STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN ARTHUR JAMES, III

APPELLANT

APPELLATE CASE NO. 2018-001080

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

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STATEMENT OF THE CASE

On January 25, 2018, a Williamsburg County Grand Jury indicted appellant for the offenses of assault and battery of a high and aggravated nature (ABHAN) and possession of a weapon during the commission of a violent crime. R. 341 – 342. Appellant was tried before the Honorable R. Ferrell Cothran, Jr., and a jury from May 29 – 31, 2018. R. 1. Warren Anderson represented the state. R. 1. Grant Smaldone represented appellant. R. 1.

Appellant was convicted of ABHAN and possession of a weapon during the commission of a violent crime and was sentenced to concurrent terms of twenty years and five years, respectively. R. 323, ll. 8-14; R. 332, l. 24 – 333, l. 4.

This appeal follows.

STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review only errors of law." *State v. Sams*, 410 S.C. 303, 307, 764 S.E.2d 511, 513 (2014); *see also State v. Wilson,* 345 S.C. 1, 545 S.E.2d 827 (2001). An appellate court is bound by a trial court's factual findings unless they are clearly erroneous. *Wilson,* 345 S.C. at 6, 545 S.E.2d at 829.

"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). "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." *Sams*, 410 S.C. at 308, 764 S.E.2d at 513; *see also State v. Drafts*, 288 S.C. 30, 340 S.E.2d 784 (1986); *State v. Gourdine*, 322 S.C. 396, 472 S.E.2d 241 (1996). "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). "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.* at 570, 647 S.E.2d at 166–67. "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.

"In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant." *Sams*, 410 S.C. at 308, 764 S.E.2d at 513 (citing *State v. Cole,* 338 S.C. 97, 525 S.E.2d 511 (2000)). "The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense." *Id.*

ARGUMENT

The court erred in appellant's ABHAN trial where it refused to charge the jury on the lesser offense of second degree assault and battery, where expert testimony about the complainant's injuries was that he had "a scar" and that most people tolerate the type of surgery undergone by the complainant "without much difficulty," since these facts supported a finding of moderate bodily injury (second degree assault and battery) rather than great bodily injury (ABHAN), since the court must instruct the jury on a lesser-included offense where there is any evidence of the lesser offense rather than the greater offense.

Relevant facts

The complainant, James Singletary, pulled into the IGA parking lot in his red Chevy, and appellant left his mother's car and walked over. R. 22, ll. 14-18; R. 59, ll. 14-17. It appears the complainant's sister Jackie, who previously dated appellant, had gone missing. Appellant said he walked over to tell the complainant the "good news" that he had heard from her and she was home. R. 134, l. 22 – 135, l. 24; R. 139, ll. 3-5; R. 140, l. 7 – 141, l. 11; R. 176, l. 19 – 177, l. 7.

What happened next was disputed. Appellant said he went to the complainant's car to speak with him but ran away when the complainant reached in his glove box. R. 139, ll. 3-12. The complainant claimed appellant came up and punched him in the face three times. R. 23, ll. 4-7. It was undisputed that the 6'5" complainant got out of his car and came after the 5'2" appellant. R. 35, l. 15 – 37, l. 10.

For a while it appeared the altercation was over and both men retreated to their respective cars. R. 37, l. 19 – 38, l. 3. However, the complainant subsequently opened his trunk, got out a machete, and headed towards appellant while waving the machete. R. 39, ll. 3 – 42, l. 23. Appellant said that the complainant had earlier pointed a gun at him. R. 143, ll. 10-16; R. 165, ll.

2-4. Appellant explained he was frightened for himself and for his mother when the complainant "unleashed" his "sword" and came towards them. R. 154, ll. 5-6; R. 148, l. 24 – 149, l. 9; R. 150, ll. 22-25; R. 152, ll. 3-5.

Appellant got his mother's gun and shot the complainant twice, after first firing what appellant said was a warning shot and the complainant contended was just a shot that missed. R. 151, l. 24 – 152, l. 2; R. 154, ll. 3-6; R. 162, ll. 5-6; R. 41, ll. 22-23. EMS arrived and took the complainant to the hospital. R. 75, ll. 9-10. Appellant remained on the scene to explain what happened to police officers. R. 105, ll. 9-23; R. 73, ll. 22-25.

Both appellant and the complainant were criminally charged: appellant with ABHAN and possession of a weapon during the commission of a violent crime, and the complainant with first degree assault and battery and possession of a weapon during the commission of a violent crime. R. 96, ll. 9-23. Strangely, at trial the complainant denied that he had pleaded guilty to any charges in conjunction with this case, but he was impeached with his sentence sheet. R. 47, l. 5 – 49, l. 19. The solicitor agreed the complainant had, in fact, pleaded guilty and said that the complainant was "wrong" for brandishing the machete. R. 275, ll. 15-18.

The testimony about the complainant's injuries was succinct. The complainant testified that as a result of the gunshot wounds, "we had to do surgery on my stomach. They had to remove the bullet from my stomach. They took out fifteen inches of intestines." R. 28, ll. 6-8.

Dr. John Gause treated the complainant at McLeod Regional Medical Center, and he was qualified as an expert in general surgery. R. 54, ll. 1-15. Dr. Gause said the complainant had been shot in the abdomen and groin, and that the surgery he performed resulted in the complainant "los[ing] part of his small intestine." R. 54, l. 18 – 55, l. 10. Dr. Gause explained that the complainant had holes in his small bowel so he "resected" the bowel; "hook[ed] the

bowel back together." R. 54, l. 19 – 55, l. 4. Dr. Gause said that absent the surgery, the complainant "would have died from peritonitis." R. 55, ll. 17-21. The solicitor questioned Dr. Gause about the extent of the injuries:

> **Q. Did this cause him permanent disfigurement, or will it cause him permanent disfigurement?**
>
> **A. He's got a scar on his midline so he has a scar.**
>
> **Q. And how about impairment of his organs, any impairment of his organs?**
>
> **A. Most people tolerate a resection of a portion of small bowel without much difficulties, but it's something that had to be done.**
>
> Q. But he did lose a portion of that bowel?
>
> A. Yes, sir.

R. 56, ll. 4-13 (emphasis added).

At the close of evidence, defense counsel requested the jury be charged on the lesser-included offense of assault and battery in the second degree. R. 319, ll. 14-22. However, the court stated, "I don't think the facts of this case warrant that. It's either going to be ABHAN or [assault and battery] first degree or not guilty," and denied the request. R. 319, ll. 22-25. An hour into deliberations, the jury asked to be re-charged on ABHAN and first degree assault and battery. R. 320, ll. 8-21. The court did so re-charge the jury and appellant was convicted as indicted.

Discussion

The court erred when it refused to charge the jury on assault and battery in the second degree, since there was evidence presented that tended to reduce the crime.

The South Carolina Constitution requires the judge charge the jury on the applicable law. S.C. CONST. art. V, § 21; *State v. Hendrix*, 86 S.C. 64, 68 S.E.2d 129 (1910). "If there is

evidence in the record from which the jury could infer the defendant is guilty of the lesser-included offense, rather than the crime charged, the trial judge **must** instruct the jury on the lesser-included offense." *State v. Gilmore*, 396 S.C. 72, 76, 719 S.E.2d 688, 690 (Ct. App. 2011) (emphasis added). "The trial judge is to charge the jury on a lesser included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." *State v. Gourdine*, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996).

Appellant was charged with ABHAN. S.C. Code Ann. § 16-3-600(B) provides in relevant part, that a person commits the offense of ABHAN "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." "Great bodily injury" is defined as "bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ." § 16-3-600(A)(1). While the jury could have found an unlawful injury was inflicted by appellant which caused great bodily injury or was accomplished by means likely to cause great bodily injury—and thus he was guilty of ABHAN—it was error not to charge the jury on the offense of second degree assault and battery, as there was evidence appellant was guilty of the lesser rather than the greater charge.

Assault and battery in the second degree is a lesser-included offense of ABHAN. S.C. Code Ann. § 16-3-600(D)(3). § 16-3-600(D) provides in relevant part that a person commits 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: (a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted." Moderate bodily injury is defined as "physical 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."[1] S.C. Code Ann. § 16-3-600(A)(2).

The evidence here supported a charge of second degree assault and battery because when Dr. Gause was asked his expert opinion of whether the complainant had permanent disfigurement, Dr. Gause only replied, "He's got a scar on his midline so he has a scar." R. 56, ll. 4-6. No photos of the scar were introduced, and the scar was never discussed. The jury could have reasonably found appellant unlawfully injured the complainant, but the scar was mere "moderate disfigurement" rather than "serious, permanent disfigurement."

The evidence also supported a charge of second degree assault and battery because when Dr. Gause was asked his expert opinion of whether the complainant had any impairment of his organs, Dr. Gause answered, "Most people tolerate a resection of a portion of small bowel without much difficulties, but it's something that had to be done." R. 56, ll. 7-11. No evidence was introduced about how much or for how long the complainant's organ was impaired. There was no testimony that the complainant did not tolerate the surgery well or that his bowel's functioning was impaired. Therefore, the jury could have reasonably found appellant committed an unlawful injury and the resecting of the complainant's bowel was a "temporary loss" of the function of an organ. Alternatively, it could have found the injury was one which involved medical treatment that required "the use of regional or general anesthesia."

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[1] § 16-3-600(A)(2) continues on to explain that "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."

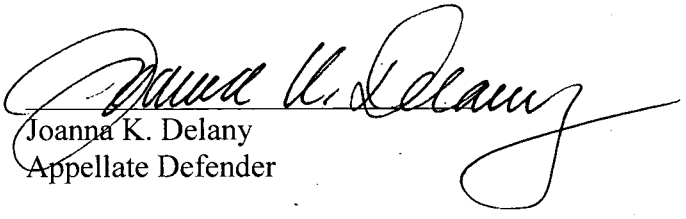
In *Casey v. State*, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991), the South Carolina Supreme Court reversed where the trial court refused to charge the jury on involuntary manslaughter in Casey's murder trial despite evidence the shooting happened during a struggle over the weapon. The Court explained that there must be "**no evidence whatever**" tending to reduce the crime from murder to manslaughter to warrant a refusal to charge on the lesser offense. (emphasis in original) (quoting *State v. Norris*, 253 S.C. 31, 35, 168 S.E.2d 564, 565 (1969)).

"[O]ur cases consistently hold that a request to charge a lesser included offense is properly refused only when there is no evidence the defendant committed the lesser rather than the greater offense." *Id.* "In determining whether the evidence requires a charge on a lesser-included offense, the Supreme Court must view the facts in the light most favorable to the defendant." *State v. Sams*, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014).

Dr. Gause testified that the complainant only had a scar and that most people tolerated the surgery well, and in fact, the complainant here seemed to have no problems during or after the surgery. In the light most favorable to appellant it cannot be said there was no evidence to support a charge on assault and battery in the second degree. The facts presented at trial support a finding that appellant unlawfully injured the complainant causing moderate bodily injury. Since there was evidence of assault and battery in the second degree, the court committed reversible error by refusing to charge it. *See State v. Crosby*, 355 S.C. 47, 53, 584 S.E.2d 110, 113 (2003); *State v. Light*, 378 S.C. 641, 650-51, 664 S.E.2d 465, 470 (2008).

CONCLUSION

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



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This 4th day of September, 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."

September 4, 2019.

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