ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM SALUDA COUNTY
The Honorable Thomas A. Russo, Circuit Court Judge
Opinion No. 5572 (S.C. Ct. App. filed June 27, 2018)

Supreme Court Case No. 2018-001671; Court of Appeals Case No. 2014-000274

STATE OF SOUTH CAROLINA,

Petitioner,

v.

STEVEN OTTS,

Respondent.

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUE ON APPEAL 3

STATEMENT OF THE CASE 4

STATEMENT OF FACTS 5

STANDARD OF REVIEW 8

ARGUMENT 8

The Court of Appeals Misconstrued the Purpose of the Jury Instruction 10

Otts' Claim of Self-Defense Invited a "Defense of Others" Explanation 11

Any Failure to Instruct on the Burden of Proof Was Harmless 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Federal Cases

U. S. v. Gilbreath, 452 F.2d 992 (5th Cir. 1971) 10
U.S. v. Cronn, 717 F.2d 164 (5th Cir. 1983) 10

State Cases

Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008) 18
State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) 15
State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) 18
State v. Blurton, 352 S.C. 203, 573 S.E.2d 802 (2002) 10
State v. Bryant, 336 S.C. 340, 520 S.E.2d 319 (1999) 14
State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000) 9
State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976) 10
State v. Cook, 78 S.C. 253, 59 S.E. 862 (1906) 16
State v. Good, 315 S.C. 135, 432 S.E.2d 463 (1993) 11
State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct.App.2000) 18
State v. Hays, 121 S.C. 163, 113 S.E. 362 (1922) 16
State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000) 18
State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989) 10
State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987) 9
State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997) 16
State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010) 8
State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014) 18
State v. Santiago, 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006) 14
State v. Smith, 391 S.C. 408, 706 S.E.2d 12 (2011) 8
State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) 10
State v. West, 138 S.C. 421, 136 S.E. 736 (1927) 8

State Statutes

S.C. Const. art. V, § 21 10

STATEMENT OF ISSUE ON APPEAL

Whether the Court of Appeals ignored the standard of review when the jury charge was substantially correct, when read in its entirety adequately covered the law, was supported by the evidence and was responsive to the defense's theory of the case. The Court also created new law in holding the State could not request a jury instruction ordinarily requested by the defense, without citing any support for why this would constitute error.

STATEMENT OF THE CASE

Respondent, Steven Otts, assaulted Hydrick Burno on January 27, 2011. Burno died three days later on January 31, 2011. Otts was subsequently charged with Burno's murder. On May 4, 2011, the Saluda County grand jury indicted Otts for murder. He was represented on the charge by Tristan M. Shaffer and Catherine T. Johnson, Esquires. (R. p. 1.) On July 22, 2013, Otts proceeded to a jury trial before the Honorable Thomas A. Russo, Circuit Court Judge. At the trial's conclusion, the jury found him guilty of murder. (R. p. 409, ll. 91-12.) Judge Russo sentenced Otts to thirty years imprisonment. (R. p. 411, ll. 19-25.) He filed a motion for a new trial on August 3, 2013, which was denied by written Order of Judge Russo on January 30, 2014. (R. pp. 421-428.)

Otts appealed his conviction and sentence. (Appendix p. 1.) The Court of Appeals reversed, finding the trial court erred in giving an instruction on the defense of others. (Appendix pp. 79-88.) The State filed a Petition for Rehearing. (Appendix p. 89.) The Court of Appeals denied the petition on August 16, 2018. (Appendix p. 103.) The State filed its Petition for Writ of Certiorari on September 17, 2018. By Order dated December 13, 2018, this Court granted the State's petition. This Brief follows.

STATEMENT OF FACTS

The facts of this case are relatively simple. The evidence produced in the State's case established that on January 27, 2011, three individuals – Otts, his girlfriend Sacca Coleman, and Antonio Valentine – had been "hanging out" drinking alcohol at a residence in Ridge Springs, South Carolina. Keisha Stallworth, who lived next door, came home from work shortly after 8:00 p.m. and joined Otts, Coleman, and Valentine. Stallworth testified she did not drink any alcohol, but Otts and Coleman were intoxicated. (R. pp. 24-30.) The four then decided to go to nearby Orchard Park Apartments and got into Valentine's automobile, a Ford Explorer. Otts and Coleman were in the back seat of the Explorer. Valentine was driving and Stallworth was in the front passenger seat. The group then rode to Orchard Park Apartments, where Otts lived.[1] (R. pp. 22-30.)

Upon arriving at the apartment complex, Coleman would not get out of the vehicle with Otts because she wanted to stay with Valentine and Stallworth. Otts became angry because his girlfriend would not get out of the vehicle and remain at the apartment complex with him. He became aggressive with Coleman. Otts began arguing with Coleman; then there was scuffling, and "licks" were passed. Otts began trying to pull or drag Coleman out of the vehicle. She resisted, and Otts pulled her top clothing off in an attempt to drag her out of the vehicle leaving her wearing only her bra. Coleman was the murder victim's cousin by marriage *and* also a friend of the murder victim. (R. pp. 23-27, 29-30, 40, 201, 203, 174.)

Several residents of the apartment complex, including the murder victim Hydrick Burno, heard the altercation and looked to see what was going on and came out of their apartments. A crowd of more than ten people assembled to watch the incident. As Otts was becoming more

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[1] The murder victim in this case, Hydrick Burno, also lived at the same apartment complex. Otts lived with the murder victim's uncle and aunt.

aggressive with his girlfriend, Burno, who was now standing nearby in the apartment complex parking lot, came to the defense or aid of his cousin and attempted to calm Otts down.[2] According to one eyewitness, who was watching the whole incident from her balcony directly above the incident, the victim put his arms around Otts from behind (similar to a bear hug), and tried to calm Otts down and stop the altercation. (R. pp. 23-47, 49-57, 57-77.)[3]

Otts said to the murder victim: "Mother fucker, when you let go of me, I'm going to knock your punk ass out." The victim let go of Otts and backed away from him. According to two different witnesses, Otts then swung at the victim with his fist striking the victim on the left side of his head. The blow was so hard that it fractured the victim's skull and severely damaged the victim's brain. The victim immediately collapsed, unconscious, striking the back of his head as he fell to the pavement. The victim then went into a seizure. Stallworth attempted to render assistance to the victim. Otts turned back to continue the altercation with his girlfriend Coleman. Someone pointed out to Otts that he had knocked the victim out. Otts went over and picked Burno up by the collar, and said "get up, get up." Otts saw the victim was unconscious and dropped him back down on the asphalt, causing Burno to strike the back of his head again, which was already bleeding from the first fall. When someone said the police were being called, Otts fled the scene on foot into some nearby woods. Coleman also left the scene, but returned later. (R. pp. 57-77, 23-47, 49-57, 78-98, 99-139.)

After the ambulance was called, the victim regained consciousness briefly at the scene but while being transported to the hospital began to act strangely due to swelling of his brain. Burno eventually died at the hospital three days later due to swelling of the brain as a direct

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2 Otts and the victim also knew each other and were friends.

3 Stallworth testified she never saw Burno put his hands on Otts. She informed police in her statement Otts pushed the victim away when Burno first tried to come to the aid of Coleman and stop the assault of Coleman by Otts.

result of the fractured skull to the left side of his head, in the temple area, caused by the blow from Otts' fist.[4] (R. pp. 78-98, 99-139. Otts remained in hiding until January 31, 2011 when he turned himself in to police. (R. p. 215.) He was subsequently charged with the victim's murder.

In the defense's case, Otts testified and claimed he never assaulted or dragged Coleman, but they were only arguing. (R. pp. 198-206.) He claimed Burno, who was a friend, approached him from behind, tried to pull him away from Coleman, and eventually put him in a bear hug and picked him up and moved him away from Coleman near another car. Otts admitted that when Burno was trying to pull him away from Coleman, Burno asked Otts several times to leave Coleman alone. (R. p. 238.) Otts testified he squirmed away from Burno's "bear hug" and was headed back to argue more with Coleman, when Burno kept grabbing his jacket trying to stop him. Otts said he told Burno to let go of him and whirled and struck Burno on the side of the face.[5] Coleman, who resided with Otts at the time of trial, attempted to corroborate her boyfriend's version, claiming she was not physically assaulted and her top was not pulled off during the altercation. (R. pp. 173- 176.) She also attempted to discredit a State's witness by testifying Stallworth did not work that day and had been drinking all afternoon with her and Valentine. Coleman claimed Otts was not drinking at all. Otts also testified Stallworth was drinking. (R. p. 174.)

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[4] The autopsy determined the injury to the back of the victim's skull from being dropped on the asphalt did not cause his death. The blow with the fist to the victim's skull was the proximate cause of his death. (R. pp. 99-139.)

[5] On cross-examination, at one point, Otts claimed he was not returning to argue with his girlfriend when he broke away from the victim's grasp, but was retreating. However, on direct and cross-examination he admitted when he broke away from the victim's "bear hug" he was attempting to return to the argument with his girlfriend. (R. pp. 209-12, 243-45, 246, 251.) Otts never testified he was afraid for his life or that he was afraid of suffering great bodily harm. He testified the victim was bigger than him and had been drinking and he did not know what the victim was going to do, but the victim could have hurt him. (R. p. 211.)

The State in reply called Stallworth's employer who verified through employment records that Stallworth did clock in that day and did not leave work until approximately 8:00 p.m. that night. Both Otts and Coleman admitted Burno was attempting to stop the altercation between Otts and Coleman, when he was struck with the fatal blow. Coleman admitted Burno was trying to pull Otts away from her and pursuade Otts to go inside the apartments. Contrary to Coleman's testimony, Otts admitted he had drunk two twenty-four ounce beers before the altercation. Otts admitted he had previously been convicted of receiving stolen goods and providing false information to the police. Coleman admitted she had been convicted on two previous occasions of providing false information to police. Coleman first denied she and Otts had talked about the case since the victim was murdered, and then she admitted they had talked about the case before the trial. (R. pp. 198-218, 226-265, 172-198, 287-91.)

STANDARD OF REVIEW

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Mattison*, 388 S.C. at 479, 697 S.E.2d at 583. If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction. *State v. Smith*, 391 S.C. 408, 706 S.E.2d 12 (2011). The court has a duty to charge the jury as to the law applicable to the facts brought out in the testimony. *State v. West*, 138 S.C. 421, 136 S.E. 736 (1927).

ARGUMENT

The Court of Appeals found error in the trial court's jury instruction in the trial of Steven Otts for the murder of Hydrick Burno after Burno tried to intervene in a domestic dispute

between Otts and his girlfriend. Specifically, the Court found error in the trial judge's explanation on the "defense of others" at the conclusion of its charge on self-defense. (Appendix p. 79.) The State requested the charge in response to the defense's argument Otts was justified in fatally striking the victim in the head because the victim held Otts in a bear hug, and then grabbed his jacket as Otts advanced toward Coleman again. In reversing the conviction, the Court of Appeals found it was improper for the trial court to charge the jury on the "offensive 'defense of others,' at the request of the State, to address the victim's behavior." (Appendix p. 84.) The Court also said the instruction was improper for failing to include the State's burden of proof and failing to guide the jury on the "actions and status of the defender or the person being defended." (Appendix p. 86.)

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

The Court of Appeals Misconstrued the Purpose of the Jury Instruction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Any Failure to Instruct on the Burden of Proof Was Harmless

The Court of Appeals also misses the point in its Opinion by focusing on whether the burden of proof accompanied the jury instruction on the "defense of others." (*See* Appendix, p. 86 n. 6 ("Curiously, the State has repeatedly argued that neither State nor the defendant bore the burden of proof, asserting 'I don't think anyone has the burden of proof on that issue. It's just a correct principle of law.'").) Respectfully, the State always has the burden of proof – that was not in dispute, nor was that the basis for the objection at trial. *See State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (stating a party cannot argue one theory at trial and a different theory on appeal). As the trial court informed the jury at least twelve times by Respondent's count, the State is required to prove its case beyond a reasonable doubt. The jury was specifically told the State must disprove self-defense beyond a reasonable doubt. (R. p. 403.) At no time did the trial judge ever instruct the jury it was Otts' burden of proof for any reason. Yet, the Court of Appeals found the explanation confusing for its failure to instruct, again, on the State's burden of proof at the end of the "defense of others" charge. Why would the jury confuse

the State's burden of proof at this point, after being repeatedly informed of the State's burden throughout the entire instruction?

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

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

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

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

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

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

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

citing any support for why this would constitute error. Respondent respectfully submits the Court of Appeals improperly applied well-established Supreme Court precedent. As a result, the remand ordered by the majority opinion in the Court of Appeals should be vacated, and the conviction should be affirmed.

CONCLUSION

The Court of Appeals ignored the standard of review and found error in giving a charge that was correct as a whole and supported by the evidence. The Court also created new law in holding the State could not request a jury instruction ordinarily requested by the defense, without citing any support for why this would constitute error. Further, the Court of Appeals misconstrued the State's argument on harmless error and found the explanation confusing despite the consistency of the testimony. Petitioner respectfully requests this Court reverse the South Carolina Court of Appeals' opinion and affirm the conviction and sentence for murder.

Respectfully submitted,

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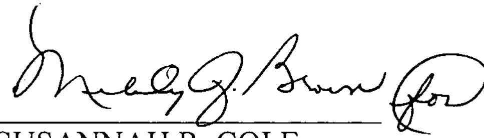

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January 11, 2019

ATTORNEYS FOR PETITIONER

RECEIVED
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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SALUDA COUNTY
The Honorable Thomas A. Russo, Circuit Court Judge
Opinion No. 5572 (S.C. Ct. App. filed June 27, 2018)

Supreme Court Case No. 2018-001671; Court of Appeals Case No. 2014-000274

STATE OF SOUTH CAROLINA,

Petitioner,

v.

STEVEN OTTS,

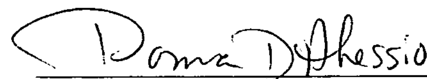
Respondent.

PROOF OF SERVICE

I Donna D'Alessio, an employee of the Petitioner, hereby certify that I have served the Brief of Petitioner in the foregoing action by depositing two (2) copies of same via U.S. mail, first class, postage prepaid to Respondent's attorney, Susan B. Hackett, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 11th day of January, 2019.



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