STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYREECE RAHEAM STOKES,

APPELLANT

APPELLATE CASE NO. 2018-001419

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial court erred when it admitted evidence that appellant was arrested with two knives six days after the incident, since the knives could not be forensically linked to the crime, and, assuming arguendo the knives were relevant, any probative value was substantially outweighed by the danger of unfair prejudice?

2.

Whether the trial court erred in appellant's attempted murder trial when it charged the jury on ABHAN over the defense's objection, where the defense was one of misidentification, since there was no evidence appellant was guilty solely of the lesser offense?

STATEMENT OF THE CASE

On March 13, 2017, a Dorchester County Grand Jury indicted appellant for the offenses of attempted murder and armed robbery. R. 454 – 457. Appellant was tried before the Honorable Clifton Newman and a jury, July 23 – 25, 2018. R. 1. Pierce Wehman and Michelle Williams represented appellant. R. 1. Donald Sorenson and Ryan Templeton represented the state. R. 1.

Appellant was convicted of the armed robbery and sentenced to twenty-five years imprisonment. R. 437, ll. 12-15; R. 450, ll. 21-22. Appellant was convicted of the lesser offense of assault and battery of a high and aggravated nature (ABHAN) and sentenced to twenty years imprisonment. R. 437, ll. 16-19; R. 450, ll. 18-20.

This appeal follows.

ARGUMENT

1.

The trial court erred when it admitted evidence that appellant was arrested with two knives six days after the incident since the knives could not be forensically linked to the crime, and, assuming arguendo the knives were relevant, any probative value was substantially outweighed by the danger of unfair prejudice.

Standard of review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Hatcher,* 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan,* 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*; *see also State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Relevant facts

Nikia Pitts was sitting in her car, smoking and talking on the phone, when her purse was stolen and she was stabbed in the face and chest. R. 205, ll. 14-22; R. 208, l. 15 – 209, l. 5. Pitts said the man who stabbed her walked up with a butcher knife and a steak knife, demanded her purse, and stabbed her after she gave it to him. R. 207, l. 20 – 208, l. 20. Then the man stole her cell phone. R. 76, ll. 1-8. One of the knives broke off in Pitts' chest and she pulled it out and dropped it on the ground. R. 209, l. 20 – 210, l. 2. The other stab wound was to the bottom of Pitts' eye socket and went "midway through her brain," according to Dr. Norcross. R. 245, ll. 15-20.

Remarkably, Pitts was able to walk inside her house, have 911 contacted, and eventually recover from the attack. R. 210, ll. 10-14; R. 222, ll. 10-17. Pitts still suffers from headaches and "dry eyes" as a result of the stabbing. R. 222, ll. 10-21.

Pitts was shown a photographic lineup containing appellant's photograph while at the hospital, but she **did not** identify appellant as her attacker. R. 310, l. 21 – 311, ll. 23. In fact, Pitts identified two other men in the lineup, and not appellant, as her attacker. R. 48, l. 23 – 49, l. 14. Pitts also told Officer Boehler she thought her attacker might be Carl Washington, the father of one of her children. R. 146, ll. 21-24; R. 138, l. 10 – 139, l. 19.

After being discharged from the hospital, Pitts' sister showed her Facebook photographs of men with "bad reputations" from the neighborhood; photographs that included appellant. After seeing the Facebook photographs, Pitts decided appellant was her assailant. R. 218, ll. 5-20; R. 352, l. 14 – 353, l. 8; R. 362, ll. 9-13. Officers then showed her the same lineup they had shown her at the hospital, and this time she did pick out appellant. R. 105, l. 9 – 106, l. 25. Defense counsel argued Pitts' subsequent identification of appellant was unduly suggestive and unreliable, but was unsuccessful in suppressing the identification. R. 175, ll. 3 – 177, l. 7.

Police obtained a warrant and arrested appellant six days after Pitts was attacked. R. 288, l. 23 – 289, l. 2. At the time of his arrest, appellant was in the woods behind his house. R. 282, l. 24 – 283, l. 4. He had a knife in his pocket or waistband, and another knife was on the ground nearby. R. 283, l. 24 – 284, l. 8; R. 20, ll. 16-20.

Pitts' identification of appellant was the only evidence linking him to the crime. R. 360, ll. 1-10. There were no other witnesses to the crime, and there was no DNA evidence, no fingerprint evidence, no cell phone evidence. R. 359, ll. 18-25. Appellant did not confess.

Pretrial, defense counsel moved to suppress the two knives possessed by appellant at the time of his arrest. R. 8, ll. 5-18. Defense counsel argued that although the knives were "taken in for testing" by law enforcement, "no DNA was recovered," and "there's nothing linking these knives forensically to the incident . . ." R. 9, l. 20 – 10, l. 1. The prejudice "outweighs any probative value considering there's no forensic no link from those knives that are found six days later to the incident." R. 10, ll. 8-12. Defense counsel exhorted the court to exclude the knives pursuant to Rule 403, SCRE. R. 10, ll. 16-18.

In support of the defense's motion to suppress, the court took testimony from Detective Michael Weaver in camera. R. 11, l. 9. Weaver confirmed that when appellant was arrested September 7, 2016, he had a "knife with a large blade" in his pants pocket and "another similar-style knife" was nearby on the ground. R. 12, ll. 6-11; R. 20, ll. 13-25. Both knives were taken into evidence and tested, but no forensic evidence was found linking them to the crime. R. 21, ll. 1-2; R. 14, l. 14 – 15, l. 19.

Defense counsel argued the admission of the knives would unfairly prejudice appellant because "[t]hey were tested [but] [t]they don't come back to the scene." R. 21, ll. 21-24. "[A]dmitting those is extremely prejudicial and doesn't carry much probative value at all, if any, as they can't be linked to the incident. It's all a propensity-type evidence that he's carrying a knife, he must have been the one carrying a knife that night." R. 22, ll. 7-11. Defense counsel explained that in addition to there being no tie between the butcher knife seen by Pitts and the one found near appellant, the steak knife "couldn't have been used" since the steak knife used in the attack on Pitts broke. R. 188, ll. 2-7.

The solicitor said one of the knives fit the description of a knife used in the attack because, "It was a butcher knife." R. 24, ll. 1-2. The solicitor argued that the knives' relevance

"outweighs any prejudice" because the complainant described an assailant who had "two knives, a steak knife and a butcher knife. And then [appellant] is then caught six days later with a butcher [ ] knife and I submit a new steak knife, because the old one snapped off in her chest." R. 22, ll. 15-24.

The court asked the parties to "start from the perspective of is it [the knives] relevant?" R. 179, ll. 1-2. Defense counsel argued the knives were "not relevant" "based on the inability of the State to link either one of those to the crime." R. 179, ll. 3-5. Defense counsel also contended the evidence was an improper attempt to use "carrying knives as propensity evidence as well." R. 179, ll. 5-8.

The court cited *State v. McConnell*,[1] *Holman v. State*,[2] *State v. Clayton*,[3] and *State v. Elders*,[4] and asked the solicitor whether the knives "had some evidentiary value or nexus with the crime . . . that would make this admissible?" R. 180, l. 17 – 182, l. 14.

The trial court observed that in *State v. Elders*, four knives were found in the defendant's belongings when he was arrested. R. 185, ll. 6-8. "And the defendant claims the knives were calculated to arouse sympathy or prejudice of the jury in that they were irrelevant, given that none of them were used during the crimes in question." R. 185, ll. 8-11. The court asked the solicitor how to distinguish this case from *Elders* after reading the following from *Elders*: "[T]he knives were not used in the commission of the crimes. Additionally, none of the witnesses

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1 *State v. McConnell*, 290 S.C. 278, 350 S.E.2d 179 (1986).

2 *Holman v. State*, 381 S.C. 491, 674 S.E.2d 171 (2009).

3 No citation was provided on the record. It appears the court was referring to an unpublished opinion: *State v. Clayton*, Op. No. 2011-UP-003 (S.C. Ct. App. filed Jan. 20, 2011). *See* R. 181, ll. 8-12.

4 *State v. Elders*, 386 S.C. 474, 688 S.E.2d 857 (Ct. App. 2010).

specifically testified that the knives were similar to the knife used to commit the crimes." R. 184, ll. 12-13; R. 185, ll. 12-16. The solicitor then responded that this case was distinguishable since, "We have our victim who is going to describe a butcher-style knife, and has described that." R. 186, ll. 4-6.

Defense counsel summarized his arguments the knives were inadmissible: "I don't believe that it's relevant. I think there's no nexus. There's been no testimony that links these specific knives to this crime." R. 188, ll. 20-22. Even if relevant, the evidence is "overly prejudicial." R. 188, l. 24 – 189, l. 1. "[T]here's very limited relevant value to this, other than he's the type of person that carries knives." R. 189, ll. 3-4.

The court found the evidence here was distinguishable from that in *Elders* because "the knives confiscated from [appellant] were similar to the knife used to commit the crimes." R. 189, ll. 18-23. The court ruled the knives were admissible. "I find that the probative value of [appellant] being arrested having knives similar to those that the . . . victim contends were used in the assault outweighed the prejudicial effect." R. 190, ll. 2-5. The court stated, "I find that this probative value here is not negligible, but relevant evidence the jury should be able to consider. So I deny that motion." R. 190, ll. 6-10.

When Pitts testified, the solicitor showed her State's Exhibit #17, the butcher knife found upon appellant's arrest. R. 212, l. 17 – 213, l. 1. The solicitor asked, "Is that knife consistent with the other knife?" and Pitts answered, "Yes, big butcher knife, yes." R. 212, ll. 17-19. Defense counsel objected to the testimony based on his pretrial motion, and the court overruled the objection. R. 212, ll. 20-22. The knives were later admitted over defense counsel's objection. R. 283, l. 24 – 284, l. 23.

In closing argument, the solicitor told the jury that the steak knife found on appellant "obviously wasn't involved in our crime. But it's a replacement for the steak knife that he snapped off in Nikia Pitts's chest five days earlier." R. 419, ll. 4-8. The solicitor also argued in closing that if he were to "go out an stop every citizen walking around in Dorchester County today, that we wouldn't find a single one of them carrying a dirty, rusty butcher knife [like appellant]." R. 420. ll. 5-9.

Discussion

It was error to admit the knives since they were irrelevant to any fact at issue. The steak knife could not have possibly been used in the attack on Pitts and there was no evidence that the butcher knife was used either. The state conceded that the steak knife that was admitted at trial could not have been the steak knife used in the attack on Pitts, since that knife was broken in half and left in her chest. There was no showing the butcher knife that was admitted was the butcher knife used against Pitts. The admission of the knives, which were unrelated to the crime and went back to the jury room during deliberations, was unfairly prejudicial.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Evidence which is not relevant is not admissible." Rule 402, SCRE.

The appellate courts of this state have addressed the impropriety of admitting weapons connected to a defendant that were not used in the crime, as irrelevant. In *State v. Elders*, 386 S.C. at 478, 688 S.E.2d at 859, Elders carjacked and attacked a couple with a knife they described as having a "'little hump' on it and a blade that was about six to eight inches long." At trial, the state offered four knives found among Elders' possessions two days after the crime

occurred: three of the knives were pocketknives and the fourth was a "switch blade with bears emblazoned on the handle." *Id.* at 479, 688 S.E.2d at 860. "Elders objected to the admission of the knives, contending they were irrelevant because none of them were used during the commission of the crimes." *Id.* Elders further argued the knives were calculated to arouse the sympathy or prejudice of the jury. *Id.* at 485, 688 S.E.2d at 863.

This Court in *Elders* found the knives should have been excluded pursuant to Rule 403, SCRE, since the knives were not used in the commission of the crime, and none of the witnesses testified the knives were similar to the knife used to commit the crime. *Id.* at 486, 688 S.E.2d at 863-64. This Court reasoned that the knives "tended to prove not that Elders committed the crimes in question, but rather that he was the sort of person who might commit such crimes." *Id.*

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

Here, as in *Elders*, there was no proof the knives were used in the commission of the crime. Instead, Pitts simply agreed that one of the knives she was attacked with was a "big butcher knife, yes." There were no distinguishing characteristics about the butcher knife mentioned, and butcher knives are ubiquitous. As discussed above, the steak knife could not have been used against Pitts. Instead, the knives only tended to show that appellant had the propensity to commit the crime because he had knives when he was arrested, thereby misleading the jury, and causing undue prejudice by inviting the jury to make its decision on the improper basis that appellant was a scary guy who ran around the woods with knives. Assuming arguendo the knives were relevant, they were admitted in violation of Rule 403's prohibitions.

In *State v. McConnell*, 290 S.C. at 279, 350 S.E.2d at 180, McConnell was charged with murdering a man by shooting him with a .357 caliber bullet. McConnell argued the defense of accident and the police recovered the .357 Magnum pistol that fired the fatal shot. *Id.* In the months after the shooting, police discovered a .22 caliber slug lodged in a wall in McConnell's apartment and two .25 caliber bullets found in an air conditioning unit downstairs. *Id.* at 279-80, 350 S.E.2d at 180. The gun that fired the .22 round was not in McConnell's possession at the time of the shooting and there was no evidence he had ever fired a .25 caliber weapon. Id. at 280, 350 S.E.2d at 180. The South Carolina Supreme Court reversed, concluding "these items should not have been admitted because they were not properly connected with the incident, irrelevant, incompetent, and raised spurious inferences of prior bad acts." *Id.* The Court found "insufficient connection between the evidence and the crime" and that the "cumulative prejudicial effect of the enumerated evidence far outweighed its probative value." *Id.*

McConnell is similar to the case at hand because the unmatched bullets were not connected to the crime there, just as the knives were not connected to the crime here. So too is the circumstance that while having slugs in your apartment walls is not a bad act per se, and neither is having kitchen knives, their entry into evidence "raised spurious inferences of bad acts." Both a butcher knife and a steak knife have a common, lawful purpose[5] just as guns may be discharged lawfully. However, under the circumstances, the jury was left to conclude in *McConnell* that only a criminal would have an apartment riddled with bullets just as the jury was left to conclude here that only a criminal would have kitchen knives out in the woods instead of in the kitchen. *Accord State v. Bright*, 323 S.C. 221, 473 S.E.2d 851 (1996) (in trial for arson and

[5] *See, e.g. Knight v. State*, 146, 993 P.2d 67, 72 (Nev. 2000) (a steak knife is not primarily designed or fitted for use as a weapon); *Commonwealth. v. Myers*, 417 A.2d 700, 701 (Pa. Super. Ct. 1980) (thirteen-inch butcher knife had a common, lawful purpose).

defrauding an insurer, evidence defendant had recovered insurance proceeds from two house fires years earlier was irrelevant, reversible error).

Pitts' identification of appellant, after she had previously failed to identify him in a lineup, was the only evidence linking him to the crime. The improper admission of the knives cannot be deemed harmless beyond a reasonable doubt.

In *Holman v. State*, 381 S.C. at 492, 674 S.E.2d at 172, Holman was charged with a shooting at Vorhees College. The state admitted, without objection, a handgun seized from Holman's home that "was in no manner connected to the shooting incident at Voorhees College." The Court found Holman's trial counsel was ineffective for failing to object to the unrelated gun and found that the admission of this irrelevant evidence was prejudicial. *Id.* at 493, 674 S.E.2d at 172.

Trial counsel correctly argued the admission of the knives were irrelevant propensity evidence that would unfairly prejudice appellant by causing the jury to think because he had these knives, he must have had the knives used against Pitts. The admission of the knives was error, and prejudicial error.

2.

The trial court erred in appellant's attempted murder trial when it charged the jury on ABHAN over the defense's objection, where the defense was one of misidentification, since there was no evidence appellant was guilty solely of the lesser offense.

Standard of review

"The law to be charged to the jury is determined by the evidence presented at trial." *State v. Hill,* 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "An appellate court will not reverse the trial [court]'s decision absent an abuse of discretion." *State v. Pittman,* 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." *Id.* at 570, 647 S.E.2d at 167.

"To justify charging the lesser crime, the evidence presented must allow a rational inference the defendant was guilty only of the lesser offense." *State v. Geiger*, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (Ct. App. 2006). "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense." *State v. Sams*, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014). "The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense." *Id.*

Relevant facts

Pitts testified she cooperated with the robber. When he demanded her purse, Pitts said, "I put my hands up and said, please, don't hurt me, I have kids, you could have it . . ." R. 208, ll. 4-9. But the robber told Pitts, "I don't give an F about your kids," took her purse and stabbed her in the head and chest. R. 208, ll. 12-20. Although she was in shock, Pitts pulled the knife out of her chest and held her face together until she could get in the house. R. 209, l. 24 – 210, l. 3.

In opening statements, defense counsel told the jury that Pitts "was a victim, uncontested." R. 199, ll. 6-7. Defense counsel posited the jury should find appellant not guilty based on the "faulty" identification made by Pitts after "staring probably for days" at the photo of appellant her sister gave her. R. 199, l. 23 – 200, l. 10.

At the charge conference, the solicitor asked the judge to charge the jury on the lesser offense of ABHAN. R. 377, ll. 22-25. The solicitor argued that if the jury found appellant stabbed Pitts without the specific intent to kill, it could find him guilty of ABHAN. R. 378, ll. 1-13. Defense counsel objected to the request. R. 379, ll. 14-17. The court asked the parties whether the state had the right to a charge on a lesser "or is that solely the prerogative of the defendant?" R. 380, ll. 11-14.

Defense counsel cited *State v. Wiggins*[6] and *Abney v. State*.[7] R. 381, l. 24 – 382, l. 23. Defense counsel argued that since *Abney* found the failure to request a lesser can be a valid trial strategy, it was the defense's strategy not to request a charge on lesser-included offense. "It's just a misidentification case. And so pursuant to our trial strategy and in order to present a concise defense, and in conference with [appellant], we have asked that a lesser-included not be given to the jury in this case so they can't split the baby . . ." R. 383, l. 2-7. The court asked appellant if he agreed with the strategy, and appellant agreed he did not want a lesser-included offense charged. R. 383, ll. 9-18.

Defense counsel observed that the state was "in complete control of why we are here. They are going to charge him. They have to stick with what they charged him with." R. 384, ll. 9-12. The defense pointed out that, "Our defense has been very clear from the very beginning, it

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[6] *State v. Wiggins*, 330 S.C. 538, 500 S.E.2d 489 (1998).

[7] *Abney v. State*, 408 S.C. 41, 757 S.E.2d 544 (Ct. App. 2014).

was not [appellant], not accident, not defense, not he missed. It just wasn't him. It's a misidentification case." R. 382, l. 25 – 383, l. 3.

The state responded that pursuant to *Abney*, the court was required to charge the lesser offense whenever there was "any evidence from which it could be inferred the lesser rather than the greater offense was committed." R. 384, l. 22 – 385, l. 1. The court ruled that it must charge the lesser, regardless of who requests it, when there was any evidence to support the lesser, and accordingly did charge the jury on both attempted murder and the lesser offense of ABHAN. R. 386, l. 24 – 387, l. 2. The jury deliberated for over five hours before finding appellant guilty of ABHAN and armed robbery. R. 433, l. 21; R. 437, ll.1-18.

Discussion

The trial court erred when it charged the jury on the lesser-included offense of ABHAN where the defense opposed the charge and conceded the only fact in controversy was the identity of Pitts' attacker. Someone stabbed Pitts midway through the brain and in the chest after robbing her. The person who stabbed Pitts through the brain, unprovoked, had the specific intent to kill her. The only question for the jury was the man's identity. The court's error in charging ABHAN evoked a compromise verdict[8] from the jury.

S.C. Code § 16-3-600(B)(1) provides in relevant part that a "person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and: (a) great bodily injury to another person results; or (b) the act is accomplished by means likely to produce death or great bodily injury." The ABHAN statute criminalizes conduct which can be much milder than conduct rising to the level of attempted murder. *See State v.*

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8 *But see State v. Sims*, 426 S.C. 115, 129, 825 S.E.2d 731, 738 (2019). "[W]e do not believe our state's jurisprudence concerning [compromise verdicts] has been fully accepted or developed."

Hardin, 425 S.C. 1, 5, 819 S.E.2d 177, 179 (Ct. App. 2018) (ABHAN conviction for punching and pistol-whipping employee during robbery).

The solicitor argued the state was entitled to a charge on ABHAN because the jury could find appellant stabbed Pitts without the specific intent to kill. That argument could be made by the state in every attempted murder case. ABHAN would thereby become a default compromise verdict, a purpose for which lesser-included offenses were never intended. If stabbing a compliant robbery victim midway through the brain is not attempted murder, nothing is.

In *State v. Wiggins*, 330 S.C. at 549, 500 S.E.2d at 495, the South Carolina Supreme Court found the trial court did not err in charging the jury on voluntary manslaughter over the defendant's objection in his trial for murder. Wiggins claimed he was acting in self-defense, but the Court found there was evidence in the record that tended to show he acted in sudden heat of passion upon sufficient legal provocation. *Id.* Therefore, the Court concluded the trial judge properly submitted both self-defense and voluntary manslaughter to the jury. *Id.*

Here, unlike in *Wiggins*, there was no evidence in the record to support a lesser included instruction—as defense counsel stated, their position had been "very clear from the very beginning that it was not [appellant] . . . It's just a misidentification case."

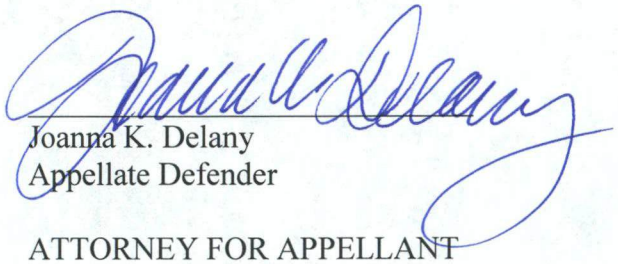
In *Abney v. State*, 408 S.C. at 45-46, 757 S.E.2d at 546, this Court observed that the "trial court should refuse to charge on a lesser included offense when there is no evidence that the defendant committed the lesser rather than the greater offense." "To justify charging the lesser crime, the evidence presented must allow a **rational** inference the defendant was guilty only of the lesser offense." *State v. Geiger*, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (Ct. App. 2006) (emphasis added).

"The trial court should refuse to charge the lesser included offense when there has been no evidence tending to show the defendant may have committed **solely** the lesser offense." *Id.* (emphasis added). "Although an indictment for a higher offense will sustain a conviction for a lesser included offense, a request to charge a lesser included offense is proper only when the evidence could support a reasonable inference that the defendant committed the lesser rather than the greater offense." *State v. Morris*, 307 S.C. 480, 483, 415 S.E.2d 819, 821 (Ct. App. 1991). "A mere contention that the jury might accept the State's evidence in part and reject it in part will not support a request for the lesser charge." *Id.*

There was no evidence appellant committed the lesser rather than the greater offense. Pitts was stabbed through her brain and chest. The only fact in dispute was identity. Because there was no evidence that Pitts' attacker committed solely the lesser offense of ABHAN where she was stabbed in the chest and brain after being the compliant victim of a robbery, it was error to give the instruction of ABHAN—a straw the jury grasped at to arrive at a compromise verdict and the exact peril defense counsel sought to avoid.

CONCLUSION

Based on the foregoing arguments, appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.



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ATTORNEY FOR APPELLANT

This 6th day of August, 2019.

CERTIFICATE OF COUNSEL

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

August 6, 2019.

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