to fashion an appropriate [self-defense] charge"). As demonstrated above, the trial judge instructed the jurors on the elements of self-defense, but then went further and added fact-specific directions to his charge, including language stating: (1) Appellant had the right to act in the defense of others; (2) Appellant was entitled to act on appearances; (3) Appellant was not required to wait for a person to be actually attacked before acting. Such language was removed from the charge at trial counsel's request.

Accordingly, because the trial judge instructed the jury on the correct standards of law applicable to the case, he did not err in providing his charge to the jury.

Intent

The State also disagrees with Appellant's assertion that the trial judge's supplemental instructions on the various degrees of assault and battery were error. The trial judge correctly explained that all degrees of assault and battery require only a general intent to injure and that the severity and type of resulting harm are what differentiate these offenses from each other. See 6A C.J.S. Assault § 86 (2018) (explaining battery is a general intent crime, "and thus the required mental state entails only an intent to do the act that causes the harm). The Supreme Court of South Carolina recently confirmed that the various degrees of assault and battery are all general intent crimes. In State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), the court found the crime of attempted murder is a crime which requires a specific intent to kill. Id. at 55–56, 810

S.E.2d at 22. However, the court found that one charged with attempted murder who did not possess express malice and a specific intent to kill would actually be guilty of a crime which "involve[s] a lower level of intent," including "the assault and battery offenses codified in [S.C. Code Ann.] section 16-3-600. Id. at 74 n.5, 810 S.E.2d at 32 n.5.

Further, Appellant's reliance on State v. Bryant, 316 S.C. 216, 447 S.E.2d 852 (1994) for the proposition that the various degrees of assault and battery are specific intent crimes is entirely misplaced. In Bryant, the arresting officer initiated a traffic stop with defendant due to the latter's speeding. State v. Bryant, 311 S.C. 442, 443–44, 429 S.E.2d 816, 817 (Ct. App. 1993). Bryant instead fled and stopped in a driveway. Id. When the officer pulled in behind Bryant, the latter grabbed him by the throat and reached for the officer's gun. Id. During the ensuing struggle, Bryant threw the officer against the patrol car, damaging the vehicle, before the officer was able to gain the upper hand. Id. Ultimately, Bryant was convicted of failing to stop for a blue light or siren, resisting arrest, ABHAN, and malicious injury to personal property. Id. Bryant challenged, and prevailed, on the notion that the State had to prove Bryant intended to damage the property because his intent to harm the officer could not be transferred to the property "because the two harms differ" and the doctrine of transferred intent only applied in situations in which the same type of harm occurred to an unintended victim. Id. at 444–45, 429 S.E.2d at 818. The Supreme Court of South Carolina agreed with the Court of Appeals' analysis and affirmed its ruling. Bryant, 316 S.C. at 219, 447 S.E.2d at 854. No challenge was made to the propriety of charging Bryant with ABHAN based upon his general intent to harm the officer.

Without question, the level of intent required for ABHAN and the various degrees of assault and battery is a general intent to injure. The trial judge's instructions correctly indicated

such to the jurors and that the resulting injury determined the offense for which Appellant was guilty. Accordingly, the trial judge did not err in supplemental instructions to the jury.

## 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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ATTORNEYS FOR RESPONDENT

December 5, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS



APPEAL FROM HORRY COUNTY
Court of General Sessions
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2017-002168

THE STATE, .....RESPONDENT,

v.

PHILIP DAVID GUDERYON,.....APPELLANT.

**PROOF OF SERVICE**

I, Destiny Blue, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served this 5th day of December, 2018.

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ALAN WILSON
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December 5, 2018



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Division of Appellate Defense
Post Office Box 11589
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RE: State v. Philip David Guderyon – Appellate Case No. 2017-002168

Dear Ms. Hackett:

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

Sincerely,

William F. Schumacher
Assistant Attorney General
Bar Number 100231

WFS/
Enclosures

cc: Honorable Jenny A. Kitchings
(original and one enclosed)
Victim Advocacy Division