STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PHILIP DAVID GUDERYON,

APPELLANT

APPELLATE CASE NO. 2017-002168

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On January 21, 2016, an Horry County grand jury indicted Appellant for assault and battery of a high and aggravated nature (ABHAN). R. 351-352. The state, represented by Joshua D. Holford and Cara J. Walker, called the case to trial before the Honorable Benjamin H. Culbertson and a jury on October 9-12, 2017. R. 1. J. Eric Fox represented Appellant. R. 1. At the close of the state's case, Appellant moved for a directed verdict, explaining the state failed to prove causation. R. 150, l. 9 – R. 152, l. 3; R. 156, l. 18 – R. 158, l. 25. Judge Culbertson ultimately denied Appellant's motion, but only after explaining, "[t]his was a close call." R. 161, l. 25 – R. 162, l. 4.

At the conclusion of the case, Judge Culbertson instructed the jury regarding ABHAN, assault and battery in the second degree, assault and battery in the third degree, and self-defense. R. 294, l. 7 – R. 300, l. 25. During deliberations, the jury asked, "[A]re we to consider intent as to which level of assault this is or is this the resulting harm the deciding factor?" R. 312, ll. 22-25; R. 326. Over objection, the judge instructed the jury as follows: "To convict the Defendant of assault and battery of a high and aggravated nature, the State must prove beyond a reasonable doubt that the Defendant intended to unlawfully injure another person, and either great bodily injury to that person resulted or the act was accomplished by means likely to produce death or great bodily injury." R. 319, ll. 10-16. His instructions on the lesser-included offenses followed similarly. R. 319, l. 16 – R. 320, l. 18.

Approximately ten minutes later, the jury found Appellant guilty as charged. R. 321, l. 22 – R. 322, l. 5. Judge Culbertson sentenced Appellant to ten years imprisonment. R. 324, ll. 2-7; R. 353.

On October 16, 2017, Appellant served his notice of appeal. This brief follows.

ARGUMENT

I. The trial judge erred by failing to direct a verdict of acquittal in Appellant's favor where the state failed to present any evidence that Appellant's conduct caused the purported injuries.

Standard of review

"A case should be submitted to the jury when the evidence is circumstantial 'if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.'" State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." Id. "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." Id. at 139, 708 S.E.2d at 776-777. "On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state." Id. at 139, 708 S.E.2d at 777; see also State v. Hepburn, 406 S.C. 416, 429 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. Hepburn, 406 S.C. at 416, 429 S.E.2d at 409.

Relevant facts

State's case-in-chief

Appellant and his friend, James "Jimer" Petrocine, went to Carlos'n Charlie's on October 16, 2015. R. 116, ll. 18-25; R. 122, ll. 3-5. Ryan Whiteside went with them as well. R. 122, ll. 20-25. The trio "met up with a bunch of people" at the bar. R. 116, ll. 23-25.

Jimer ran into his friend, Mariah Stevens, as well. R. 104, ll. 15-16; R. 118, ll. 9-17. When Jimer was on the dance floor, Mariah approached him. R. 118, ll. 18-21. According to Jimer, he was playing with Mariah's boobs while the two were out on the dance floor together. R. 118, ll. 20-21; R. 123, ll. 5-12. Jimer claimed that Justin Hodges approached them on the dance floor and grabbed Jimer's arm. R. 118, l. 22; R. 123, ll. 22-23. Everyone agreed that Justin was a "big guy." R. 124, ll. 7-10.

Appellant explained that when Justin approached Jimer, one of Jimer's friends indicated to Appellant that there was a confrontation between Jimer and Justin. State's Exhibit #8. Seeing the two arguing and assuming Justin was jealous of Jimer's interaction with Mariah, Appellant walked over to them, encouraging them to "chill." State's Exhibit #8. However, Justin and Jimer continued to argue. State's Exhibit #8. Justin, who was bigger than Appellant and Jimer, was acting aggressively and threateningly. State's Exhibit #8. Justin pushed Justin and appeared to be swinging at him, and Appellant hit Justin in the face. State's Exhibit #8. Appellant felt intimidated and scared by Justin's aggressive and threatening conduct. State's Exhibit #8. Appellatn was clear – he was not trying to hurt Justin, he only wanted to defend himself. State's Exhibit #8.

Jimer claimed that when Justin explained that Mariah was his girlfriend, Jimer said, "[Y]ou can have your girl," and the two then shook hands. R. 118, l. 23; R. 123, ll. 24-25. Further, Jimer claimed Justin was hit almost immediately after the two men shook hands. R. 118, ll. 23-24; R. 119, ll. 21-24. Jimer explained that he "felt some wind" over his shoulder, then he "heard like a hit." R. 120, ll. 3-4; R. 125, l. 23 – R. 126, l. 1; R. 129, ll. 6-12. Jimer was adamant that Appellant was behind him and not behind Justin. R. 129, ll. 6-12; State's Exhibit #8 (Appellant likewise was adamant that he was not behind Justin). Thereafter, "Justin was on

the ground." R. 120, ll. 4-5; State's Exhibit #7. Jimer did not see who hit Justin. R. 120, ll. 6-7; R. 126, ll. 20-21.

Mariah told a different version. Mariah claimed that Jimer "touched" her, and that she told him not to touch her. R. 104, ll. 18-20. According to Mariah, Jimer touched her breast when she gave him a hug. R. 106, ll. 19-22. Mariah further claimed that she left Jimer, went to Justin, and told Justin what Jimer had done. R. 103, ll. 23-24; R. 104, ll. 20-22. Then, Justin approached Jimer, where the two talked. R. 105, ll. 1-2. Mariah claimed that after Justin talked to Jimer, "everything was fine," and Justin and Jimer "even played pool" together. R. 105, ll. 4-8. Mariah last saw Justin standing next to a wall talking to someone. R. 105, ll. 15-21. She went to the bathroom. R. 105, ll. 12-24. When she returned from the bathroom, Justin was "gone." R. 105, ll. 23-24.

It was undisputed that the bar's bouncers dragged Justin, who was unconscious, outside the bar. R. 25, ll. 9-14; R. 127, ll. 22-23; State's Exhibit #9; State's Exhibit #10. The bouncers did not wait for medical personnel to arrive before they moved Justin's body outside. R. 26, ll. 2-4; State's Exhibit #9; State's Exhibit #10. The bouncers deposited Justin's body on the floor inside the bar at least once before finally dumping his body outside the bar. State's Exhibit #7.

At some point, Justin arrived at the Grand Strand Medical Center. R. 64, ll. 2-7. Although individuals testified to observing an ambulance at the bar, the state presented no witnesses or other evidence concerning how Justin arrived at the hospital, who called for the ambulance, the condition in which he was found by emergency medical personnel, or what happened to Justin between being dumped outside by the bouncers and arriving at the hospital. Dr. Joseph Cheatle cared for Justin while he was in the hospital. R. 64, ll. 2-7. According to Dr. Cheatle, Justin suffered a subgaleal hematoma on the left side and a subdural hematoma on the

right frontal lobe. R. 65, ll. 19-24. In Dr. Cheatle's opinion, Justin "had a force applied to the back of his head" causing the "front of his head on the exact opposite trajectory" to bleed. R. 67, ll. 1-3. Further, Dr. Cheatle explained Justin suffered a vascular skull fracture. R. 72, ll. 5-11. Dr. Cheatle explained the force to the back of Justin's head could have been from human contact or any contact with a hard surface, such as a bat, pipe wrench, or any number of things. R. 75, l. 16 – R. 76, l. 22.

The police arrived at the hospital because the hospital was treating an unknown male. R. 85, ll. 3-9; R. 85, ll. 21-22. The police were trying to find out his identity. R. 85, l. 24 – R. 86, l. 1. From the hospital staff, the police received two phones, two sets of keys, and a wallet or a change purse. R. 86, ll. 8-12. Inside the change purse, the police found an identification card. R. 86, ll. 13-14. The police then went to Broadway at the Beach, the area in which Carlos'n Charlie's was located. R. 86, ll. 16-19. The officers "started walking through the parking lot clicking key fobs." R. 86, ll. 20-24. When a car "chirped" in response to the clicking, the police "ran the tag," which revealed it belonged to Justin. R. 87, ll. 1-2. In the car, the police found a woman's purse along with some for "an Ashley, a Kaitlin, and then Justin." R. 87, ll. 4-7. The police also searched for Justin's name on Facebook. R. 87, ll. 8-14.

Initially, the police reached out Ashley. R. 87, l. 16. Ashley indicated Kaitlin was Justin's roommate. R. 87, ll. 20-24. Then, on a lark, the police went to Carlos'n Charlie's. R. 88, ll. 5-11. The police obtained video surveillance evidence from Carlos'n Charlie's. State's Exhibit #7; State's Exhibit #9.

Motion for directed verdict

At the conclusion of the state's case, defense counsel moved for a directed verdict on the ABHAN charge. R. 150, ll. 16-19. Defense counsel explained the state failed to show causation. R. 150, ll. 19-20. The video presented by the state merely showed Justin on the ground. R. 151, ll. 1-7. The video did not show how he ended upon the ground. R. 151, ll. 1-7. He argued that "[i]t could be true that [Appellant] did punch him in the face, but that he fell, struck his head and injured himself completely unrelated to that event." R. 151, ll. 9-11. The state simply could not prove what caused Justin's injury. R. 157, l. 8 – R. 158, l. 22. Due to the state's "fatal gap in evidence," defense counsel argued Appellant was entitled to a directed verdict. R. 152, ll. 1-3.

The state theorized that Appellant approached Justin from behind and struck him in the back of the head, which somehow caused Justin to fall backwards with his feet up. R. 153, ll. 12-18. To support its theory, the state relied almost exclusively on Dr. Cheatle's testimony that the injury was to the rear of Justin's head. R. 154, ll. 3-21.

Although he ultimately denied the motion for directed verdict, Judge Culbertson indicated "[t]his was a close call." R. 160, l. 25 – R. 161, l. 1. He explained that he did not know that there was evidence that proved the state's theory or where a reasonable juror could rely upon beyond a reasonable doubt that there was a sucker punch to the back of the head. R. 161, ll. 1-5. However, he thought the state had presented evidence that "there was a punch by [Appellant] that created great bodily injury." R. 161, ll. 6-8. Judge Culbertson was perplexed because there was "evidence of a crime, but not based upon the state's theory." R. 161, ll. 13-15. He saw absolutely no evidence of a sucker punch to the back of the head, which was the entirety of the state's case. R. 161, ll. 15-18. Nevertheless, he concluded there was a punch and "there

was evidence that it was a likelihood or did cause great bodily injury." R. 161, l. 24 – R. 162, l. 4.

Defense case-in-chief

Ambrose Heavener was a patron of Carlos'n Charlie's on October 17, 2015. R. 199, l. 15 – R. 200, l. 14. He recalled an altercation happening that night. R. 200, ll. 15-17. More specifically, he remembered there was a "standoff" followed by "a swing." R. 200, ll. 18-23. He heard people arguing, which caused him to turn around to determining what was happening. R. 201, ll. 14-18. Heavener saw "two people standing pretty much chest to chest, face to face, ... going at it pretty good for a minute there." R. 201, l. 21 – R. 202, l. 1. The people had "their fists kind of balled at their sides and just looked like they were fixing to start a fight." R. 202, ll. 1-3. He then saw a guy approach the men, trying to calm them down. R. 202, ll. 16-23.

One of the men "turned real fast toward [Appellant] like he was gonna hit him and, ... it looked like he was about to hit him." R. 204, ll. 1-3. Instead, Appellant "swung and hit him and he fell down." R. 204, ll. 3-4. The man looked aggressive and as if he may attack. R. 204, ll. 9-13. Appellant struck the man on the face on the left side. R. 204, ll. 18-21.

Steven Sumpter was at Carlos'n Charlie's as well. R. 219, ll. 8-10. Appellant sat across the bar from Steven. R. 224, ll. 4-6. Steven saw someone approach Appellant and direct his attention to the dance floor. R. 224, ll. 6-10. Steven followed their gaze. R. 224, ll. 8-10. Appellant walked toward "a little commotion going on over near the dance floor." R. 224, ll. 16-17. It looked like there was going to be a fight. R. 224, ll. 14-19. Appellant tried to step in between the individuals who were close to fighting. R. 225, ll. 5-12.

According to Steven, one of the men took a swing at Appellant. R. 227, ll. 7-9. Appellant "punched back and hit the larger gentleman." R. 227, ll. 10-11. Appellant hit the man

in the face. R. 229, ll. 13-17. The larger man fell backwards, apparently, "knocked out on his feet." R. 229, ll. 18-20.

Renewed motion for directed verdict

At the conclusion of the defense's case, counsel moved for a directed verdict explaining there was no evidence to support "the state's theory that this was a sucker punch, ambush from behind." R. 235, ll. 18-22. There was no evidence of a witness to say what happened. R. 235, ll. 22-23. While there was evidence that Justin suffered an injury to the back of his head, there was no evidence that the injury was the result of Appellant hitting him from behind. R. 235, l. 24 – R. 236, l. 1. The judge denied the motion. R. 236, ll. 9-10.[1]

Discussion

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely

[1] After the jury's verdict, defense counsel moved for a new trial, which the judge denied. R. 323, ll. 4-25.

raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, the Lollis Court directed a verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. The Court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), the Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51. As explained by the Court, although our courts have abandoned the

traditional circumstantial evidence jury charge, the language of the charge is instructive in making a directed verdict determination. The traditional charge provided:

> Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009)).

In State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Supreme Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the victim in a burn pile behind the home of Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim's home, and DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

The state charged Appellant with ABHAN. Thus, the state was required to show Appellant "unlawfully injure[ed] another person and (a) great bodily injury to another person result[ed]; or (b) the act [was] accomplished by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600 (B)(1). "A person cannot be convicted of any crime defined in terms of a result ... unless his act is the proximate cause of the result." McAnninch. Page 90. The Supreme Court explained "[t]he proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the

result would not have occurred." State v. Des Champs, 126 S.C. 416, 416, 120 S.E. 491, 493 (1923) (internal quotation and citation omitted). Proximate cause "is more broadly, rather than more narrowly, applied against the wrongdoer in a criminal prosecution than against the tort-feasor in a civil action." Id. at 416, 120 S.E. at 493. "Thus, in a criminal action, the wrongdoer whose crime has resulted in injury to another will not be absolved on the ground that the wrongful act or negligence of the person injured contributed to the injury as proximate cause." Id.

Thus, the statute required the state prove that Appellant's conduct *caused* Justin's injury. See State v. Greene, 423 S.C. 263p, 814 S.E.2d 496, 498-499 (2018) (discussing causation in the context of a homicide by child abuse case); State v. Dantonio, 376 S.C. 594, 604-606, 658 S.E.2d 337, 343-344 (Ct. App. 2008) (explaining causation in a felony driving under the influence case); State v. Burris, 334 S.C. 256, 265 n.11, 513 S.E.2d 104, 109 n.11 (1999) (noting "the rule the unlawful activity must proximately cause death"); State v. Burton, 302 S.C. 494, 497-498, 397 S.E.2d 90, 92 (1990) (discussing causation in a murder case); State v. Matthews, 291 S.C. 339, 346-347, 353 S.E.2d 444 449 (1986) (discussing causation); State v. Brown, 205 S.C. 514, 32 S.E.2d 825, 827 (1945) (discussing causation). More specifically, the state was required to prove that Appellant's act of hitting Justin once caused great bodily injury or was likely to produce death or great bodily injury. The state was unable to do so.

Quite simply, "there must be a causal relationship between the defendant's act" and the resulting harm "before criminal liability may be imposed." State v. Jenkins, 276 S.C. 209, 211, 277 S.E.2d 147, 148 (1981) (exploring causation in a homicide case). In the context of homicide cases, where the issue of causation principally arises, "[o]ne who inflicts an injury on another is deemed by law to be guilty of homicide where the injury contributes mediately or immediately to the death of the other. The fact that other causes also contribute to the death does not relieve the actor from

responsibility." State v. Riley, 219 S.C. 112, 112, 64 S.E.2d 127, 130 (1951). In other words, the "intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring the injurious results." Des Champs, 126 S.C. at 416, 120 S.E. at 493.

The Court reversed a reckless homicide conviction where the state failed to prove that reckless operation of a vehicle was the proximate cause of the accident that caused the death. State v. Dobson, 281 S.C. 36, 38-39, 314 S.E.2d 310, 311 (1984). Dobson and his friend were riding in a jeep in which Dobson was driving. Id. at 37, 314 S.E.2d at 311. When the jeep overturned, Dobson's friend was killed. Id. On appeal, Dobson argued "the state failed to prove a reckless act on his part which was the proximate cause of the accident." Id. at 38, 314 S.E.2d at 311. Dobson argued a mechanical malfunction, not his undisputed drinking while driving, caused the accident. Id.

The Court explained that when a "case rests entirely on circumstantial evidence, a directed verdict is proper when the evidence fails to positively prove the guilt of the accused to the exclusion of any other reasonable hypothesis." Id. According to the Court "[e]ven if a finding of recklessness were warranted by the evidence of [Dobson]'s intoxication, the state failed to meet the circumstantial evidence test in showing that this recklessness was the proximate cause of the accident." Id. The Court was particularly impressed by the expert testimony offered by Dobson that "the locking of the left front wheel caused the accident." Id. Recognizing that the state's expert contradicted Dobson's theory regarding the cause of the accident, the Court concluded Dobson's expert's theory was "a reasonable hypothesis." Id. at 39, 314 S.E.2d at 311. In fact, the record contained "no other explanation for the overturning of the jeep." Id. According to the Court, "[t]he evidence was simply too speculative to submit the reckless homicide issue to the jury." Id.

As the trial judge noted, no evidence in the record supported the state's theory that Appellant struck Justin in the back of the head. The evidence indicated that Appellant struck Justin in the face with a single punch. The undisputed evidence – the video and still photographs – further indicated that Justin fell backward, landing with his feet straight up toward the ceiling, as the judge noted. Additionally, the undisputed evidence – the video and the still photographs – showed two bouncers dragging Justin from the dance floor to the door. The bouncers deposited Justin on the floor and re-positioned him. Thereafter, the bouncer dumped him outside. There was no evidence presented regarding where the bouncers put Justin – was he dropped on his head on a concrete sidewalk by the bouncers? There was no evidence presented regarding how the bouncers handled Justin – did the bouncers knock his head against walls, doors, or other objects? The state's evidence simply failed to show that Appellant's act of punching Justin in the face caused the injuries described by Dr. Cheatle. For this reason, the trial judge erred in failing to direct a verdict of acquittal on the charge of ABHAN.

II. Where Appellant, who did not use deadly force, was charged with assault and battery of a high and aggravated nature, the trial judge erred by instructing the jury that in order for self-defense to apply, Appellant must have been in fear of great bodily injury or death.

Standard of review

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id. "It is error to give instructions which may confuse or mislead the jury." State v. Rothell, 301 S.C. 168, 169-170, 391 S.E.2d 228, 229 (1990).

Relevant facts

During the charge conference, defense counsel objected to the portions of the self-defense instruction requiring the evidence show Appellant was in imminent danger of death or serious bodily injury in order for self-defense to apply. R. 248, ll. 9-17. Defense counsel explained he could not imagine "that a person that is assaulted with something less than deadly force, a fist, does not have the right to defend himself." R. 248, ll. 21-24. He further explained that "from the Defense point of view," the incident involved "a punch for a punch." R. 249, ll. 7-9. According to defense counsel, the law must permit a person to "resist a punch with a punch." R. 249, ll. 12-16. Self-defense must include the ability of a person punched in the face, or threatened with a punch in the face, to be able to respond in self-defense. R. 249, ll. 18-21. Thus, defense counsel objected to

the self-defense jury instruction including language that Appellant must have been in fear of death or great bodily injury in order to exercise his right to self-defense. R. 249, ll. 21-22.

The state agreed that the "the law could not be that a person must be in fear of losing his life in every situation," but relied upon the portion of the charge regarding fear of serious bodily injury as sufficient to cover situations in which a deadly threat was not posed. R. 250, ll. 19-23. According to the state, in order to exercise one's right to self-defense, one "must be in fear of death or serious bodily injury." R. 251, ll. 19-25. Anything less than fear of death or serious bodily injury precluded the use of self-defense. R. 251, ll. 19-25.

Judge Culbertson agreed with defense counsel, but explained his hands were "tied" by the lack of authority from the appellate courts to provide a different instruction. R. 249, ll. 23-24; R. 250, ll. 1-7. Judge Culbertson succinctly explained defense counsel's argument that based upon the proposed jury instruction for self-defense, a person "just in fear of injury" would not be able to defend himself. R. 250, l. 24 – R. 251, l. 7. Put simply, "[t]he question is here if somebody puts you in fear, not of your life, not of serious bodily injury, but just in fear of injuring you, can you not defend yourself?" R. 251, ll. 13-18. Judge Culbertson spoke frankly when he admitted he did not "know the answer because the Appellate Court hasn't addressed it, but at least that gives you your grounds for appeal is whether or not self-defense is available to any defendant who is not in fear of death, not in fear of serious bodily injury, but is in fear of injury or moderate injury." R. 252, l. 1-6; R. 252, ll. 12-19. According to the judge, it was for the appellate courts to decide "if it's erious bodily injury or it's death, then that means self-defense is not available" when the conduct "involves less than serious bodily injury or death." R. 253, ll. 1-5. Although he "tend[ed] to agree with [the defense's] argument," Judge Culbertson refused to alter the standard self-defense instruction. R. 253, ll. 6-8.

At the conclusion of the trial, the judge instructed the jury concerning the elements of the charged offense, including the lesser-included offenses. Finally, the judge instructed the jury as follows regarding self-defense:

> First, the Defendant must be without fault in bringing on the difficulty. If the Defendant's conduct was the type which was reasonably calculated to and did provoke an assault resulting in death or great bodily injury, the Defendant would be at fault for bringing on the difficulty and would not be entitled to an acquittal based on self-defense. **The second element of self-defense is that the Defendant actually in imminent danger of death or serious bodily injury or that the Defendant actually believed he was in imminent danger of death or serious bodily injury.** If the Defendant was actually in imminent danger, self-defense requires that the circumstances warranted a person of ordinary firmness and courage to strike the fatal blow to prevent death or serious bodily injury. If the Defendant believed he was in **imminent danger of death or serious bodily injury**, self-defense requires that a reasonably prudent person of ordinary firmness and courage would have had the same belief. In deciding whether the Defendant actually was or believed he was in **imminent danger of death or serious bodily injury**, you should consider all the facts and circumstances surrounding the crime including the physical condition and characteristics of the Defendant and the victim. The Defendant does not have to show that he was actually in danger. If the Defendant believed he was in imminent danger and a reasonably prudent person with ordinary firmness and courage would've had the same belief, then the Defendant has the right to act on appearances, even though the Defendant's beliefs may have been mistaken. You must decide whether the Defendant's fear of **immediate danger of death or serious bodily injury** was reasonable and would have been felt by an ordinary person in the same situation. Words accompanied by hostile acts may, depending on the circumstances, establish self-defense. However, mere words, no matter how abusive, insulting, vexatious or threatening they may be, will not justify an assault and battery unless accompanied by an actual offer of physical violence. The relative sizes, ages and weights of the Defendant and the victim may be considered in deciding the apparent or actual need for force in self-defense and the amount of force needed.
>
> The final element of self-defense is that the Defendant had no other probable way to **avoid the danger of death or serious bodily injury** and to act as the Defendant did in this particular instance. A person cannot be required to make an exact calculation as to the degree or amount of force which may be needed to avoid death or serious bodily harm. Therefore, in self-defense, the Defendant has the right to use the force needed to avoid death or serious bodily harm. The force used in self-defense does not have to be limited to the degree or amount of force used by the victim. The Defendant has the right to use so much force as appeared necessary for

complete self-protection and which a person of ordinary reason and firmness would've believed to be needed to prevent death or serious bodily harm.

R. 296, l. 25 – R. 298, l. 13 (emphasis added).

Discussion

When a person does not use deadly force, the person "need not anticipate serious bodily harm before responding with non-deadly force." William S. McAninch, et al., The Criminal Law of South Carolina 620 (6th ed. 2013). Additionally, the person "need not retreat before responding with non-deadly force." Id. To support this proposition, the authors explained that "the key to self-defense is proportionality of the response." Id. (citing State v. Wood, 1 S.C.L. (1 Bay) 351 (1794)). After recounting the facts of the case, the authors explained "that one need not submit to every assault." Id. Rather, "[a] person is entitled to defend against reasonably anticipated unlawful bodily harm even though it would not be serious, but in defending, he must respond proportionally." Id.

"The general rule is that where a person reasonably believes he is threatened with bodily harm he may use whatever force appears to be reasonably necessary to protect himself." Byrd v. Isgitt, 338 So.2d 374, 375 (La. Ct. App. 1976). "The general rule at common law is that a person may use reasonable force to protect himself against one who threatens him with physical injury." Note, Justification for the Use of Force in the Criminal Law, 13 Stan. L. Rev. 566, 566-567 (1961); "For the purposes of self-defense which stops short of killing or attempting to kill, there is no duty to retreat, and no need for the apprehension of serious bodily harm." Beyer v. Birmingham Ry., Light & Power, Co., 64 So. 609, 611 (Ala. 1914); see also Adams v. State, 75 So. 641, 641 (Ala. Ct. App. 1917).[2]

[2] See also Hartley v. Oldtman, 410 S.W.2d 537, 543 (Mo. Ct. App. 1966) (explaining that "[w]here a person has reasonable grounds to believe, and does believe that another is about to assault him, or do bodily harm to one to whom he owes a duty to protect, he need not wait until the other person actually strikes or makes an assault before resorting to the application of reasonable force to repel

The Supreme Court of Appeals of West Virginia analyzed a similar issue in the civil context. Shires v. Bogges, 77 S.E. 542, 545 (W. Va. 1913). The trial judge instructed the jury that the defendant could exercise his right to self-defense only if he believed the plaintiff intended to do him some great bodily harm. Id. The court was asked whether the law limited self-defense in this manner. Id. According to the court, the law did not. Id.

The South Carolina Supreme Court has long held that a trial judge has the responsibility to craft a self-defense charge tailored to the facts of a case. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011); State v. Fuller, 297 S.C. 440, 444-45, 377 S.E.2d 328, 331 (1989). As recognized in Fuller, there is a "body of common law self-defense" and trial judges must "consider the facts and circumstances of the case at bar in order to fashion an appropriate charge." Fuller, 297 S.C. at 443, 377 S.E.2d at 330.

In Fuller, the defendant solicited a prostitute. Id. at 441, 377 S.E.2d at 329. However, when the pair arrived at the prostitute's trailer, they discovered it was occupied. The defendant then left. Id. When the defendant later returned to the prostitute's trailer, he found a car driven by a white woman was blocking the road. Id. The defendant asked her to move her car. Id. Two men approached the defendant's car and asked him "what he was 'trying to do to that white lady.'" Id. One of the men used a racial slur and grabbed the defendant by the throat. Id. at 441, 377 S.E.2d at 329-30.

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the attack" and that "where the person does not use a deadly weapon, fear of bodily harm only is sufficient to support a justification by self-defense); Silfast v. Matheny, 136 P.2d 260, 262 (Ore. 1943) (approving a jury charge that the intentional infliction of bodily harm by a means not intended or likely to cause death or serious bodily harm is privileged for the purpose of preventing the other from inflicting bodily harm upon the actor in certain circumstances); Anders v. Clover, 165 N.W. 640, 641 (Mich. 1917) (explaining "[t]here can be no doubt that one assaulted may justly exercise such reasonable force as may be, or as appears to him at the time to be, necessary to protect himself from bodily harm in repelling said assault.).

The defendant fired a warning shot allowing him to drive away. Unbeknownst to the defendant, the street was a dead end. Id. at 442, 377 S.E.2d at 330. Due to the men blocking his escape, the defendant ultimately crashed his car against a rail. Id. The two men yelled, "'we're going to take care of you.'" Id. The defendant thought he saw something shiny in one of the men's hands and fired four shots at them, killing both. Id. No gun was found on the men. Id.

The trial judge only instructed the jury on the basic elements of self-defense. Id. The Court held it was error to only give the general charge when the defendant "repeatedly requested additional charges." Id. at 443, 377 S.E.2d at 330. The Court found the trial judge erred by not giving three specific charges on self-defense that further explained the principles in the general charge. First, the trial judge failed to charge the jury that the defendant had the right to act on appearances. Id. at 443-44, 377 S.E.2d at 330-31 (citing State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955)). Second, the trial judge failed to charge the jury that "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense." Id. (citing State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951)). Third, the trial judge failed to charge that an individual has no duty to retreat "if by doing so he would increase his danger of being killed or suffering serious bodily injury." Id. (citing State v. Hardin, 114 S.C. 280, 103 S.E. 557 (1920)).

The South Carolina Supreme Court held a trial judge erred in failing to charge on the specific elements of self-defense that were applicable to the defendant's theory in State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000). As stated by the Court, "[a] self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant." Id. The Court found the instruction given in Day incomplete because the trial judge failed to instruct the jury that the defendant had the right to judge the conduct of the deceased more harshly than otherwise because of the deceased's drug consumption. Id.; see

also State v. Hendrix, 270 S.C. 653, 660-661, 244 S.E.2d 503, 507 (1978) (including the intoxication of the deceased under its analysis of the imminent peril element of self-defense and stating intoxication would provide a basis for the defendant to judge the conduct of his adversary more harshly than otherwise).

The trial judge erred by instructing the jury that in order for Appellant to avail himself of self-defense, the law required that he be in imminent danger of death or serious bodily injury or reasonably believe he was in such danger. The judge's instruction eviscerated Appellant's claim of self-defense and permitted the state's burden to disprove self-defense to be lessened. Appellant did not use deadly force against Justin. All of the evidence indicated Appellant struck Justin once. There was no indication that Appellant used a weapon or excessively beat Justin. The judge's erroneous instruction effectively prevented the jury from considering self-defense. By requiring the state only disprove danger of imminent death or serious bodily injury, the judge committed an error of law prejudicial to Appellant.

III. In response to a jury question, the trial judge erred in instructing the jury that in order to find Appellant guilty of assault and battery of a high and aggravated nature all the state had to prove regarding intent was that Appellant intended to injure another person with no regard to whether Appellant intended the level of injury that occurred.

Standard of review

"The standard of review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). "In reviewing jury charges for error, th[e reviewing court] must consider the [trial] court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). "If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." Id. "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. "To warrant reversal, a [trial] court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Id.

Relevant facts

In its indictment, the state alleged that Appellant committed "an unlawful act of injury to Justin Hodges which resulted in great bodily injury or the act was accomplished by means likely to produce death or great bodily injury to [Justin Hodges] in violation of Section 16-3-600(b), S.C. Code of Laws, 1976, as amended." R.351-352. Judge Culbertson agreed the evidence presented entitled Appellant to jury instructions on the lesser-included offenses of assault and battery in the second and third degrees. R. 242, ll. 23-25. He instructed the jury thusly. R. 294, l. 7 – R. 296, l. 12.

During deliberations, the jury asked, "[A]re we to consider intent as to which level of assault this is or is this the resulting harm the deciding factor?" R. 312, ll. 22-25; R. 326. While discussing the question, the judge explained that he planned to instruct the jury that "[t]o conviction the Defendant of assault and battery of a high and aggravated nature, the state must prove beyond a reasonable doubt that the Defendant intended to unlawfully injure another person and either great bodily injury to that person resulted or the act was accomplished by means likely to produce death or great bodily injury." R. 313, ll. 13-24. His proposed instructions for the lesser-included offenses provided almost identical language. R. 314, ll. 5-11; R. 314, ll. 18-22.

Defense counsel objected "to adding the word intent to the Court's previous charge." R. 316, ll. 11-12. He requested a "charge on intent as a general proposition." R. 316, ll. 14-16. The judge's previous instruction to the jury was a correct statement of the law regarding the definitions of the charged offense and the lesser-included offenses. R. 316, ll. 16-19. According to defense counsel, by "placing emphasis on that word, intent," there was a danger that the judge would "suggest an answer to their question." R. 316, ll. 16-23. He explained that by including the additional word, the Court was placing emphasis on it. R. 316, l. 24 – R. 317, l. 1. Additionally, defense counsel argued that the judge's reading and "emphasizing [of] that word" was suggesting an outcome to the jury. R. 317, ll. 1-3.

Over objection, the judge instructed the jury as follows: "To convict the Defendant of assault and battery of a high and aggravated nature, the State must prove beyond a reasonable doubt that the Defendant intended to unlawfully injure another person, and either great bodily injury to that person resulted or the act was accomplished by means likely to produce death or great bodily injury." R. 319, ll. 10-16. His instructions on the lesser-included offenses followed the same pattern, including the addition of the word "intended" as the verb and "unlawfully

injure another person" as the object of the verb. R. 319, l. 16 – R. 320, l. 18. Approximately ten minutes later, the jury returned with a guilty verdict of ABHAN. R. 320, l. 22 – R. 321, l. 6.

Discussion

"Criminal liability is normally based upon the concurrence of two factors: the defendant's criminal intent and the actual, physical act constituting the offense." State v. Fennell, 340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000) (citing United States v. Bailey, 444 U.S. 394, 402 (1980)). "A defendant may not be convicted of a criminal offense unless the state proves beyond a reasonable doubt that he acted with the criminal intent, or mental state, required for a particular offense." Id. (citing State v. Ferguson, 302 S.C. 269, 271, 395 S.E.2d 182, 183 (1990)). "Assault, like every other non-strict liability offense, consists of two basic elements, act and *mens rea*." McAninch, supra, at 242.

"[T]he mental state required to be proven by the state for a particular crime might be purpose (intent), knowledge, recklessness, or criminal negligence." Ferguson, 302 S.C. at 271, 395 S.E.2d at 183. "[W]hat kind of criminal intent [that] is required to satisfactorily show a commission of [an] offense [is a] question[] of legislative intent." Id. at 272, 395 S.E.2d at 183; see also State v. Bryant, 316 S.C. 216, 219, 447 S.E.2d 852, 854 (1994).

The state charged Appellant with ABHAN, and the judge determined the evidence presented supported jury instructions on two lesser-included offenses. Thus, the state was required to show Appellant "unlawfully injure[ed] another person and (a) great bodily injury to another person result[ed]; or (b) the act [was] accomplished by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600 (B)(1). Similarly, for assault and battery in the second degree, the state was required to prove Appellant "unlawfully injure[d] another person," and "moderate bodily injury to another result[ed] or moderate bodily injury to another person could have resulted."

S.C. Code Ann. § 16-3-600 (D)(1). And, finally, for assault and battery in the third degree, the state was required to prove Appellant "unlawfully injure[d] another person, or offer[ed] or attempt[ed] to injury another person with the present ability to do so." S.C. Code Ann. § 16-3-600 (E)(1). The statutory provisions omit any reference to the mental state required for any of the offenses.

"'In offenses at common law, and under statutes which do not disclose a contrary legislative purpose, to constitute a crime, the act must be accompanied by a criminal intent, or by such negligence or indifference to duty or to consequences as is regarded by the law as equivalent to a criminal intent.'" Ferguson, 302 S.C. at 272, 395 S.E.2d at 183 (quoting State v. American Agricultural Chem. Co., 118 S.C. 333, 337, 110 S.E. 800 (1922)). Thus, the level of intent required for ABHAN and the lesser-included offenses is criminal intent or negligence or indifference to duty.

Additionally, the Supreme Court's opinion in State v. Dalby, 86 S.C. 367, 68 S.E. 633 (1910) further supports that the assault and battery offenses require a showing of criminal intent. The Court approved a jury instruction explaining that "a violent seizure of the person of another might not be even a common assault and battery," where the judge illustrated the statement "by saying if one violently seized the person of another to prevent him from falling into the water, or from being run over by a street car, it would not be an assault and battery" because "an unlawful intent is necessary to constitute the offense." Id. at 367, 68 S.E. at 634.

"The state of mind referred to as 'purposeful' or 'intentional' demands that the actor be acting purposefully in regard to the particular element of the offense." McAninch, supra, at 6. In other words, the actor must "act with the conscious objective of causing a particular result or of engaging in conduct of a particular nature."

The question presented here is whether the different levels of assault and battery require merely an intent to injure allowing the potentially unintentional resulting injury to control the criminal charge or whether there must be an intent to cause the particular injury that results.

In State v. Bryant, 316 S.C. 216, 447 S.E.2d 852 (1994), the South Carolina Supreme Court confronted a similar question. An officer attempted to arrest Bryant for failure to stop for a blue light. Id. at 218, 447 S.E.2d at 853. Bryant and the officer struggled. Id. at 218, 447 S.E.2d at 853-854. During the struggle, Bryant pushed the officer against the patrol car causing damage in excess of $200. Id. at 218, 447 S.E.2d at 854. At his trial for malicious injury to personal property – the police car, Bryant moved for a directed verdict because there was no evidence of intent to cause damage to the car. Id.

After explaining that the state was required to show "willful, unlawful and malicious damage" to the police car, the Court explained that willful was synonymous with intentional. Id. at 219, 447 S.E.2d at 854. Based on the evidence presented, the state failed to provide any evidence that Bryant intended to cause damage to the patrol car when he pushed the officer against it. Id. "The only reasonable inference form the evidence [was] that the damage to the patrol car was an unintended harm." Id. Bryant's "intent to assault and batter the police officer [could not] be transferred to the property damage since the harm caused was different from the type of harm intended." Id. There was no evidence that Bryant willfully caused harm to the car. Id.

The assault and battery statutes are divided based upon the degree of harm caused by the conduct of the defendant's conduct. It is the degree of harm that distinguishes the various levels. The punishment meted out to the offender depends upon the degree of harm. Thus, the criminal intent of the offender must apply to the intent to injury and the resulting injury. When the judge instructed the jury that it was only necessary for Appellant to have intended to injury Justin, the

judge alleviated the state's burden of proving the resulting injury was also intended. The nature of the injury Justin suffered was quite serious by any measure. Thus, when the judge explained that the resulting injury, whether great bodily injury, moderate bodily injury, or just bodily injury, controlled the offense, the jury found Appellant guilty of ABHAN in less than ten minutes.

CONCLUSION

Regarding Issue I, Appellant respectfully requests this Court direct a verdict of acquittal in his favor on the charge of assault and battery of a high and aggravated nature. Regarding Issues II and III, Appellant respectfully requests this Court reverse his conviction and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of December, 2018.