STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN ARTHUR THOMAS,

APPELLANT

APPELLATE CASE NO. 2015-000720

FINAL BRIEF OF APPELLANT

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II. The trial court reversibly erred by refusing to instruct the jury on (A) the defense of accident and (B) the law of citizen's arrest where there was evidence presented at trial that Melton was unintentionally stabbed when Appellant approached him with the intention of making a citizen's arrest if Melton did not return electronic equipment that Appellant had probable cause to believe he had stolen from Appellant's vehicle and where the court instructed the jury on the law of self-defense.

III. The trial court reversibly erred by refusing to issue a curative instruction where the trial court's PowerPoint slides, which were presented contemporaneously with the court's jury instructions, included an improper charge on inferred malice in violation of our Supreme Court's decision in *State v. Belcher*[1].

[1] 385 S.C. 597, 685 S.E.2d 802 (2009).

STATEMENT OF THE CASE

On February 11, 2014, the Berkeley County Grand Jury indicted Appellant John Arthur Thomas for attempted murder and possession of a weapon during the commission of a violent crime. R. 301.

On February 17-19, 2015, Appellant proceeded to trial before the Honorable Kristy L. Harrington and a jury. Chad D. Shelton and Cody J. Groeber represented Appellant. Assistant Solicitors Daniel B. Poulos and Michael Patterson represented the State.

The jury found Appellant not guilty of attempted murder, but guilty of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN). R. 256, l. 17 - 257, l. 2.

Following a sentencing hearing on March 23, 2015, the trial court sentenced Appellant to ten years imprisonment, suspended upon the service of four years of incarceration and three years of probation. R. 299. 51, l. 20 - 300, l. 6.

STATEMENT OF FACTS

Relevant Facts

On November 4, 2013 at around 8:00 p.m. John Thomas stopped at The Monkey Business Bar and Grill located in Cross, a small, rural town on the western edge of Lake Moultrie in Berkeley County. R. 130, l. 4 - 132, l. 12. Thomas' friend and roomate Misty Watts rode with him to the restaurant. *Id.*

Thomas sat at the bar and ordered food. While Thomas was eating, Kenneth Melton, an acquaintance of Watts and Thomas, arrived with Eric Singletary, whom Appellant did not know. *Id.* The two began drinking. *Id.* Melton and Thomas had formerly been friends. R. 111, l. 20 - 113, l. 20.

Thomas had distanced himself from Melton, a convicted felon, following a series of confrontations, including an incident when Melton had appeared unannounced at Thomas' house with a rifle and demanded to hunt the surrounding woods. R. 157, ll. 1-25. Another incident involved Thomas intervening when a man threatened Melton with a chainsaw after the latter initiated an altercation. R 31, ll. 3-16; R. 77, ll. 8-20; R. 121, ll. 12-25.

Since the deterioration of their friendship, Melton had threatened Thomas with violence on several occasions. R. 113, l. 20 - 128, l. 10. As Thomas ate, Watts talked with Melton in the back corner of the restaurant by the juke box. R. 130, l. 8 - 132, l. 24. Watts, Melton, and Singletary then walked to the front of the bar and sat with Thomas. *Id.* While Melton introduced Singletary, Watts grabbed Thomas' car keys off of the bar and quickly left through the bar's back door. R. 131, l. 5 - 134, l. 3.

Thomas became suspicious, in part, because he had only days before discovered a Facebook message from Melton to Watts asking her to steal two cell phones from Thomas for him. *Id.*

Thomas regularly acted as a purchasing agent for his longtime employer, L & S Electronics. R. 177, l. 14 - 185, l. 7. At trial, his boss confirmed that Thomas, a trusted employee, was allowed to purchase cell phones using the company's account and sell them as a side-business. *Id.*

Watts returned and quietly set Thomas' car keys down at the bar. R. 132, l. 3 - 133, l. 24. Thomas, flanked on either side by Melton and Singletary, saw Watts tap Melton on the shoulder. Thomas, now concerned that Watts had unlocked his car, watched as Melton left the bar. *Id.* Thomas hastily asked to pay his tab and announced that he was leaving. Watts attempted to delay him by refusing to leave the bar and encouraging him to stay. R. 134, ll. 2-21.

When Thomas reached the parking lot, Melton's truck was gone. Thomas drove to Melton's house. *Id.* He was not home. Thomas then drove to another local bar Melton frequented, the Sportsman. R. 135, l. 12 - 136, l 15. Melton was not there. Taking advantage of the restaurant's outdoor lighting, Thomas searched his car and realized that a container with a new order of company cell phones and several specialized low-voltage electronics meters were missing along with his work tools. *Id.*

As Melton had no cell phone, Thomas began furiously texting Watts while driving back to The Monkey Business. R. 136, l. 18 - 137, l. 21. With over three thousand dollars-worth of his employers' electronics stolen, Thomas feared his job was in jeopardy. *Id.* When he returned to the bar, Melton's truck was in the parking lot. *Id.*

Thomas looked into Milton's truck for the stolen items, but only saw a rifle lying across the seat. R. 138, ll. 7-24. Thomas, concerned that Melton was likely carrying a knife, took out his pen sized pocket knife and entered the bar. R. 139, l. 2 - 141, l. 21.

Thomas decided to confront Melton about the theft, in the hope that Milton would return the electronics if Thomas made clear how serious the theft was. *Id.* If Melton denied the theft, Thomas

planned to call the police and have them arrest Melton. *Id.* Given Cross's remote location, police response time can be slow. R. 162, l. 25 - 163, l. 3.

Thomas worried that if he allowed Melton to leave the bar after confronting him about the theft, Melton would return with his rifle. *Id.* Thomas entered the restaurant and approached Melton, who was sitting at the bar. Thomas grabbed Melton by the shoulder. Melton reacted by lunging off of his bar stool. In the brief scuffle that ensued, Melton was stabbed with the pocket knife just below his collar bone. *Id.*

Melton separated from Thomas and fled out of the front door of the bar towards the parking lot. R. 145, ll. 3-23. Fearing that Melton was retrieving his rifle, Thomas ran out of the bar through the back door. *Id.* Singletary and Melton left the bar in Melton's truck and called for medical assistance at a nearby gas station. R. 28 ll. 11-24.

Due to Cross's inaccessible location, Melton was taken by helicopter to MUSC. R. 29, ll. 12-23. Curiously, once EMS and the police arrived to treat Melton, Singletary left the gas station in Melton's truck without being interviewed. Melton suffered no injuries to his internal organs. R. 88, l. 1 - 93, l. 3. Melton's wound was closed with stitches and he was released from the hospital the following morning. *Id.* Melton did not undergo any further medical treatment and Dr. Fann, the emergency room doctor, stated that Melton did not experience any permanent or temporary impairment. *Id.*

After running out of the bar's back door, Thomas fell into a large drainage ditch separating the bar from an adjacent trailer park. He suffered a cracked rib and significant bruising. R. 145, l. 3 - 147, l. 10. He lost his cell phone and glasses in the fall. *Id.* Once he realized Melton had left the bar, Thomas returned and spoke briefly with the bartender. *Id.* He then drove home.

The next morning, Thomas emailed his sister, explained the incident and asked her to take him to the hospital for treatment and then to the Sheriff's office. R. 149, l. 13 - 150, l. 21. Shortly after his sister arrived, an Orangeburg County Sheriff's Deputy arrived at his home and placed him under arrest. *Id.* The deputy then took Thomas to the hospital.

Trial

Thomas proceeded to trial on February 17-19, 2015. The State argued that Thomas attacked Melton because Watts was flirting with Melton and she had refused to leave the bar with Thomas. R. 2, l. 8-24. The State entered into evidence a thirty second video pulled from the bar's surveillance cameras.[2]

This low resolution video showed the confrontation between Thomas and Melton. The State claimed that Thomas stormed into the bar and immediately stabbed Melton while his back was to Thomas. The police did not preserve any footage from earlier in the night when Thomas believed that Watts and Melton stole the electronic equipment. R. 16, l. 12 - 17, l. 17.

Testimony of William "Bo" Melton

Melton steadfastly denied that there was any ill feeling between him and Thomas. R. 24, l. 6 - 26, l. 17. Melton denied that he or Singletary left the bar at any time while Thomas was there. R. 40, ll. 2-21.

Melton claimed that Thomas simply charged him without warning or provocation. R. 27, l. 4 - 28, l. 19. As the two began to fight, Melton alleged Thomas threatened him, "he was going to cut me, cut and kill me." R. 26, ll. 2-20. Melton admitted that he was a felon with prior convictions for burglary and misdemeanor assault and battery of a high and aggravated nature. R. 30, ll. 15-21.

[2] The video was entered into evidence as State's Exhibit No. 3.

On cross-examination, Melton was asked if he had pawned some items on November 16, 2013 at the Money Man Pawn Shop in Moncks Corner. R. 32, l. 5- 45, l. Tellingly, he gave no response. Over the State's objection, the defense presented several receipts. *Id.* The receipts showed that Melton had pawned three specialized electrical meters, a heater, and power tools; less than two weeks after the incident. R. 303.

Confronted with the receipts, Melton delayed, "I'm looking for my signature." Upon finding his signature, he reluctantly admitted that he had pawned the items. R. 32, l. 21-24., Melton incredulously averred that he owned the items. He explained that he occasionally did maintenance work on a few rental properties, which is why he happened to own three specialty low-voltage electric meters, normally used by commercial electrical contractors. R. 33, l. 1-7.

Melton admitted that he also just so happened to occasionally sell cellular phones as a second side business. R. 33, ll. 8 - 4. Melton adamantly denied owning any firearms, "I'm a convicted felon." R. 38, ll. 3. The defense then produced a second receipt from the same Monck's Corner pawn shop showing that Melton had sold a .270 caliber rifle Remington 700 on January 14, 2014, less than two months after the incident. R. 304.

Melton admitted to pawning the gun, but denied it was his. R. 38, ll. 1-50. He claimed that he had agreed to sell the gun on behalf of a friend who did not have an ID. *Id.* Melton also denied telling nurses at MUSC that he had access to guns. He also denied telling them that he had used methamphetamine or marijuana on the day of the incident. R. 38, l. 21 - 39, l. 7.

Melton denied ever threatening Thomas. R. 42, l. 8 - 46, l. 16. At the conclusion of Melton's cross-examination, he admitted that he was consulting with a lawyer about the case for the purpose of filing a civil suit against the bar.[3] *Id.* at ll. 17-23.

Testimony of Misty Watts

Watts recalled that Thomas quickly finished eating soon after Melton and Singletary arrived at the bar. R. 54, l. 11 - 56, l. 19. Watts testified that when Thomas later returned to the bar, Melton turned around and stood up from his bar stool before the scuffle began. *Id.*

Watts remembered that she had received two text messages from Thomas that night. The first offered to give her a ride home. *Id.* The second message, which Watts seemed to only vaguely recollect, said "something along lines of there will be bloodshed." *Id.*

On cross-examination, Watts confirmed that she and Thomas were not dating and she, in fact, had a boyfriend during the time she lived with Thomas. She admitted that Thomas had allowed her to stay with him rent free after she lost her job. R. 57, ll. 5-17.

Testimony of Debbie Huntley

Debbie Huntley, the bartender on the night of the incident, testified that Watts had initially agreed to leave the bar with Thomas, but that after Melton arrived and spoke with Watts by the juke box; she changed her mind and wanted to stay R. 66, l. 2 - 67, l. 22.

Huntley testified that Thomas never yelled at Watts or objected to her speaking with Melton. R. 68, ll. 5-25. Huntley stated that when Thomas returned to the bar after paying for his dinner, he

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[3] On January 21, 2016, Melton was arrested for attempted murder, possession of a weapon during the commission of a violent crime, and possession of a weapon by a person convicted of a violent felony. Melton is accused of shooting a man in the head during an altercation at the Sportsman Bar. *Game of Pool Ends with Bar Fight, Shooting in Cross; One Person in Jail*, Berkeley County Observer, January 22, 2016, http://www.berkeleyobserver.com/2016/01/22/bar-fight-in-cross-lands-one-customer-in-jail/.

looked angry and upset. R. 62, l. 4-25. Huntley remembered Melton turned around and stood up out of his bar stool as Thomas approached him. *Id.*

Huntley recalled that Melton had been drinking, but that Thomas had had at most one beer while eating dinner. She was unsure if Melton was intoxicated, but described him as "gregarious". R. 69, l. 23 - 71, l. 23. Over the State's objection, Huntley testified that she believed Melton was a dishonest person. R. 71, l. 7 - 72, l. 13.

She said that Thomas was "a good man. He's kind to others, very even keel." R. 73, ll. 2-7. Huntley was also called by the defense and testified that Melton had a reputation for violence generally and, specifically, a reputation for violence against women. R. 174, l. 19 - 175, l. 10.

Huntley's husband, Joseph, was also at the bar on the night of incident, but could not provide much insight into the confrontation as it "happened real fast." R. 76, l. 13 - 77, l. 14. Joseph Huntley had known Melton for almost a decade and opined that Melton "has a knack of getting in trouble". *Id.*

In contrast, Joseph spoke well of Thomas, "I've never had a problem with John. I mean, he's always helped me out. He always been there, you know. You know he even helped [Melton] out because there was an incident where this guy had a chain saw. . ." *Id.* Huntley's testimony was cut short by an objection from the solicitor. *Id.*

Testimony of Dr. Steven Austin Fann

Dr. Fann treated Melton at MUSC. He testified that there were no injuries to Melton's internal organs. R. 88, l. 1-6. Dr. Fann explained that Melton sustained a two centimeter long puncture wound to the upper corner of his chest. R. 89, ll. 6-24. Dr. Fann had no notes indicating that Melton received stitches or that any anesthesia was administered.

However, there was a note indicating that sutures were removed during a later visit. Dr. Fann further testified that Melton suffered no permanent disfigurement, no protractive loss of function, and no physical impairment as a result of being stabbing. R. 91, l. 17 - 93, l. 3. Melton did not undergo any surgery for his injury. *Id.*

Testimony of Lawrence Brodie

Brodie, the owner of L & S Electronics and Thomas' longtime boss, testified that he allowed Thomas to purchase cell phones on the company's account for resale and that Thomas always reimbursed him for the cost. Vol. II p. 213, l. 14 - 215, l. 18. L & S specialized in low voltage and sound communications including commercial fire alarms and nursing home emergency call systems. *Id.*

Thomas had worked for the company for over a decade; his responsibilities included procuring cell phones for all employees and managing the cost of the company's phone plan. *Id.* Brodie identified an inventory bill from Silmar Electronics showing the purchase of a "LVPRO3" low voltage electronic test meter. R. 180, l. 1 - 184, l. 9; R.* (Defense Exhibit No.: 6). This is the same model meter that Melton pawned just days after the incident. R. 305.

Brodie explained that this specific meter was a new model and could not be purchased by the general public, "you don't get to buy this unless you're a distributor for that company." R. 181, l. 2-22. Brodie testified that on the day of the incident Thomas had this meter with him. R. 183, l. 2 - 184, l. 17.

Brodie stated that Thomas had shown him seen several cell phones he had purchased at a sale and was storing in a black and yellow "tote" container in his car. *Id.* Thomas' work tools were in his car as well. *Id.* The next time Brodie saw Thomas' vehicle, it had been completely ransacked. *Id.* After hearing that a pawn shop had this specific model of meter, Brodie called the

distributor to see if any other meters of this model had been sold. R. 182, l. 1- 185, l. 7. The distributor informed him that his company was the only one in the Charleston area to purchase this model. *Id.*

Brodie recalled with obvious frustration that the Moncks Corner police department had refused to help him retrieve the meter because the Berkeley County Sheriff's department was investigating the incident. *Id.* The Berkeley County Sheriff's Office likewise refused to help until Thomas' case had been resolved. *Id.*

Brodie stated that Thomas was an honest person. Thomas had transacted business on his behalf and handled tens of thousands of dollars' worth of money and equipment without incident. R. 184, l. 22 - 185, l. 7.

Jury Instructions

The defense requested jury instructions on, among other points of law: self-defense, the defense of accident, and the law of citizen's arrest. R. 191, l 18 - 195, l. 9. The defense also requested instructions on the lesser-included charges of assault and battery in the second degree, and assault and battery in the third degree. R. 198, l. 23 - 201, l. 6.

The State opposed these instructions. The State also opposed all lesser-included offense except for assault and battery of a high and aggravated nature, and assault and battery in the first degree. *Id.*

Defense of Accident and Citizen's Arrest

The defense argued that a charge on citizen's arrest was warranted because Thomas testified that, had Melton denied the theft, he would have called the police and held Melton until their arrival. R. 191, l 18 - 195, l. 9. Moreover, Thomas had probable cause to believe that Melton was involved in the theft based on his observations earlier in the night. *Id.*

A charge on the defense of accident was merited because Thomas had testified that he did not intentionally stab Melton, but that he did so accidently in the course of their scuffle. R. 206, ll. 11-18. Moreover, the defense had presented evidence that the stabbing occurred while Thomas was asserting one or both of two legal rights: attempting a citizen's arrest for grand larceny or acting in self-defense. *Id.*

The trial court refused to charge the law on citizen's arrest, ruling that, at the common law, citizen's arrest required notice to the arrestee that the citizen was making an arrest. R. 204, ll. 1-18. The defense countered that the citizen's arrest is a statutory right and that the statutes did not require notice to the arrestee. R. 204, l. 19 - 209, l. 4; *see also* S.C. Code Ann. § 17-13-10, -20.

Despite allowing a jury charge on self-defense, the court also refused to instruct the jury on the defense of accident, reasoning that Thomas had failed to prove that he was "acting lawfully" and with reasonable care at the time of the stabbing. *Id.*

Lesser-included Offenses

The defense also requested jury instructions on the lesser-included offenses of assault and battery in the second degree, and assault and battery in the third degree as Melton's actual injuries were very minor. R. 198, l. 23 - 201, l. 6. The prosecutor opposed charging on the lesser-included offenses, reasoning that because Melton was stabbed, he suffered great bodily injury. *Id.* The Court agreed with the State:

> I thought the definition of moderate bodily injury would be included ***except when there's penetration of the skin, muscles, connective tissue that requires surgical repair of a complex nature or when treatment requires the use of regional or general anesthesia, which I though that's what [Dr. Fann's] testimony was. . . .***
>
> [S]o that would preclude [the defense] from receiving -- even though you may argue it was moderate bodily injury, ***the fact that there was the exception that required regional general [sic] anesthesia or***

regional anesthesia to a muscle or skin or connective tissue, would preclude me from charging under the law.

R. 199, ll. 6-12 (*emphasis added*).

The State readily acceded to this interpretation, but, when asked by the court, declined to confirm that Dr. Fann testified he had used anesthesia. R. 200, ll. 4-10. Defense counsel countered that he did not recall Dr. Fann stating that he used anesthesia and that, even if he did, the definition of moderate bodily injury included injuries requiring the use of anesthesia. *Id.* at ll. 11-25.

The trial court was unconvinced by the defense's argument and refused to instruct the jury on assault and battery in the second degree, and assault and battery, third degree.

Inferred Malice PowerPoint Slide

The court's jury charge was accompanied by PowerPoint slides mirroring the instructions. The PowerPoint included a slide instructing jurors that malice may be inferred from the use of a deadly weapon. The court did not orally give this instruction. R. 253, l. 16 - 254, l. 24.

At the conclusion of the charge, defense counsel moved for a curative instruction regarding the slide on instructing the jury on the permissible inference of malice. The defense argued that the instruction was improper under *State v. Belcher*, 385 S.C. 597, 685 S.E.2d (2009), as there was evidence that mitigating, reducing, excusing, or justifying the alleged attempted murder. *Id.*

The Court refused to provide a curative instruction reasoning that she had told jurors, "I would instruct them on the law applicable to this case." *Id.* The court also stated that, "I believe for the very short time that it was up on the screen, ***there was nothing that distinguished that line from any of the others, and that giving the curative instruction and giving the complete and accurate instruction on the law under self-defense Belcher.***" R. 254, ll. 16-24 (*verbatim*) (*emphasis added*).

Jury Deliberations, Verdict, and Sentencing

During deliberations the jury twice asked for a written explanation of the differences between the two instructed lesser-included charges, assault and battery of a high and aggravated nature and assault and battery in the first degree. R. 306-307. The jury found Thomas guilty of assault and battery of a high and aggravated nature. R. 256, l. 17 - 259, l. 16.

On March 23, 2015, a sentencing hearing was held. Solicitor Scarlett Wilson represented the State in addition to Assistant Solicitor Poulos. A court ordered pre-sentencing report concluded that Thomas could be adequately and safely monitored by probation agents. R. 262, l. 9 - 20, l. 18.

Wilson attacked the report, arguing that the probation agents failed to do a competent investigation. R. 282, l. 19 - 287, l. 16. She contended that the report should be ignored because did not take into account whether Thomas should "simply" be punished for the crime. *Id.* "I think that retribution is a completely valid sentencing mission." R. 286, ll. 6-7.

After the defense argued in favor of home detention, Wilson countered that her office had elected not to establish a home detention program, so it was not available as a sentencing option. R. 289, ll. 3 - 7 The trial court then sentenced Thomas to ten years of incarceration, suspended upon the service of four years imprisonment and the completion of three years of probation. R. 300, l. 1-8.

ARGUMENT

I. The trial court reversibly erred by refusing to instruct the jury on the lesser-included offenses of (A) assault and battery in the second degree, and (B) assault and battery in the third degree where the trial court erroneously concluded that the use of anesthesia to treat Melton's injuries and the infliction of a puncture wound precluded a jury charge on the lesser-included of offenses.

Appellant requested the trial charge the jury on the lesser-included offenses of assault battery in the second degree and assault and battery in the third degree. R. 198, l. 23 - 201, l. 6. Both are lesser-included offenses of attempted murder. S.C. Code Ann. § 16-3-600(C)(3).

Evidence presented at trial conclusively showed that Melton had suffered only minor injuries from the stabbing. R. 91, l. 17 - 93, l. 3. The trial court ruled that, because Melton had suffered a puncture wound, the court ruled a jury instruction on the lesser-included offenses was not warranted by the evidence. R. 199, ll. 6-12.

Discussion: A defendant is entitled to jury instructions on a lesser-included offense when there is any evidence that defendant committed only the lesser-included offense.

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). A jury instruction on a lesser-included offense when there is ***any evidence from which it could be inferred 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); *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); *see also State v. Light*, 378 S.C. 641, 664 S.E.2d 465 (2008) (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).

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).

(A) Appellant was entitled to a jury instruction on assault and battery in the second degree.

The trial court refused to instruct the jury as to assault and battery in the second degree because the court believed that any penetrating wound or any resulting medical treatment requiring the use of anesthesia constituted the infliction of great bodily injury. R. 199, ll. 6-12.

This ruling was incorrect. South Carolina defines assault and battery in the second degree in relevant part as:

> 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.***

S.C. Code Ann. § 16-3-600(D)(1)(a) (*emphasis added*). Moderate bodily injury is defined 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.***

§ 16-3-600(A)(2) (*emphasis added*).

First, the court's decision to deny a charge on assault and battery in the second degree was based on an inaccurate recollection of the treating doctor's trial testimony. The court believed that Dr. Fann testified that he used anesthesia while treating Melton. R. 199, ll. 6-12. In actuality, Dr. Fann never testified that he used anesthesia while stitching Melton's cut. R. 91, l. 11 - 93, l. 15.

However, Dr. Fann did testify that Melton's injuries were minor and presented no risk of even short term bodily impairment. *Id.* Moreover, Melton never lost consciousness and did not suffer "moderate disfigurement". *Id.* Even if Dr. Fann had used anesthesia, charge on assault and battery in the second degree, and assault and battery in the third degree, would have still been proper.

Contrary to the trial court's ruling, ***moderate bodily injury expressly includes medical treatment requiring the use of anesthesia***. § 16-3-600(A)(2). In addition, neither the definition of moderate bodily injury, nor the definition of assault and battery in the second degree excludes penetrating wounds.

(B) Appellant was entitled to a Jury Instruction on assault and battery in the third degree.

"A person commits the offense of assault and battery in the third degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so." S.C. Code Ann. § 16-3-600(E)(1). Assault and battery in the third degree is a

lesser-included offense of every preceding assault and battery offense, including attempted murder. § 16-3-600(E)(3); *see also State v. Middleton*, 407 S.C. 312, 315-316, 755 S.E.2d 432, 434 (2014).

As detailed above, Melton's actual injuries were very minor; amounting to a laceration treated by stitches. R. 88, l. 1 - 93, l. 3. The only follow-up medical care was the removal of the stitches. *Id.* The definition of moderate bodily injury excludes: "scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that do not ordinarily require extensive medical care." § 16-3-600(A)(2). Thus, evidence at trial could have supported a finding that Melton sustained a level of injury not amounting to moderate bodily injury.

Conclusion

All the elements of both assault and battery in the second degree and assault and battery in the third degree were present in Appellant's case. Whether Melton suffered, or was at risk of suffering, great bodily injury, or moderate bodily injury or only minor bodily injury was a question for the jury. *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007) (refusal to charge lesser-included offense supported by any evidence was an error). Melton's minor bodily injury alone provided evidence mandating jury instructions on the lesser-included offenses. *Watson*, 349 S.C. at 375, 563 S.E.2d at 337.

In denying charges on the lesser-included offenses, the trial court not only impermissibly weighed the evidence, instead of assessing whether any evidence supported the lesser-included offenses, but, also misconstrued the definition of moderate bodily injury. R. 199, ll. 6-12; S.C. Code Ann. § 16-3-600(A)(2). *Middleton*, 407 S.C. at 315-316, 755 S.E.2d at 434.

Accordingly, the trial court erred and Appellant is entitled to a new trial.

II. The trial court reversibly erred by refusing to instruct the jury on (A) the defense of accident and (B) the law of citizen's arrest where there was evidence presented at trial that Melton was unintentionally stabbed when Appellant approached him with the intention of making a citizen's arrest if Melton did not return electronic equipment that Appellant had probable cause to believe he had stolen from Appellant's vehicle and where the court instructed the jury on the law of self-defense.

Appellant requested the jury instructions on the defense of accident as he testified that he accidently stabbed Melton while attempting to retrieve property that Melton had stolen. R. 204, l. 19 - 206, l. 9. The defense further requested a charge on the law citizen's arrest as Appellant also testified that, if Melton refused to return the stolen goods, Appellant would have called the police and attempted a citizen's arrest to detain Melton until law enforcement arrived. *Id.*

The court refused to charge on the defense of accident and the law of citizen's arrest. The court reasoned that Appellant had not been "acting lawfully" at the time of the stabbing and that Appellant had failed to give Melton reasonable notice that he was making a citizen's arrest as required at common law. R. 197, ll. 1-4; R. 203, l. 25 - 204, l. 18.

Discussion: The trial court has a duty to give a requested jury instruction that correctly states the applicable law and is supported by any evidence presented at trial.

"A trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues." *State v. Lee-Grigg*, 374 S.C. 388, 405, 649 S.E.2d 41, 50 (Ct. App. 2007). A trial court commits reversible error where it fails to give a requested charge on an issue raised by the evidence. *Id.* at 406, 649 S.E.2d at 50. When reviewing the trial court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant. *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 512–13 (2000).

(A) Appellant was entitled to a jury instruction on the defense of accident.

"In South Carolina, the defense of accident requires a showing that that the harm caused was unintentional, that the defendant was acting lawfully at the time of the incident, and due care was exercised in handling the weapon." *State v. Harris*, 382 S.C. 107, 116, 674 S.E.2d 532, 537 (Ct. App. 2010); *see also State v. Williams*, 400 S.C. 308, 316, 733 S.E.2d 605, 610 (Ct. App. 2012) (defendant's testimony was sufficient to present a question for the jury as to whether defendant shot victim accidently).

Appellant testified that he accidently stabbed Melton, "[i]t was an accident . . . I was just trying to protect myself because I was scared." R. 144, ll. 19-20. It is undisputed that Melton had a reputation for violence and dishonesty. It was also undisputed that Melton had threatened Appellant in the past. There was substantial circumstantial evidence that, not only did Melton steal thousands of dollars' worth of electronics and equipment out of Appellant's car, but that Melton, a convicted felon, owned a rifle. R. 304.

This evidence entitled Appellant to a jury charge on the law of accident. Moreover, based on this same evidence, the court charged the jury on self-defense. Accident and self-defense are interrelated defenses. *State v. McCaskill*, 300 S.C. 256, 387 S.E.2d 268 (1990)(error in failing to charge that if the defendant lawfully armed herself in self-defense because of a threat to her safety created by the decedent, and the gun accidentally discharged, the jury would have to find her not guilty); *see also Williams*, 400 S.C. at 316, 733 S.E.2d at 610 (a self-defense charge and an accident charge are not mutually exclusive as long as there is any evidence to support both charges).

The court correctly ruled that there was evidence to support an instruction on self-defense. Under the facts of this case, same evidence entitled Appellant to an instruction on the defense of accident. *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999) (even though defendant unlawfully

possessed a weapon, defendant was entitled to an instruction on the defense of accident if he was entitled to be armed in self-defense when the gun went off).

(B) Appellant was entitled to a jury instruction on the law of citizen's arrest.

The defense of accident is not applicable unless the defendant was acting lawfully. *McCaskill*, 300 S.C. 256, 387 S.E.2d 268. At trial, the defense presented evidence that Appellant accidently stabbed Melton either while acting in self-defense or while he was attempting a lawful citizen's arrest of Melton based on Appellant's reasonable belief that Melton had committed grand larceny by stealing thousands of dollars' worth of cell phones and work equipment out of Appellant's car. R. 140, l. 5 - 141, l. 21.

Based on this evidence, the defense requested a jury instruction on the law of citizen's arrest. R. 203, l. 25 - 209, l. 4. The trial court refused. *Id.* While noting that it was a close call, the court ruled that at common law citizen's arrest required notice to the arrestee and that Appellant had not given Melton any warning that he was being placed under arrest. *Id.* The court also observed that the citizen's arrest statutes did not include a notice requirement, but that the determined that the common law was controlling. *Id.*; S.C. Code Ann. § 17-13-10, -20.

At common law, a citizen was permitted to initiate an arrest under certain circumstances, such as when a citizen had witnessed a felony or had "certain information" that a felony had been committed. Traditionally, the arresting person must also give notice to the arrestee that he is making a citizen's arrest. *State v. Nall*, 304 S.C. 332, 341, 404 S.E.2d 202, 208 (Ct. App. 1991).

In *State v. McAteer*, 340 S.C. 644, 532 S.E.2d 865 (2000), our Supreme Court held that the General Assembly had completely abrogated common law citizen's arrest and that the right to make a citizen's arrest existed solely by statute. South Carolina has two statutes detailing the circumstances under which a citizen's arrest is permissible.

"Upon (a) view of a felony committed, (b) certain information that a felony has been committed or (c) view of a larceny committed, any person may arrest the felon or thief and take him to a judge or magistrate, to be dealt with according to law." § 17-13-10. At night the circumstances permitting a citizen's arrest are broader:

> A citizen may arrest a person in the nighttime ***by efficient means as the darkness and the probability of escape render necessary***, even if the life of the person should be taken, when the person: (a) has committed a felony; (b) has entered a dwelling house without express or implied permission; (c) has broken or is breaking into an outhouse with a view to plunder; (d) has in his possession stolen property; or (e) being under circumstances which raise just suspicion of his design to steal or to commit some felony, flees when he is hailed.

§ 17-13-20 (*emphasis added*). Neither statute retains the requirement at common law that the citizen give reasonable notice to the arrestee. *State v. Sweat*, 386 S.C. 339, 688 S.E.2d 569 (2010) (cardinal rule of statutory interpretation is to determine the intent of the legislature).

The only reference to notice in either statute is limited to an arrest at nighttime where the arresting citizen has intercepted a person he believes has "design to steal" or to commit a felony and that person flees after "he is hailed." § 17-13-20(e). In addition, the General Assembly clearly recognized the particular risks and difficulties of making an arrest at nighttime. Thus, a citizen is permitted to make an arrest "by efficient means as the darkness and the probability of escape render necessary. . ." § 17-13-20.

A plain reading of the two applicable statutes evidences that the General Assembly, in addition to eliminating citizen's arrest for any misdemeanors, also intended to eliminate the common law's notice requirement. *State v. Landis*, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004) (legislative intent, the primary concern of statutory interpretation, should be ascertained from the plain language of the statute).

Moreover, given the allowances made by the statute for an arrest made at night, Appellant's failure to give Melton notice prior to attempting a citizen's arrest did not prohibit a jury instruction on citizen's arrest. Appellant had presented evidence from which the jury could have concluded that he was attempting to make a citizen's arrest by the "efficient means" rendered necessary by the darkness and the probability of escape. Therefore, the Court erred in refusing to charge the jury on the law of citizen's arrest.

Conclusion

The evidence at trial presented a question for the jury as to whether Appellant accidentally stabbed Melton in the process of attempting a lawful citizen's arrest or while acting in lawful self-defense. The Trial Court therefore erred in refusing to give these charges, and Appellant is entitled to a new trial.

III. The trial court reversibly erred by refusing to issue a curative instruction where the trial court's PowerPoint slides, which were presented contemporaneously with the court's jury instructions, included an improper charge on inferred malice in violation of our Supreme Court's decision in *State v. Belcher*[4].

PowerPoint slides accompanied the trial court's jury instructions. R. 253, l. 16 - 254, l. 24. The slides included an instruction that jurors may infer malice from the use of a deadly weapon. *Id.* At the conclusion of the charge, defense counsel objected to the inferred malice slide as improper under *State v. Belcher*. *Id.*

The defense requested a curative instruction. The trial court stubbornly refused, reasoning that "there was nothing that distinguished [the inferred malice charge] from any of the others, and that giving a curative instruction and giving the complete and accurate instruction on the law under the self-defense *Belcher*. I think that the record is thoroughly protected." R. 254, ll. 16-24 (verbatim).

***Belcher* and the permissive inference of malice jury instruction.**

In *Belcher*, our Supreme Court overruled settled law and held "that a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide." 385 S.C. at 600, 685 S.E.2d at 803-804.

Belcher was convicted of murder and possession of a firearm during the commission of a violent crime following the shooting of his cousin. *Belcher*, 385 S.C. at 600, 685 S.E.2d at 803. The jury was charged with the offenses of murder and voluntary manslaughter, as well as self-defense. *Id.* The jury was also instructed that they may infer malice from the use of a deadly weapon. *Id.*

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[4] 385 S.C. 597, 685 S.E.2d 802 (2009).

Belcher argued on appeal that the permissive inference of malice charge violated the constitutional prohibition against charging juries on the facts. *Id.* at 602, 685 S.E.2d at 804. In a review of the state's jurisprudence, our Supreme Court found that when the permissive inference charge first developed in the late nineteenth century it was subject to "some qualification." *Id.* at 604, 685 S.E.2d at 806. "This qualification relates to homicide prosecutions ***where the evidence shows the death may have been something less than murder—that is, mitigated, excused or justified.***" *Id.* at 605, 685 S.E.2d at 806 (*emphasis added*).

The Court concluded "that instructing a jury that 'malice may be inferred by the use of a deadly weapon' [was] confusing and prejudicial where evidence [was] presented that would reduce, mitigate, excuse or justify the homicide." *Id.* at 611, 685 S.E.2d at 809. As Belcher had presented evidence of self-defense at trial, it was "conceivable that the only evidence of malice was Belcher's use of a handgun." *Id.* Thus, the permissive inference charge was not harmless error and Belcher was entitled to a new trial. *Id.* at 612, 685 S.E.2d at 810.

In the present case, the defense put forward evidence that Appellant was attempting to recover property of his employer that was stolen by a convicted felon with a reputation in his community for violence and dishonesty. R. 174, l. 19 - 175, l. 10. Appellant stated that he feared for his life during the altercation because he believed Melton would retrieve the rifle from his truck. Appellant also testified that the stabbing was accidental.

In light of the evidence at trial, the court charged the jury on self-defense, but inadvertently included a slide on the permissible inference of malice. R. 209, ll. 1-4. The court's reasoning in not providing a curative instruction appears to be, that it had given the jury a "complete and accurate instruction on the law under self-defense *Belcher*." R. 254, ll. 16-24.

The permissible inference of malice charge is always improper when evidence at trial supports an instruction on self-defense. *State v. Miller*, 397 S.C. 630, 636, 725 S.E.2d 724, 728 (Ct. App. 2012) (inferred malice charge was improper where a charge on manslaughter was given and there was evidence that mitigated the killing).

Appellant had presented evidence that "mitigated, excused, or justified" the stabbing. *Belcher*, 385 S.C. at 600, 685 S.E.2d at 803-804. Thus, it was an error for the trial court to include a PowerPoint slide instructing the jury that they may infer malice from the use of a deadly weapon.

The improper permissive inference of malice charge was not harmless error.

Erroneous jury instructions are subject to harmless error analysis. *Lowry v. State*, 376 S.C. 499, 509, 657 S.E.2d 760, 765 (2008). Whether an improper "use of a deadly weapon" implied malice instruction is harmless error turns on whether there is overwhelming evidence of malice apart from the use of a deadly weapon. *Belcher*, 385 S.C. at 611 - 612, 685 S.E.2d at 809-811.

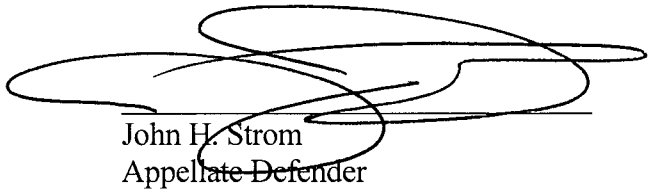
In Appellant's case there was almost no evidence of malice, apart from the use of a pocket knife. Critically, the inferred malice charge was indistinguishable from PowerPoint slides on the other instructions. R. 254, ll. 16-24. Contrary to the determination of the trial court, the fact that the improper charge blended seamlessly with the other charges heightened the risk of prejudice to Appellant. *Id.*

That the court failed to orally instruct the jury on implied malice could have only increased the confusion juror's must have experienced and may explain their repeated requests for "further explanation" of the applicable law. R. 306-307. Therefore, it cannot be said that the improper permissible inference of malice instruction did not contribute to the verdict beyond a reasonable doubt and Appellant is entitled to a new trial. *Leonard*, 292 S.C. at 137, 355 S.E.2d at 273 (instructions that do not fit the facts of the case may serve only to confuse the jury).

CONCLUSION

By reason of the foregoing arguments, Appellant John Thomas' conviction should be reversed and this case remanded to the Berkeley County Court of General Sessions for a new trial.

Respectfully submitted,



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ATTORNEY FOR APPELLANT

This 6th day of July, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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