STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID ALAN WHITE,

APPELLANT

APPELLATE CASE NO 2016-000616

FINAL BRIEF OF APPELLANT

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I. Whether the trial court erred in limiting Appellant to pursuing either the defense of self-defense or accident, ruling that the two were mutually exclusive defenses?

II. Whether the trial court erred in (1) excluding Appellant's proffered testimony that the alleged victim told Appellant that he had a gun and a knife on his moped, which was located in close proximity to the incident, and (2) restricting the admission of testimony that the victim told Appellant about his history of making shanks in prison to impeachment only, where such evidence was not hearsay and integral to Appellant's defense?

III. Whether the trial court erred in denying Appellant's request to charge self-defense where there was evidence in the record that Appellant was armed in self-defense and acted in self-defense?

IV. Whether the trial court erred in denying Appellant's request to charge assault and battery second degree where the severity of the alleged victim's injuries was a question of fact for the jury to decide?

STATEMENT OF THE CASE

On November 28, 2013, the Charleston County Grand Jury rendered an indictment against Appellant David Alan White for attempted murder. On September 2, 2014, the Grand Jury rendered an additional indictment against White for possession of a weapon during the commission of a violent crime. R. 444

On March 14-17, 2016, White appeared for trial before the Honorable J.C. Nicholson, Jr. and a jury. White was represented by Mary Ford and Benjamin Mack, and the state was represented by Jenna Newman and Shannon Elliott. R. 1, 92, 282, and 419. The jury was charged on attempted murder, assault and battery of a high and aggravated nature ("ABHAN"), assault and battery first degree, possession of a weapon during the commission of or attempt to commit a violent crime, and accident. R. 404, l. 12 – 408, l. 18. The trial judge denied the defense's request to charge self-defense. R. 413, l. 6 – 416, l. 1. The jury returned a verdict of guilty on ABHAN and the weapons charge. R. 424, l. 1 – 428 l. 17. Judge Nicholson sentenced White to consecutive terms of ten years for ABHAN and five years for the weapons charge, for a total of fifteen years. R. 430, l. 1 – 443, l. 5.

This appeal follows.

STATEMENT OF FACTS

Introduction

Appellant White did not dispute that he caused the injury to the alleged victim, Joseph Johnson. However, he testified that his actions were defensible because he was reacting to Johnson punching him in the side of the head as White was leaving the yard of their mutual friend and did not intend to cut Johnson with the knife. Rather, White's hand was in the pocket of his heavy jacket, along with his open pocket-knife, when he was struck. White immediately spun around and intentionally swung out his arm, but he did not realize that knife was in his hand or that Johnson was still so close to him. The knife cut Johnson's neck. R. 345, l. 9 – 349, l. 23. The solicitor argued that "this was no accident" and that White acted intentionally and aimed for Johnson's neck. R. 394, l. 6 – 395, l. 5. The treating physician testified that though surgery was required to repair the damaged muscle, there was no injury to the more serious parts of the neck. R. 296, l. 22 – 301, l. 6; R. 303, l. 6 – 304, l. 16; R. 306, l. 3 – 307, 19.

Despite the evidence, the trial judge refused the defense's requests for jury charges on self-defense and assault and battery second degree. R. 413, l. 4 – 416, l. 1. He instructed defense counsel that she had to pursue either accident or self-defense, saying that they cannot "co-exist." R. 328, l. 22 – 333, l. 12. He further excluded additional evidence that would have supported White's assertion of self-defense, including testimony that Johnson was talking about how he made shanks in prison and that he had knife and gun on his moped, which he had accessed just prior to the incident. R. 323, l. 25 – 341, l. 22. Regarding the lesser-included offense of assault and battery second degree, he ruled that Johnson's injury was "severe" as a matter of law. R. 414, ll. 2-5.

Varying Accounts of the Incident

On the night before Thanksgiving 2013, Spencer Washington (hereinafter "Spencer') had several men, including White, over to his house to smoke turkeys for the holiday. White arrived at Spencer's house at approximately 12:30 or 1:00 p.m. that day to help Spencer rake leaves. R. 322, l. 19 – 323, l. 4; R. 353, l. 11 – 354, l. 20. White had been fishing earlier in the day such that he had his pocketknife in the pocket of his thick Carhart jacket. He used the knife at Spencer's house to cut the saran wrap off pallets so that they could be used in the fire pit. He put the knife back into his pocket, with the blade out. R. 261, ll. 6-14; R. 346, l. 5 – 347, l. 18.

Joseph Johnson was also over at Spencer's house that day. White had never met Johnson before that night. R. 323, ll. 5-15; R. 355, ll. 2-6. Johnson, who was a barber "on the side," cut several people's hair that evening. While he cut White's hair, Johnson told White about the shanks that he used to make when he was in prison. R. 323, l. 16 – 326, l. 12; R. 342, ll. 6-22. Johnson later told White that he had a gun and a knife underneath the seat of his moped.[1] While the comments struck White as odd, he just walked away and went to the fire pit. R. 326, l. 18 – 327, l. 4; 342, l. 23 – 343, l. 13. Later on in the evening, White went to the store with Kyle Green to get some beer. R. 343, l. 21 – 344, l. 5. When they returned and rejoined the other men at the fire pit, the conversation between all of the men turned to the subject of wrestling. They joked about who amongst them would have to "tap out" first. The men commented on how Johnson had been a champion wrestler in high school. R. 344, l. 6 – 345, l. 8.

White left the group to go call his wife to pick him up because he was tired of being out there and felt uncomfortable. R. 345, ll. 9-16; R. 365, ll. 3-7. As he was walking away, Johnson

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[1] White testified that Johnson told him about the gun and knife on his moped during an *in camera* hearing. As will be discussed more fully *infra*, the trial judge excluded this testimony from being admitted before the jury, finding that it was hearsay. *See* R. 323, l. 25 – 341, l. 22.

came up behind him and punched White in the side of the head. White testified that he reacted by spinning around quickly. R. 345, l. 16 – 346, l. 4; R. 347, ll. 22-25. White had several head injuries in the past and was concerned about the impact the punch to his head may have had. R. 348, l. 1-12. White said that he did not even realize that the knife was in his hand when he spun around and swung his arm. Though he thought that it was Johnson who had hit him, he did not realize that he was going to be that close when he turned. R. 351, ll. 7-14; R. 358, ll. 2-8; R. 360, ll. 8-20. He did not realize that Johnson was cut until he saw the blood. R. 349, ll. 8-19.

When asked why he did not run away when Johnson hit him, White said that he "was more scared than anything" and unsure if he could get away safely. He had felt threatened by the statements made by Johnson earlier in the night and was fearful of Johnson. R. 348, l. 13 – 349, l. 5; R. 351, ll. 15-17. White's intent when he swung his arm was "protecting" and "defending" himself. R. 349, ll. 6-7. He did not intend to cut Johnson or aim for his throat. R. 320, ll. 16-23. White dropped the knife and left because he was scared. R. 349, l. 22 – 350, l. 7. He considered going to the hospital to have his head checked, but after police contacted him he stayed at his mother's house until police arrived. White was cooperative with police and gave a statement. R. 350, ll. 8-25. While his statement to police was not admitted into evidence, White agreed with the solicitor that he "told the police that the victim snuck up on [him] and boxed [him]." R. 356, ll. 5-7. He also told police that he was scared that night, wanted to go to the hospital, and was praying for Johnson. R. 363, l. 10 – 364, l. 5.

The State called several witnesses in an attempt to show that White – a thirty year old man with a wife, three children, a steady job, and no criminal history – attempted to kill Johnson that night. *See* R. 320, l. 25 – 322, l. 4; R. 441, l. 21 – 442, l. 6. They included all of the men at the backyard gathering – Spencer Washington ("Spencer"), Albert Jenkins, Henry Washington

("Henry"), Dwayne Forrest, Kyle Green, and Joseph Johnson. As will be seen below, none of the men gave a consistent account the incident, or the events leading up to it.

Spencer did not see White and Johnson interact during or after White's haircut, and never saw them being aggressive with each other. R. 70, l. 21 – 71, l. 8; R. 73, ll. 13-21. As far as the incident itself, Spencer said that he saw White walk past Johnson, and then saw White swing back towards Johnson. **Spencer said that White appeared to be in a state of shock after he dropped the knife, such that he did not believe that White intended to cut Johnson.** R. 71, ll. 15-25; R. 83, ll. 3-23. While Spencer had no independent recollection of it, he agreed with the solicitor that in his written statement he wrote that White told Johnson "you're about to get this" before White swung at him. R. 72, l. 7 – 73, l. 10; R. 88, l. 15 – 89, l. 21. **Spencer said that, until White dropped a knife after the incident, he never saw White with a knife that night.** R. 84, ll. 12-20.

Kyle Green knew both White and Johnson through Spencer. R. 180, l. 25 – 181, l. 25. When Green arrived people were in the back smoking turkeys and drinking beer. He saw Johnson cutting people's hair, including White's hair. R. 182, ll. 3-23. Green observed White and Johnson joking with each other – nothing out of the normal. R. 182, l. 24 – 183, l. 3. He was a good distance away when the incident happened, so he did not know what caused it. He saw them facing each other and both of their hands go up. When asked whose hands went up first, he initially said: "I think it might have been David's [White's hands]." R. 183, ll. 4-12; R. 184 ll. 5-9. He then confirmed to the solicitor that it was White whose hands went up first, followed by Johnson. R. 183, ll. 13-16. **On cross-examination, Green admitted that he could not really recall how the incident happened.** R. 185, ll. 3-18. Green did not see White with a

weapon at any time during the several hours that he was at Spencer's house that night. R. 183, ll. 17-20; R. 185, l. 19 – 186, l. 3.

Albert Jenkins knew both Johnson and White for approximately nine months from seeing them at Spencer's house, though he was not close with either of them. R. 148, ll. 2-23; R. 156, ll. 3-13. He was at Spencer's for approximately two hours prior to the incident. R. 148, l. 24 – 149, l. 19. Jenkins said that White and Johnson had been joking with each other but the "jokes got a little serious and so [Spencer] asked them to cut the joking because it was getting a little out of hand." R. 149, l. 20 – 150, l. 25. He claimed that White had been playing with a knife and that Spencer told White to stop or he would have to leave. R. 150, l. 25 – 151, l. 6; R. 156, l. 19 – 157, l. 2. Jenkins had never mentioned seeing White with a knife earlier in the evening in any of his prior statements to the police or the solicitor. R. 157, ll. 3-15.

Though Jenkins was on the other side of the yard, he said that White was leaving at Spencer's request. As White was walking away, White and Johnson "got close to each other [and] pushed off." R. 151, l. 7 – 152, l. 3; R. 152, ll. 6-23. Johnson grabbed his neck and said "oh man he cut me." R. 152, ll. 3-4. **Jenkins admitted that he was surprised because he did not see all that transpired.** R. 152, ll. 4-5. Though the solicitor prompted him to say that White ran from the yard, Jenkins corrected her that White walked out of the yard. R. 154, ll. 17-23.

Henry Washington is Spencer's brother. White and Johnson were both hanging out by the fire when Henry arrived at Spencer's on the night of the incident. R. 162, l. 1 – 163, l. 1. Henry described all of the men as laughing and joking with each other, with the conversation turning to wrestling at one point and who would "tap out" first. R. 163, l. 2 – 164, l. 5; R. 166, l. 16 – 167, l. 2. He recalled White pushing Johnson earlier in the evening but said that it was well

before the incident and playful. R. 165, l. 23 – 166, l. 15. **Henry did not observe the incident between White and Johnson, as his back was turned to them until Johnson said that he was cut.** R. 164, ll. 6-25; R. 168, ll. 5-7. Henry did not know that White even had a knife with him, as he had not seen him with one earlier in the night. R. 168, ll. 12-16.

Dwayne Forrest had seen both White and Johnson at Spencer's house two or three times in the past but did not know either of them well. R. 162, ll. 5-17. Forrest claimed that White and Johnson were "fussing" with each other when he came into Spencer's yard, "like they [were] ready to fight each other." R. 172, l. 18 – 173, l. 23; R. 174, ll. 9-14; R. 177, ll. 2-6. Forrest said that White's hands were in his pockets and then he "swung his arm and that's when [Johnson] grab[bed] his neck." R. 173, l. 24 – 174, l. 2; R. 176, ll. 16-24. Forrest admitted that he arrived at Spencer's house just minutes before the incident and had no idea what else had transpired that night. R. 176, ll. 3-11; R. 177, ll. 7-12.

Joseph Johnson did not recall having ever met White before the night of the incident. R. 103, ll. 21-23. According to Johnson, White was playing around with a knife, which he had seen him with earlier near the fire, while Johnson cut his hair. R. 104, l. 1 – 105, l. 19. Johnson said that everyone was friendly and having a good time, but said that he did not know White, so he "didn't have nothing to say to [White]." R. 105, l. 20 – 106, l. 7. Johnson said that after he finished White's hair, he packed up his hair cutting tools. As Johnson was putting them on the back of his moped, Henry asked him if he was leaving. Johnson told Henry "yes" and they shook hands. Johnson said that he turned around toward Spencer and said that he would see him later. He claimed that White came walking past him and suddenly swung at him, cutting Johnson's neck. R. 106, l. 8 – 108, l. 13. Johnson maintained that he never hit White and had no physical contact with him other than cutting his hair. R. 128, l. 21 – 129, l. 1. Johnson said that

he did not speak to White while he cut his hair and denied that he had any argument with White on the night of the incident. R. 140, ll. 18-20; R. 143, ll. 2-20.

Johnson acknowledged that for two years he had told investigators and the solicitor's office that he was attacked from behind while he was sitting on his moped. R. 133, l. 16 – 137, l. 13. Though Johnson initially denied any recollection of the preliminary hearing, when confronted with the transcript, he admitted that he confirmed to the judge that White attacked him from behind. R. 137, l. 14 – 138, l. 22; R. 233, l. 6 – 235, l. 11. Johnson claimed that his memory comes and goes and that he wanted to tell the solicitor how it really happened earlier, but did not get a chance to tell them until the day before his testimony. Notably, however, as recently as the Thursday before the trial began, Johnson told the solicitor the "cut from behind" version of events. R. 131, l. 16 – 137, l. 13.

Paramedics transported Johnson to the Medical University of South Carolina ("MUSC") for emergency treatment. R. 199, l. 20 – 208, l. 23. Though Johnson testified that he was at MUSC for twelve to fourteen days, his treating physician confirmed that it was ten days. R. 307, l. 20 – 308, l. 14. Dr. Samir Fakhry explained that Johnson was treated for a ten-centimeter laceration to his neck. They performed a surgery to determine what part of Johnson's neck was damaged and repair it. The doctors determined that the injury was to the sternocleidomastoid muscle, which aids the rotation of the head, and not to any of the more serious structures of the neck. R. 296, l. 22 – 301, l. 6; R. 303, l. 6 – 304, l. 16; R. 306, l. 3 – 307, 19. While Johnson lost a significant amount of blood, it was still less than what would have been necessary to cause severe shock or death. R. 301, ll. 7-21.

Admissibility of Johnson's Statements

An *in camera* hearing was held during White's testimony to determine the admissibility of statements that the alleged victim, Johnson, made to him prior to the incident. R. 323, l. 25 – 341, l. 22. The solicitor objected based on "hearsay" when defense counsel asked White what Johnson told him while he was cutting his hair that night. Defense counsel argued that the testimony was not being offered for the truth of the matter asserted but to show state of mind. The trial judge initially overruled the objection. R. 323, l. 25 – 324, l. 12. When the solicitor objected based on "hearsay" again, the judge sent the jury out and defense counsel proffered the testimony. R. 324, l. 13 – 325, l. 12. White testified that Johnson "was talking about back when he was in prison and the shanks he used to make when he was in prison" and told him "about his gun and knife he had underneath his moped seat." R. 326, l. 1 – 327, l. 13.

The solicitor argued that the testimony was hearsay because it was offered to show that Johnson was armed and does not fall under any exception. R. 328, ll. 1-15. The judge responded that it was being offered to show state of mind. R. 328, ll. 16-21. However, he then raised the issue of relevance, asking defense counsel how the defendant's state of mind was relevant to an accident defense. The judge reasoned that self-defense could not be applicable because White said he did not aim for Johnson's throat or cut him on purpose. R. 328, l. 22 – 330, l. 1. Defense counsel responded that White was acting lawful in self-defense based on Johnson hitting him in the head and his fear of him based on the comments about weapons Johnson made throughout the night, but that he did not intend to cut Johnson when he swung his arm. R. 330, ll. 2-21. The trial judge responded: "The accident and self-defense pretty well can't co-exist. Which is it you want to do?" R. 331, ll. 1-3. Defense counsel reiterated how self-defense and accident were both at play at the time of the incident and argued that the

statements are not hearsay because they go to White's state of mind. R. 331, ll. 10-24. The trial judge responded: "I think it's relevant as to self-defense. I'm not buying into your argument hey its self-defense and then all of a sudden it's an accident. That's getting to the point of being absurd." R. 331, l. 25 – 332, l. 3.

After defense counsel persisted in her argument that the defenses were not mutually exclusive, the trial judge asked the solicitor for her response. R. 332, l. 4 – 333, l. 13. The solicitor argued that the statement about the shank was irrelevant because Johnson did not say that he had a shank on him that night. R. 333, ll. 14 – 334, l. 1. Regarding the gun and knife on Johnson's moped, the solicitor argued that "it can't be both ways for both an accident and self-defense." R. 334, ll. 1-13. As such, she averred that if the defense is accident that state of mind is irrelevant, and that if the defense is self-defense that it is hearsay and "too prejudicial." R. 334, ll. 13-20. In response, defense counsel argued that Johnson's discussion of making shanks was strange to bring up and part of why White felt threatened by Johnson that night. R. 334, l. 21 – 335, l. 11.

The trial judge initially ruled that the statement regarding shanks was not relevant to self-defense or accident and would be excluded. R. 335, ll. 18-24. Defense counsel presented an alternate theory of admissibility for impeachment because Johnson denied telling White about making shanks during his cross-examination. R. 337, l. 22 – 338, l. 22. The trial judge agreed that the shank statement would be admissible, but for purposes of impeachment only. R. 338, l. 23 – 339, l. 24.

Regarding Johnson's statement that he had a gun and knife under his moped seat, defense counsel reiterated that she was not trying to show that the weapons were actually there, but that White believed that Johnson had access to them because they were in close proximity. R. 335, l.

25 – 336, l. 16. The solicitor admitted that there was a moped, but averred: "[T]his is going to boil down to I just don't think it's an appropriate -- I just don't think it falls under the hearsay exception or the non hearsay rules." R. 336, ll. 17-25. She further argued that the statement was irrelevant because Johnson never threatened to use the weapons on White. R. 337, ll. 1-9. Defense counsel reiterated her position that the statement is not hearsay and went to White's state of mind. R. 337, ll. 19-22. She further argued that due process requires that White be able to express his state of mind. R. 338, ll. 11-22. The trial judge ruled that defense counsel was not allowed to go into the gun and knife on the moped, ruling: "I don't think that has any bearing on the case and its hearsay. And I think it's being offered for that purpose, okay." R. 339, l. 24 – 340, l. 3.

After the trial judge indicated his rulings, defense said that she strongly object[ed] "for the record." R. 340, ll. 4-5. The judge told her that she had already objected and did not need to object any further. R. 340, ll. 6-11. When defense counsel asked if she could go into White's state of mind and how he felt as a result of Johnson's comments, the judge responded: "He can talk about his state of mind but we're not going to specifically go into statements that the victim made. He can testify to what he thought all day long [a]s a result of it. I'm not trying to prohibit that." R. 340, l. 25 – 341, l. 10. At the close of the defendant's case, defense counsel renewed her prior motions and moved for a mistrial, citing the judge's prior ruling limiting White's testimony, which hampered their ability to present a complete defense. R. 368, ll. 11-16. The trial judge denied the motions. R. 368, ll. 17-18.

Request for Additional Jury Charges

The charge conference took place off-the-record, but the trial judge indicated that he would let defense counsel place her objections on the record after he gave the jury charge. R.

369, ll. 14-20; R. 414, ll. 11-12. Following the charge, defense counsel renewed her request for charges on self-defense and assault and battery second degree. R. 413, ll. 6-10. The trial judge ruled: "The court finds as a matter of law there was no moderate injury. It was a severe injury based upon the medical testimony." R. 413, l. 23 – 414, l. 4.

Regarding self-defense, the judge gave the solicitor an opportunity to put her argument on the record. R. 414, ll. 4-12. The solicitor argued that the defendant said that he did not feel threatened by Johnson and had brushed off some of the statements that Johnson made that night. She also pointed to testimony from the defendant that whoever was behind him was "going to get it." R. 414, ll. 13-23. The trial judge ruled that he did not charge self-defense because he did not think that the facts justif[ied] self-defense based upon the statements made." R. 414, l. 24 – R. 415, l. 1. He explained:

> The first statement made I believe by Spencer Washington he said the defendant said he was going to get this. But the major problem that the court had with self-defense was the defendant's testimony itself. He said he did not mean to cut him, did not cut him on purpose. Then he also said when he pulled the knife out of his pocket and swung it around whoever he hit -- whoever hit him was going to get it. He said he did not know who hit him; did not know it was Mr. Johnson. And I just don't think the elements of self-defense are applicable under the facts of this case.

R. 415, ll. 2-12. Thus, he denied the defense's request to charge self-defense. R. 416, l. 1.

ARGUMENT

I. The trial court erred in limiting Appellant to pursuing either the defense of self-defense or accident, ruling that the two were mutually exclusive defenses.

During the *in camera* hearing on the admissibility of evidence, discussed more fully *infra* in Issue II, the trial judge made clear to defense counsel that she had to pursue either accident of self-defense. At the time of the *in camera* hearing during which the trial judge issued his ultimatum, the only testimony elicited from White regarding the incident itself included the following:

DEFENSE COUNSEL:	Did you try to kill Joseph Johnson?
DAVID WHITE:	I did not.
DEFENSE COUNSEL:	Did you end up cutting Joseph?
DAVID WHITE:	Yes, I did.
DEFENSE COUNSEL:	Did you mean to cut him?
DAVID WHITE:	I did not.
DEFENSE COUNSEL:	Did you aim for his throat?
DAVID WHITE:	I did not.

R. 320, ll. 16-23. Defense counsel explained to the judge that she had not yet elicited White's detailed testimony regarding the incident. R. 329, ll. 5-6. She anticipated that White would testify that he was lawfully armed in self-defense and intended to swing his arm but not to cut Johnson. R. 330, ll. 2-21; R. 331, ll. 4-17; R. 332, ll. 4-7; R. 332, l. 21 – 333, l. 12. Defense counsel analogized cases in which a person was lawfully armed with a gun in self-defense but the discharge of the gun was accidental. R. 332, ll. 4-7.

Despite the fact that White had barely begun his direct testimony, the trial judge said that White's testimony was inconsistent with self-defense. R. 328, l. 22 – 329, l. 23. The trial judge said: **"The accident and self-defense pretty well can't co-exist. Which is it you want to do?"** R. 331, ll. 1-3 (emphasis added). He later said:

> **I'm not buying into your argument hey its self-defense and then all of a sudden it's an accident. That's getting to the point of being absurd . . . a gun doesn't go off unless you point it and pull the trigger. The knife doesn't cut unless you swing, okay. Neither one of those acts are accidents.**

R. 331, l. 25 – 332, l. 11 (emphasis added).

The trial judge misunderstood the law regarding self-defense and accident. In *State v. Williams*, 400 S.C. 308, 733 S.E.2d 605 (Ct. App. 2012), this Court noted that though often mutually exclusive, it is error to refuse to charge both self-defense and accident if there is evidence in the record to support both charges. In *Williams*, the defendant shot and killed his brother. 400 S.C. at 311, 733 S.E.2d at 607. At trial, Williams testified that as he approached his brother's house, his brother was sitting on the front porch and Williams could see a small revolver tucked into the waistband of his boxer shorts. *Id.* at 312, 733 S.E.2d at 607. As Williams approached, the victim started cussing at Williams and had a "demented" look on his face, which scared Williams. *Id.* at 312, 733 S.E.2d at 607-08. Williams testified that the victim reached for his gun, at which point Williams ran back to the car, expecting to be shot in the back and fearful for his life. *Id.* at 312, 733 S.E.2d at 608. The other occupant of William's car threw Williams a loaded shotgun. *Id.* Williams said that the victim pointed his revolver at Williams and Williams pulled the trigger on his shotgun. *Id.* at 312-13, 733 S.E.2d at 608. Later, Williams said that he did not remember pulling the trigger, did not intentionally shoot the victim, and that the shotgun was pointed toward the ground. *Id.* at 313, 733 S.E.2d at 608. Additionally, Williams stated that he knew that the victim had shot a couple of people, and if he

had not defended himself, he knew the victim would have shot him. *Id.* The trial judge refused the defense's request to charge self-defense and accident. *Id.*

This Court ruled that the trial court erred in refusing to charge both self-defense and accident, reversed Williams' conviction, and remanded the case for a new trial. The trial court reviewed the elements of self-defense, which include:

> (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, or he actually was in such imminent danger;
>
> (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief ...; and
>
> (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

Id. at 314-15, 733 S.E.2d at 609. The Court noted Williams' testimony and found that "[v]iewing the evidence in the light most favorable to Williams, . . . a jury could have found Williams was not at fault in bringing about the difficulty based on Williams' testimony that the victim began cursing at him, had a 'demented' look on his face, and pulled a pistol on Williams after Williams confronted him unarmed." *Id.* at 315-16, 733 S.E.2d at 609 (citing *State v. Dickey*, 394 S.C. 491, 500, 716 S.E.2d 97, 101 (2011) (finding defendant was not at fault in bringing about difficulty despite pulling loaded weapon on victim when victim began advancing towards defendant in an aggressive manner)). Williams' belief that he was in imminent danger was reasonable based on his knowledge that the victim had shot other people and would shoot him if he did not shoot first. *Id.* Additionally, while the evidence was conflicting, there was some evidence that Williams had no other probably means of avoiding the danger because the

victim was already pointing a gun at him. *Id.* Thus, the Court held that the trial court erred in refusing to charge self-defense. *Id.* at 316, 733 S.E.2d at 609-10.

Regarding accident, the Court noted its requirements, which include that: "(1) the [assault] was unintentional; (2) the defendant was acting lawfully; and (3) due care was exercised in the handling of the weapon." *Id.* at 316, 733 S.E.2d at 610. The Court noted that **"[i]f the circumstances of a case show a defendant was entitled to arm himself in self-defense when the gun went off, he would be entitled to a charge of accident supposing evidence satisfies the other elements of the doctrine."** *Id.* (citing *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999)) (emphasis added). The Court noted that William's testimony "vacillated as to whether he acted intentionally or unintentionally when he shot the victim." *Id.* Williams testified both that he shot the victim because he was afraid that the victim would shoot him first, such that he had the right to act in self-defense, and that he did not recall shooting the gun and did not intentionally shoot it. *Id.* at 315, 733 S.E.2d at 610. The Court found that the testimony was "sufficient to at least present a question for the jury as to whether Williams shot the victim accidentally." *Id.* at 317, 733 S.E.2d at 610. Thus, the Court found that the trial judge erred in failing to give both the charges on self-defense and accident because there was evidence in the record to support both charges. *Id.*

Our Supreme Court has consistently held that the applicability of a lesser-included offense or defense depends on the evidence, even where that evidence points to seemingly inconsistent theories. *See State v. Light*, 378 S.C. 641, 664 S.E.2d 465 (2008) ("A self-defense charge and an involuntary manslaughter charge are not mutually exclusive, as long as there is **any evidence** to support both charges." (emphasis added)); *State v. Crosby*, 355 S.C. 47, 584 S.E.2d 110 (2003) (improper to hold that any evidence of an intentional shooting negates

evidence from which any other inference may be drawn); *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991) (error by trial court in not charging involuntary manslaughter, even though the trial court charged murder, voluntary manslaughter, accident, and self-defense); *State v. Taylor*, 261 S.C. 437, 441, 200 S.E.2d 387, 388 (1973) ("If, however, there is any evidence in the record from which it can be reasonably inferred that the accused inflicted the mortal wound but justifiably did so in self-defense, then the accused is entitled to a charge on the law of self-defense, despite his denial of having inflicted the mortal wound. These principles seem to be clearly established by the weight of authority in this jurisdiction as well as elsewhere.").

Here, the trial judge erred as a matter of law in instructing defense counsel that she had to pursue either self-defense or accident but could not pursue both. As will be discussed more fully in Issue II, had White been permitted to fully testify regarding Johnson's statements, he could have explained the imminence of the threat and reasonableness of his fear of Johnson that night. Such testimony would have supported his claim that he acted in self-defense. Additionally, as will be discussed more fully in Issue III, the fact that White was lawfully armed in self-defense was integral to the defense of accident. Defense counsel properly articulated to the trial judge how self-defense and accident interplayed in this case. The judge's response was that her argument was "getting to the point of being absurd." R. 331, l. 25 – 332, l. 11. Additionally, the trial judge's assertion that neither a gunshot nor a knife cut can ever be accidental is directly contradicted by this State's jurisprudence. *See Williams, supra*; *State v. McCaskill,* 300 S.C. 256, 387 S.E.2d 268 (1990); *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999). While the trial judge ultimately instructed the jury on the law of accident, he failed to charge the law of self-defense and improperly limited the defense's ability to present evidence in support of self-defense, prejudicing White.

Further, it was up to the jury to decide the credibility and weight of the testimony during its deliberations at the end of the case. *State v. Smith*, 227 S.C. 400, 88 S.E.2d 345 (1955) ("The jury may believe one witness and disbelieve another, may believe one portion of a witness' testimony and disregard another portion of such testimony."). The jury could have believed the State's theory that White knew that he had the knife in his hand and intended to cut Johnson with it. R. 390, ll. 11-19; R. 391, ll. 9-20. In that scenario, self-defense would have come into play to defend against the intentional act. The trial judge's limitation of defense counsel's presentation of evidence and argument precluded defense counsel from presenting this alternate theory to the jury.

The trial judge's ruling that self-defense and accident were mutually exclusive in this case was error. This misunderstanding formed the base of a pyramid of errors, including the exclusion of relevant, non-hearsay evidence and the failure to charge the jury on matters raised by the evidence. White is accordingly entitled to a new trial.

II. The trial court erred in (1) excluding Appellant's proffered testimony that the alleged victim told Appellant that he had a gun and a knife on his moped, which was located in close proximity to the incident, and (2) restricting the admission of testimony that the victim told Appellant about his history of making shanks in prison to impeachment only, where such evidence was not hearsay and integral to Appellant's defense.

The *in camera* hearing that precipitated the trial judge's assertion that self-defense and accident cannot co-exist was related to the admissibility of statements made by Johnson, the alleged victim, to White in the hours leading up to the incident. R. 323, l. 25 – 341, l. 22. The proffered testimony was that Johnson told White about shanks that he made while he was in prison and that Johnson had a gun and knife under the seat of his moped. R. 326, l. 1 – 327, l. 13. The solicitor argued that the testimony was hearsay and that there was no applicable exception, or alternatively, that the testimony was irrelevant. R. 328, ll. 1-15; R. 333, ll. 14 – 334, l. 20; R. 327, l. 22 – 337, l. 9. Defense counsel argued that both statements were relevant to White's fear and were not hearsay because they were admitted to show White's state of mind rather than for the truth of the matter asserted. R. 334, l. 21 – 335, l. 11; R. 335, l. 25 – 336, l. 16; R. 337, l. 10 – 338, l. 22. She further argued that Johnson had denied making the statement regarding shanks such that she could impeach him through White. R. 337, l. 22 – 338, l. 22.

The trial judge ruled that he would allow testimony regarding the shanks made in prison for impeachment purposes only and he provided a limiting instruction to the jury. R. 335, ll. 18-24; R. 338, l. 23 – 339, l. 24; R. 341, ll. 12-22. However, he precluded the defense from eliciting any testimony that Johnson said that he had a gun and knife on the moped, ruling: "I don't think that has any bearing on the case and its hearsay. And I think it's being offered for that purpose, okay." R. 339, l. 24 – 341, l. 10. The trial judge denied the defense's renewed motions at the close of her case, where counsel reiterated that the judge's limitations on White's testimony hampered his ability to present a complete defense. R. 368, ll. 11-18.

The United States Constitution guarantees a criminal defendant the right "to present a complete defense." *Crane v. Kentucky,* 476 U.S. 683, 690, 106 S.Ct. 2142 (1986). This right is also guaranteed by our State constitution: "Any person charged with an offense shall enjoy the right ... to be fully heard in his defense...." S.C. CONST. art. I, § 14 (2009); *see* S.C. CODE ANN. § 17-23-60 (2003) ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor...."). In *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038 (1973), the United States Supreme Court stated: "Few rights are more fundamental than that of an accused to present witnesses in his own defense."

Here, the State objected to the testimony regarding Johnson's statements on the grounds of relevance and hearsay. Contrary to the trial judge's ruling, both statements were relevant to White's assertion of self-defense and neither statement was hearsay. Their preclusion prevented White from presenting a complete defense.

Relevance

"'Relevant evidence' means evidence having **any tendency** to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE (emphasis added). "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE.

As discussed *supra* in Issue I, the trial judge's perception of relevance was colored by his misunderstanding that self-defense and accident cannot co-exist. R. 330, l. 22 – 331, l. 20. The solicitor's argument fed into that misconception. R. 334, ll. 10-18. Self-defense was relevant because there was evidence in this case to support both a theory that White acted in self-defense

and that he was armed in self-defense. *See Burriss*, 334 S.C. at 265 n. 10, 513 S.E.2d at 109 n. 10 (noting that "[t]here is a difference between being lawfully *armed* in self-defense and *acting* in self-defense." (emphasis in original)). Under both applications of self-defense, the imminence and reasonableness of Johnson's fear had to be ascertained by the jury, making Johnson's statements about his history of making shanks and his present access to a gun and knife relevant for their consideration.

In *State v. Washington*, 367 S.C. 76, 623 S.E.2d 836 (Ct. App. 2005), *affirmed as modified by*, 379 S.C. 120 (2008), this Court affirmed the trial court's exclusion of evidence that the victim had a gun and knife in his locked trunk at the time of the murder. This Court agreed that the items were not relevant to Washington's claim of self-defense because there was no evidence in the record indicating that Washington knew the victim had weapons in his trunk on the day of the stabbing, nor was there evidence that Washington was aware that the victim ever carried a weapon in his trunk. 367 S.C. at 81-82, 623 S.E.2d at 839. There was likewise no evidence that the victim approached his trunk prior to being stabbed. *Id.* at 82, 623 S.E.2d at 839. This Court further noted that Washington "presented his claim of self-defense" by testifying to his own experience regarding where weapons are customarily kept in vehicles and his belief that, at the time of the incident, the victim might have had a weapon in the car. *Id.* The trial judge charged the jury on the law of self-defense. *Id.* Thus, this Court ruled that under the facts of Washington's case, there was no prejudicial error by the trial court in excluding evidence regarding weapons found in the victim's trunk. *Id.*

Unlike *Washington*, the defense was not attempting to present evidence that Johnson was actually armed but rather that White believed that he was armed. Notably, by Johnson's own admission, he accessed his moped just prior to the incident. R. 106, ll. 8-17; R. 107, l. 21 – 108,

l. 2. State's Exhibit 9 shows the close proximity of the moped to the scene of the incident.[2] (State's Ex. 9, non-color copy). While the defendant in *Washington* was able to explain the reason behind his fear and the jury was charged on self-defense, White was prevented from explaining both that he thought Johnson had weapons on his moped and why. Though the trial judge allowed White to testify as to how he felt as a result of the statements, without testimony regarding the statements themselves, the jury could not properly determine the imminence of the threat or the reasonable of White's fear. R. 339, l. 24 – 340, l. 10; R. 342, l. 23 – 343, l. 13; R. 344, l. 21 – 345, l. 8; R. 348, l. 13 – 349, l. 7. Thus, Johnson's earlier statement that he had weapons on his moped, which was just feet away from the incident location and which Johnson had just accessed, were relevant to White's claim of self-defense.

Johnson's statement regarding shanks he made in prison was likewise relevant to White's fear of Johnson. Both White and Johnson denied having ever met before the night of the incident. White had no criminal history and while he tried to ignore Johnson's comments, he ultimately became uncomfortable enough to leave Spencer's house. It was on his way out of the yard that Johnson attacked White, punching White in the side of head. In *State v. Williams*, 400 S.C. 308, 315-16, 733 S.E.2d 605, 609 (Ct. App. 2012), discussed at length *supra* in Issue I, this Court cited the defendant's testimony that the victim had shot others in the past as evidence of the reasonableness of his fear of the victim. Because it was relevant to self-defense, the trial judge improperly limited the admission of the shanking statement to impeachment only.

Non-Hearsay

In addition to being relevant, the testimony regarding Johnson's statements were not hearsay. To be hearsay, the statement must be offered into evidence for the truth of the matter

[2] State's Exhibit 9 is on file with this Court.

asserted. Rule 801(c), SCRE. "If the out-of-court statement is being offered for a purpose other than proving the truth of the matter asserted, it is not hearsay." 29 Am. Jur. 2d Evidence § 671. "[T]estimony is not hearsay where it relates to what the witness himself did in reliance on, or in response to, a statement, facts upon which action was taken, personal observations, explanation of conduct, the effect of statements on the listener, the fact that something was said, or identifying what was said." 31A C.J.S. *Evidence* 259 (1996). "Words offered to prove the effect on the hearer are admissible when they are offered to show their effect on one whose conduct is at issue." 29 Am. Jur. 2d Evidence § 676.

In *People v. Kline*, 414 N.E.2d 141, 145 (Ill. App. Ct. 1980), the Illinois Court of Appeals held that the trial court erroneously excluded non-hearsay testimony that was "highly relevant evidence pertaining to defendant's claim of self-defense." The Court ruled that "[i]t was relevant that defendant reasonably thought decedents were armed and dangerous, not whether they in fact were armed and dangerous." 414 N.E.2d at 145. In explaining it's ruling, the *Kline* Court wrote: "Most importantly, we are mindful that a claim of self-defense requires an inquiry into **who was the first aggressor**, as well as a determination **whether a reasonable belief existed that a certain degree of force, even deadly, was necessary to defend**." *Id.* (emphasis added). The Court likewise ruled that the trial court erred in improperly restricting the defense's presentation of evidence regarding the **reasonableness of defendant's belief** that he had to shoot in self-defense. *Id.* at 146. The Court reasoned that the "[d]efendant's reasonable belief that such force was necessary to prevent imminent death or great bodily harm to himself is an essential element of his claim of self-defense." *Id.* "Thus, defendant's state of mind at the time of the occurrence is a material issue and is a proper subject of examination. Failure to permit defendant to directly testify as to his state of mind and the circumstances surrounding his acts is reversible error in

self-defense cases." *Id.* Kline's conviction was reversed and his case was remanded for a new trial. *Id.* at 147.

Here, the statements were not offered to prove that Johnson actually made shanks in prison or that he actually had weapons on his moped, as for purposes of self-defense it did not matter whether the statements were true. Rather, the statements were offered to show the effect on the hearer, i.e. White's state of mind. White testified that the statements made by Johnson throughout the night made him feel threatened and that he was not sure that he could get away safely. R. 348, l. 13 – 349, l. 5. However, without being able to repeat the statements themselves, White could not explain **why** he felt that way. The trial judge's erroneous exclusion of this relevant evidence prejudiced White in that he was unable to present a complete defense. Specifically, the excluded evidence would have shown that White's fear was imminent and that his response was reasonable. White is accordingly entitled to a new trial.

III. The trial court erred in denying Appellant's request to charge self-defense where there was evidence in the record that Appellant was armed in self-defense and acted in self-defense.

A jury can only properly perform its fact-finding function if properly instructed. *See State v. Lee-Grigg*, 387 S.C. 310, 692 S.E.2d 895 (2010) (noting that though character evidence was admitted at defendant's trial, "without an instruction the jury was not aware that it could consider this evidence in determining her credibility and her culpability"). "If there is **any evidence** in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." *State v. Light*, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008) (emphasis added). **"In determining the issues to be submitted to the jury . . . all of the testimony, both for the State and the defense, must be considered."** *State v. Moore*, 245 S.C. 416, 420, 140 S.E.2d 779, 781 (1965) (emphasis added).

In explaining his refusal to charge self-defense in the present case, the trial judge said:

> I did not charge the self-defense primarily because I did not think the facts justify self-defense based upon the statements made. The first statement made I believe by Spencer Washington he said the defendant said he was going to get this.
>
> But the major problem that the court had with self-defense was the defendant's testimony itself. He said he did not mean to cut him, did not cut him on purpose. Then he also said when he pulled the knife out of his pocket and swung it around whoever he hit -- whoever hit him was going to get it. He said he did not know who hit him; did not know it was Mr. Johnson. And I just don't think the elements of self-defense are applicable under the facts of this case.

R. 414, l. 24 – 415, l. 12. The trial judge's statements reveal that he engaged in weighing the evidence rather than applying the proper "any evidence" standard. Additionally, as discussed *supra* in Issue I, the trial judge misunderstood the ability of self-defense and accident to overlap or present reasonable alternative defenses.

Our Supreme Court's decisions in *State v. McCaskill,* 300 S.C. 256, 387 S.E.2d 268 (1990), is instructive on the interplay between self-defense and accident. In *McCaskill*, the defendant armed herself with a gun when she became afraid during a domestic dispute. 300 S.C. at 256-58, 387 S.E.2d at 268-69. McCaskill claimed that she was lawfully entitled to arm herself in self-defense but that the lethal charge was fired accidentally. *Id.* at 258, 387 S.E.2d at 269. While the trial judge charged both self-defense and accident separately, his "failure to instruct the jury that appellant had the right to have the gun in her possession to protect herself in the situation where the shooting occurred accidentally conveyed to the jury that her willful act of arming herself foreclosed the defense of an accidental shooting." *Id.* "Where a defendant claims that he armed himself in self-defense, while also claiming that the actual shooting was accidental, this combination of events can place the shooting in the context of self-defense." *Id.* (internal quotations omitted). Thus, in light of the evidence supporting McCaskill's claim that she lawfully armed herself in self-defense, the *McCaskill* Court held that the jury charges were inadequate and remanded the case for a new trial. *Id.* at 259, 387 S.E.2d at 270.

In *State v. Burriss*, 334 S.C. 256, 258-59, 513 S.E.2d 104, 105-06 (1999), the defendant similarly armed himself after being attacked by the victim but claimed that the discharge of the gun was accidental. There, the trial judge charged only self-defense but not accident. 334 S.C. at 259, 267 n. 2, 513 S.E.2d at 107, 110 n. 2. In finding that the failure to charge accident was error, the *Burriss* Court reviewed both its decisions in *McCaskill* and *State v. Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1994) (holding Goodson not entitled to a charge of accident because there was no evidence he was acting lawfully in self-defense when the shooting occurred). *Id.* at 260-63, 513 S.E.2d at 106-08. The *Burriss* Court determined that there was evidence in the record to

support the defendant's claim he armed himself in self-defense at the time of the fatal shooting. *Id.* at 262-63, 513 S.E.2d at 108. Thus, the trial court erred in failing to charge accident. *Id.*

The *Burriss* Court noted that "[t]here is a difference between being lawfully *armed* in self-defense and *acting* in self-defense." 334 S.C. at 265 n. 10, 513 S.E.2d at 109 n. 10. In *Burriss*, the defendant's self-defense theory only related to his right to be armed, not his actions in shooting at the victim because he claimed that the shooting was not intentional. *Id.* In the present case, the theory of self-defense was arguably applicable both as it related to accident and as an independent defense.

White's testimony on direct examination was that the use of the knife was unintentional, as he did not even realize that it was in his hand or that Johnson would be so close when he turned around. R. 320, ll. 16-23. On cross-examination White said: "I did not intentionally mean to swing out the knife at him. I mean I just swung out the knife. I just swung out." R. 357, ll. 11-13. If believed by the jury, the self-defense theory was applicable to whether White was lawfully armed in self-defense to support, as required for accident, as explained in *McCaskill* and *Burriss*. Thus, the trial judge erred in failing to charge self-defense as it related to White's being lawfully armed with the knife as required to prove accident. White is accordingly entitled to a new trial.

Additionally, there was evidence that White acted intentionally through testimony elicited by the State that White said "you're about to get this" before White swung at Johnson. R. 72, l. 7 – 73, l. 10; R. 88, l. 15 – 89, l. 21. If the jury believed that testimony, which the solicitor argued indicated that White intentionally wielded the knife, then self-defense came into play as a defense in its own right. Even without the excluded testimony regarding Johnson's statements, there was evidence to support self-defense. White testified that he was walking out of the yard when Johnson struck him in the side of the head, evidencing that White was without

fault in bring on the difficulty. While he could not tell the jury about the content of Johnson's prior statements, he said that they made him feel scared and threatened once coupled with the punch from Johnson. White further testified that he had prior head injuries, causing him added concern about the damage that a blow to the head could cause. White explained that he did not think that he could safely run away based upon Johnson's prior statements, i.e. Johnson's access to weapons.

Unfortunately, the trial judge prevented White from putting "meat on the bone" of much of his testimony. Even so, the standard for whether to give the self-defense charge was not whether the trial judge was convinced of that White acted in self-defense, but whether there was any evidence in the record, considering all of the testimony, from which it could reasonably be inferred that the defendant acted in self-defense. *See Light*, 378 S.C. at 650, 664 S.E.2d at 469; *Moore*, 245 S.C. at 420, 140 S.E.2d at 781. Thus, the trial judge erred in failing to charge self-defense as it related to White having lawfully acted in self-defense. White is accordingly entitled to a new trial.

IV. The trial court erred in denying Appellant's request to charge assault and battery second degree where the severity of the alleged victim's injuries was a question of fact for the jury to decide.

Appellant requested that the trial judge charge the jury on the lesser-included offense of assault battery in the second degree. R. 413, ll. 6-10. The trial judge ruled: "The court finds as a matter of law there was no moderate injury. It was a severe injury based upon the medical testimony." R. 413, l. 23 – 414, l. 4. The evidence at trial showed that Johnson was treated of the ten-centimeter laceration to his neck at MUSC for approximately ten days. After being treated in the emergency department, Johnson was taken into surgery, where the doctors determined that his bleeding was coming from some of the smaller blood vessels and an injury to the sternocleidomastoid muscle, which were repaired and controlled. There was no injury to the more serious structures of the neck, including the windpipe, carotid arteries, jugular veins, or nerves. R. 296, l. 22 – 301, l. 6; R. 303, l. 6 – 304, l. 16; R. 306, l. 3 – 307, 19. While the treating doctor testified that Johnson "could" have died from his injuries, he did not testify that the risk of death was "substantial." R. 305, ll. 11-13; *see* S.C. CODE ANN. § 16-3-600(A)(1). Further, the jury was not required to accept the expert's testimony. R. 401, ll. 2-20.

As discussed *supra*, in Issue III, 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 charged the jury on the lesser-included offenses of assault and battery of a high and aggravated nature ("ABHAN") and assault and battery in the first degree. R. 406, l. 6 – 407, l. 17. 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). Assault and battery in the first degree, as applicable in the present case, requires that the defendant unlawfully offered or attempted to injure another person with the present ability to do so, and the act was accomplished by means likely to produce death or great bodily injury. S.C. CODE ANN. § 16-3-600(C)(1)(b)(i). "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).

However, 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 "as a matter of law, stating that "[i]t was a severe injury based upon the medical testimony." R. 413, l. 4 – 414, l. 4. This ruling was incorrect. 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.

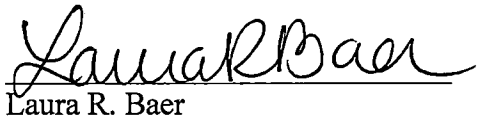
S.C. CODE ANN. § 16-3-600(A)(2) (emphasis added).

All of the elements of assault and battery in the second degree were present in Appellant'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). While defense counsel did not and need not present her own expert, she specifically questioned Johnson's treating physician regarding the area actually injured. He confirmed that the injury was not to the more vital structures of the neck, but rather to the sternocleidomastoid muscle. Thus, the State's argument that White "slit Joseph Johnson's throat" was an overstatement of the severity of the injury. *See* R. 390, ll. 8-10; R. 393, ll. 3-6; R. 394, ll. 15-17; R. 396, ll. 1. At the very least, it was up to the jury to decide the severity of Johnson's injury.

In denying charges on the lesser-included offense of assault and battery second degree, the trial court impermissibly weighed the evidence, instead of assessing whether any evidence supported the lesser-included offenses. White is accordingly entitled to a new trial.

CONCLUSION

Based on the foregoing, Appellant David White respectfully requests that this Court reverse his convictions and grant him a new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of May, 2017

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 23, 2017

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID ALAN WHITE,

APPELLANT

APPELLATE CASE NO 2016-000616

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of May, 2017.

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of May, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027 .