STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable J.C. Buddy Nicholson, Circuit Court Judge

Appellate Case No. 2016-000616

THE STATE,

Respondent,

vs.

DAVID ALAN WHITE,

Appellant.

FINAL BRIEF OF RESPONDENT

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The trial court did not err in declining to instruct the jury on self-defense since no evidence was presented that Appellant was in imminent danger of death or great bodily injury or that he had a reasonable fear of death or great bodily injury.

STATEMENT OF THE CASE

The Charleston County grand jury indicted Appellant White for attempted murder, and subsequently indicted White for possession of a weapon during the commission of a violent crime. White was tried by jury on those charges on March 14-17, 2016, before the Honorable J.C. Nicholson, Jr. The jury found White guilty of assault and battery of a high and aggravated nature (ABHAN) and the weapons charge. Judge Nicholson sentenced White to ten years imprisonment for ABHAN and a consecutive five year imprisonment for the weapons conviction.

STATEMENT OF FACTS

White cut his victim's throat with a big knife, and the victim lost copious amounts of blood before EMS and emergency doctors saved his life. Spencer Washington, the State's first witness, hosted a get together in the back yard the day before Thanksgiving. Several people were drinking beer and having a good time, while Spencer smoked turkeys for friends and neighbors. R. p. 69. Although people were drinking, Spencer attested he was not drunk. Victim, known by his lifelong nickname Little Bear, was at the get together cutting people's hair. Appellant White was Little Bear's last customer. After cutting White's hair, Little Bear packed his haircutting equipment in his moped and was standing with White, Spencer, Henry Washington (Spencer's brother), and others. White and Little Bear were joking and laughing. Then White walked over, swung a blade towards Little Bear, and Little Bear told Spencer, "he cut me." Spencer looked at White and said, "You cut him." White dropped his knife and left while Little Bear fell into Spencer's brother's arms. R. pp. 67-71.

Spencer's wife called 911. When law enforcement came, Spencer handed the knife over. Spencer claimed he did not hear White say anything, but was impeached with his prior statement in which he told law enforcement that White said to Little Bear, "You're about to get this." R. pp. 72-73. He confirmed this during redirect examination. R. p. 88. Spencer advised the jury that Little Bear did not act aggressively towards White. Spencer testified Little Bear and White were never face to face. When White left, he left his children behind at Spencer's house. R. pp. 73-74; p. 78.

Victim Joseph Johnson is Little Bear. He was fifty-four years old at trial. He held various jobs after spending four years in the Army. He has cut hair for thirty-five years. Little Bear has known Spencer since Spencer was a kid. He helped smoke turkeys in Spencer's yard and gave about

six haircuts. He cut White's hair. The two never met before. While he cut White's hair, White was playing around with a knife. After he finished the haircut, Little Bear packed his moped and prepared to leave. He was shaking hands with those gathered in the yard when his throat was slashed. White swung at Little Bear as he walked past Little Bear. Little Bear testified White did not say anything to him as he did this. Little Bear told Spencer he was cut. When Little Bear checked his injury, he felt his hand go inside his throat. He remembered EMS coming to get him, but not much else until he awoke in the hospital. R. pp. 100-09.

Little Bear has a significant record, four separate breaking and entering motor vehicle convictions, a property enhancement offense, and possession of cocaine base. But he never hit White. Little Bear showed the jury his scar. R. pp. 128-29. In addition to being impeached with his convictions, he was impeached from his prior claims that White came up from behind him. On cross-examination, Little Bear confirmed that he told White to put the knife away and White kept talking out. Little Bear testified he only drank two beers. He told the jury he did not give White a reason to cut him. Little Bear needed to be on pain medication afterwards and could not speak. R. pp. 140-41; p. 145. Little Bear denied he told White he made shanks while he was in prison. R. p. 143.

Spencer's neighbor, Albert Jenkins, came over so Spencer could smoke a turkey for him. Jenkins was convicted for giving false information to police in 2009. He testified he saw Little Bear cutting White's hair and they were just cracking jokes. R. pp. 147-50. However, the jokes started getting more serious, and Spencer cautioned them they were getting a little out of hand. Spencer told White to stop acting up in his yard. Spencer then told White to leave, telling him, "[Y]oung man you got to leave my yard because you're disrespecting my yard." White gathered things up and then he

and Little Bear got close to each other and "pushed off." Afterwards, Little Bear grabbed his neck and said, "Oh man, he cut me." R. pp. 150-52 (direct quote, p. 151, lines 23-24). Jenkins testified White just walked off and that was the last Jenkins saw of him. R. p. 154.

Jenkins explained about Little Bear and White, "I really don't know them." R. p. 153. This lack of bias towards either of them made a surprise answer on cross-examination particularly enlightening: Jenkins told defense counsel that Spencer asked White to leave the yard because White would not stop playing with his knife. R. p. 156.

After Little Bear's throat was slashed, Jenkins testified both Henry (Spencer's brother) and him implored Little Bear to stay awake as he went in and out of consciousness. Little Bear pleaded, "[M]an, y'all don't let me die." R. p. 153, lines 6-8, lines 20-25.

Henry Washington, Spencer's brother, described White as a "brother." He testified White and Little Bear were joking together. The group talked about who would be "tapping out" first. Henry explained his back was turned when he heard Little Bear say White cut him. He turned around and Little Bear fell in his arms. Henry held his hand on Little Bear's throat to try and stop the bleeding. R. pp. 164-65. He said Little Bear at one point was upset and gave White a push, but described it as "a playing push." R. pp. 165-66. Henry testified he did not see whatever triggered White to cut Little Bear with a knife. R. p. 164, lines 6-12. On cross-examination, Henry verified that from his perspective, neither one seemed upset before the incident. R. p. 168, lines 17-19.

Dwayne Forrest, also at the gathering, did not know White or Little Bear at all. Forrest testified the two were fussing and ready to fight each other. Then White swung his arm. He never saw Little Bear hit White. Forrest admitted he did not see the knife, he just saw White swing and Little Bear hold his neck. R. pp. 171-75. He added on redirect that White's hand was in his pocket

and his hand came out of his pocket when he swung the knife. R. p. 178. Forrest arrived in Spencer's yard a few minutes before the stabbing. R. p. 177.

Kyle Green was there while Little Bear cut White's hair. He testified he later saw them face to face. White's hands went up first, then Little Bear's. Green assumed that was when White cut Little Bear. He did not see a weapon, only Little Bear bleeding. Little Bear was bleeding bad. R. pp. 182-84.

Joshua Sims, a paramedic, arrived at the scene at 9:34 p.m. He found a male on the ground with his throat slashed. The patient was in critical condition. Sims was unable to completely control the bleeding. R. pp. 100-01.

The patient's eyes were closed and he would only respond to painful stimuli. The patient could not speak, only moan. The large gash on the left side of the throat appeared to involve the external jugular and the trachea. R. p. 201. The patient needed a breathing tube placed in his trachea. EMS administered RSI (Rapid Sequence Intubation), medicines to paralyze and sedate the patient for when EMS placed the breathing tube in the patient's trachea so they could breathe for him. R. p. 202. Sims explained EMS used the sedative in case the patient had active memory because, "You're unable to breathe on your own and that's a sensation that no one wants to know, wants to remember . . . ." R. p. 204, lines 6-15.

The two EMS people needed a fireman to drive the ambulance to the medical university because of the traumatic injury required both of them to tend to the patient during the trip. R. p. 207. This particular incident sticks in Sims' memory because he recalled seeing the vocal chords and could see into the patient's chest. R. p. 209, lines 8-16.

Sergeant Ron Lacher went to White's mother's house at 11:50 p.m. He was greeted by Ms.

White at the door. While he asked Ms. White if White was at the house, White simultaneously announced from the back of the house that he was coming out. R. p. 216. White told Sergeant Lacher that he showered and changed his clothes. White did not have any injuries or blood on him. R. pp. 217-18. Detective Glen Kramer spoke with White after he was arrested. Detective Kramer testified White did not have any cuts or bruises and did not appear to be in any medical distress. R. p. 242.

Dr. Samir Fakhry treated Little Bear. His patient suffered a ten centimeter laceration to the anterior of the neck. Little Bear was not responding to commands, although he moved somewhat. Dr. Fakhry decided to change out the breathing tube. He noted the bleeding was controlled somewhat, but not sufficiently. Dr. Fakhry testified severe blood loss could cause severe shock and the organs would start to fail, which was his concern. Dr. Fakhry testified that Little Bear lost between two to three pints of blood at the hospital, roughly 20% blood loss, and shock and death begins at the 35-40% range. Dr. Fakhry did not know how much blood the patient lost before arriving at the hospital. Dr. Fakhry testified Little Bear could have potentially died from the injuries. R. pp. 295-96.

Little Bear was hospitalized for ten days. R. p. 306. On December 2, Officer Adam Galloway showed a photographic lineup to Little Bear at the hospital. He testified Little Bear was unable to speak. R. pp. 193-95.

The only defense witness was White himself. He claimed he did not try to kill Little Bear, but he admitted cutting him. White never met Little Bear before. Little Bear cut his hair and he liked the haircut, there was no dispute over payment. R. p. 320, p. 323. During direct examination, White claimed Little Bear told him how he made shanks in prison. White testified he did not pay the

comments any attention. R. pp. 342-43.

As he was about to leave, White was hit in the back of the head and swung around at the person behind him with his knife – he called it a quick reaction. R. p. 347, lines 24-25. White saw Little Bear's neck was cut. White claimed he carried the knife because he was just using it to cut saran wrap off some pallets. When he finished cutting the saran wrap, he did not close the knife, he just put it back in his pocket "not thinking nothing of it." He happened to have the knife because he was fishing earlier in the day. R. pp. 346-47. White's counsel asked White, "When he hit you did you feel threatened?" White answered, "**I didn't feel threatened** but I knew I had a lot of head injuries in my past that I thought could have triggered something." R. p. 348, lines 1-4. White explained he felt threatened by the **earlier statements** that were made. R. p. 348, line 25 – p. 411, line 3. Note he did not testify he felt threatened by Little Bear hitting him. White claimed he did not know where Little Bear was when he swung his arm and he did not look where he swung the knife. R. p. 349, lines 8-12. White explained he fled "[b]ecause I didn't want any more commotion or whatever like that to happen to trigger." R. p. 350, lines 5-7.

Defense counsel asked White, "Why did you swing the knife that night?" White answered:

> Because I got hit; it was a reaction. I didn't realize that I even had the knife like that in my hand in my pocket. I just spin around real quick. **I didn't know it was him behind me that close or whatever when I swung my arm.**

R. p. 351, lines 8-12. On cross-examination, White agreed with the prosecutor he was just swinging wild and it could have been anybody behind him. R. p. 357, lines 10-23. Again on redirect, White advised, **"At the time I didn't know who it was."** R. p. 360, lines 8-11.

ARGUMENT

I.

White was not limited in presenting his defense to either accident or self-defense. In context, the trial court was merely finding an insufficient foundation was laid to admit hearsay statements that would allegedly show White had a reasonable fear of victim when he slashed his throat. White never presented sufficient evidence warranting a self-defense instruction, and he received an instruction on accident.

White raises as the first issue in his brief the false claim that the trial court limited him to raising either self-defense or accident. This never happened. Instead, defense counsel elicited a snippet of testimony from White that arguably supported the defense of accident, but not self-defense. Defense counsel then attempted to elicit testimony that before the assault, Little Bear told White he made shanks in prison and kept a gun and knife in his moped.

Prior to seeking to admit White's hearsay testimony, White testified (1) he did not try to kill Little Bear; (2) he admitted he cut Little Bear; (3) he did not mean to cut Little Bear; and (4) he did not aim for Little Bear's throat. R. p. 320, lines 14-23. He further testified he never met Little Bear before the gathering, there was no tension between them, and there was no dispute over money or the quality of the haircut. R. p. 323, lines 5-24. At this point defense counsel attempted to elicit testimony that Little Bear told White he made shanks in prison, and he kept a knife and gun in his moped. R. pp. 324-27. Defense counsel claimed it was admissible because it went to White's state of mind for purposes of self-defense. R. pp. 328-29.

The trial court observed that "based upon what he has already said how can you possibly raise self-defense because self-defense is a [purposeful] act you intentionally inflicted physical harm on a person that you were in imminent fear of. Well, he's already said he did not cut him on purpose. . . .

Now where is self-defense going to come into this?" R. p. 329, lines 7-14.

The trial court further observed, "So none of this testimony he has said so far has any relevancy at all unless there is a valid self-defense case." R. p. 329, lines 21-23. Counsel advised the trial court that White would admit he never saw a weapon and did not know whether Little Bear had a weapon. R. p. 330, lines 7-9. Further, White's counsel explained White allegedly feared Little Bear could do him harm because Little Bear talked about making shanks and bragged about being a good wrestler. R. p. 330, lines 10-12.

Counsel **falsely** predicted White would testify he armed himself in self-defense. R. p. 330, lines 15-21. Instead, White later testified he had the knife in his pocket already when the incident occurred because he was just cutting saran wrap before he "accidently" slashed Little Bear's throat. R. pp. 346-47. Further, White subsequently testified he did not feel threatened when he was hit, and he did not know who he was swinging his knife at before his knife managed to find Little Bear's throat. So, as further discussed in the next issue, the excluded testimony was not relevant because White, by his own testimony, did not know who hit him when he swung his large knife in retaliation. R. p. 360, lines 8-11. Therefore, his knowledge that Little Bear might have a gun or knife in his moped was not relevant towards explaining why he cut his then unknown assailant.

White's primary vehicle for arguing the trial court made a mistake of law is State v. Williams, 400 S.C. 308, 733 S.E.2d 605 (Ct. App. 2012). In Williams, the trial court failed to instruct the jury on either self-defense or accident, and this Court carefully analyzed the facts to first determine if the evidence supported self-defense. This Court then determined the evidence also supported an instruction on accident. Williams testified the victim started shooting at him and Williams ran away. Williams testified he was in fear for his life and he was afraid he would be shot

in the back. His driver tossed him the rifle Williams claimed went off without him pulling the trigger. His testimony was inconsistent – he alternatively claimed he shot the victim because he thought the victim would shoot him first. Id. at 315-16, 733 S.E.2d at 609-10.

After concluding evidence supported instructions for both self-defense and accident, this Court commented, "We note that even though self-defense and accident charges are often mutually exclusive, there is evidence in the record to support both charges **in this case.**" Id. at 317, 733 S.E.2d at 610 (emphasis added). The instant case is distinguishable because, as more fully discussed later in the brief, the evidence did not support self-defense. The defenses of accident and self-defense occasionally mutually coexist, but they do not in this case. See id. at 318, 733 S.E.2d at 611 (J. Lockemy, concurring).

White's arrangement of issues in his brief and his argument as to this issue are odd because White separately challenges the exclusion of his testimony about his conversation with Little Bear and the trial court's decision to decline instructing the jury on self-defense. The essence of White's argument in this issue is the trial court made an incorrect legal statement, so White is entitled to a new trial. In context, the trial court did not make a misstatement of law, but merely observed that the facts alleged and the testimony presented could not support both accident and self-defense. However, even if the trial court is mistaken, there is no prejudice as the evidence was properly excluded, and evidence did not support an instruction on self-defense, with or without the excluded evidence. State v. Preslar, 364 S.C 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005) ("In order for an error to warrant reversal, the error must result in prejudice to the appellant.").

In the instant case, the trial court was not admonishing White to choose a defense and it was not determining its instructions to the jury, it was ruling on an evidentiary matter and the lack of

foundation to admit the testimony White's counsel sought to elicit.

II.

The trial court did not err in declining to admit appellant's hearsay statements that the victim told him he made shanks in prison and kept a gun and knife in his moped because they were not relevant since appellant did not act in self-defense.

At the point of the trial in which White attempted to admit his testimony that Little Bear told him he made shanks in prison and kept a gun and knife in his moped, White had only testified he did not mean to cut Little Bear and did not mean to cut Little Bear's throat. Obviously, no evidence supporting self-defense was presented at this point. Further, as discussed later in the brief, White failed to provide sufficient evidence meeting the four elements of self-defense during the remainder of his testimony. Accordingly, Little Bear's conversation with White never became relevant, because White's knowledge that Little Bear had weapons stored in the moped was immaterial since White did not know who he swung his big knife at. Therefore, the trial court did not err in suppressing the hearsay testimony.

"The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). The admission or exclusion of evidence is a matter addressed to the trial court's sound discretion and will not be reversed absent a manifest abuse of the trial court's discretion and probable prejudice. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). "An error without prejudice does not warrant reversal." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005).

"While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence, regardless of its admissibility under the rules of

evidence." State v. Hamilton, 344 S.C. 344, 359, 543 S.E.2d 586, 594 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801, SCRE. Hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. Rule 802, SCRE; State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001).

Relevant evidence is "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. For evidence to be admissible, it must be relevant. Rule 402, SCRE. Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Pagan, 369 S.C. 201, 210, 631 S.E.2d 262, 266 (2006).

Given the absence of evidence supporting self-defense, the trial court keenly observed "**based upon what he has already said** how can you possibly raise self-defense because self-defense is a [purposeful] act you intentionally inflicted physical harm on a person that you were in imminent fear of. Well, he's already said he did not cut him on purpose. . . . Now where is self-defense going to come into this?" R. p. 329, lines 7-14 (emphasis added).

Trial counsel advised the trial court that White would testify he armed himself in self-defense. R. p. 330. However, White never did testify that he armed himself in self-defense. Instead, he later testified before the jury that he was already carrying around the knife after having used it earlier to cut some packaging tape.

The trial court found, "[L]et me say this about the shank. I don't think it's relevant as to

accident and/or self-defense because that's a prior act. It doesn't have anything to do with the present whether he had a shank or didn't have a shank so I'm not going to allow that testimony." R. p. 335, lines 18-23. However, when White offered evidence of the shank as impeachment evidence, the trial court allowed the testimony to be admitted for that purpose. R. p. 338, lines 8-10. The trial court then provided a limiting instruction that the statement about the shank was allowed for impeachment only. R. p. 341.

Additionally, the trial court also ruled it would not allow White to testify that Little Bear told him about the gun and knife allegedly kept in the moped, noting it had no bearing on the case. R. p. 340, lines 1-3. The trial court ruled correctly because White's counsel admitted that White did not know if Little Bear had a weapon on him at the time he cut him. R. p. 338, lines 11-12. Since White did not foster a belief, or have reason to foster a belief, that Little Bear was armed at the moment White struck him with the knife, the testimony about the knife and gun stored in the moped was irrelevant since it did support a reasonable belief that Little Bear was in fact armed. Additionally, in the absence of a foundation supporting self-defense, the statement constituted hearsay. See State v. Hendricks, 408 S.C. 525, 532-33, 759 S.E.2d 434, 438 (Ct. App. 2014) (rejecting argument that declarant's statement was not for the truth of the matter, and finding the declarant's statement was hearsay, because the probative value of the statement was in the truth of the matter asserted, that defendant raped victim, rather than for the purpose of explaining officer's reasons for going to see victim at the hospital, which carried minimal probative value).

White cites a case that actually defeats his claim of error, State v. Washington, 367 S.C. 76, 623 S.E.2d 836 (Ct. App. 2005), *aff'd as mod.*, 379 S.C. 120, 665 S.E.2d 602 (2008). In Washington, the trial court did not allow Washington to admit evidence that the victim kept weapons

in his trunk because no evidence was presented that Washington knew the victim kept weapons in his trunk or that he kept weapons at all. Also no evidence was presented the victim approached his trunk prior to being stabbed. Washington claimed he thought the victim might have a gun in his car because the victim was rummaging under the car seats and Washington testified that most people carry a gun under their car seat. This Court found no prejudicial error from the trial court excluding the testimony. Id. at 81-82, 623 S.E.2d at 839.

White attempts to distinguish Washington, claiming, "Unlike Washington, the defense was not attempting to present evidence that [Little Bear] was actually armed but rather that White believed that he was armed." Br. of App. p. 22. However, no evidence was presented that White believed Washington was armed. Instead, defense counsel was clear, admitting, "But again my client he'll be honest; he didn't know if the man had a weapon on him." R. p. 338, lines 11-12. Further, White admitted he did not know who hit him or who he was swinging his knife at when he retaliated at the alleged slight. Therefore, as in Washington, the evidence was not relevant because White failed to establish a belief that Little Bear was armed or that he knew Little Bear was the person who hit him when he swung his knife. Accordingly, the testimony was irrelevant and inadmissible hearsay.

Further, after the trial court's preliminary ruling, White's counsel never sought to revisit this ruling after White completed his direct testimony. Even if White did attempt to revisit the ruling, the evidence never became admissible because White's supposed fear of Little Bear was not relevant when he swung the knife without knowing who he swung it at. On cross-examination, White provided the following testimony:

Q: You took a knife and you swung behind you.

A: I did not intentionally mean to swing out the knife at him. I mean I just swung out the knife. I just swung out.

Q: You were just swinging wild?

A: Pretty much.

Q: [Little Bear] could have been behind you?

A: **Spencer could have been behind me.**

Q: Anyone could have been behind you?

A: Whoever hit me.

R. p. 357, lines 10-19 (emphasis added).

Accordingly, the trial court did not err in declining to allow the hearsay testimony, as it was irrelevant to the case. Determination of relevancy is largely within the discretion of the trial court and will not be reversed absent an abuse of that discretion. State v. Sweat, 362 S.C. 117, 127, 606 S.E.2d 508, 513 (Ct. App. 2004). Further, any error was harmless, since evidence did not even support a self-defense instruction and the evidence of guilt was overwhelming. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

III.

The trial court did not err in declining to instruct the jury on second degree assault and battery where the uncontroverted evidence was that the injury suffered constituted "great bodily injury."

White argues the trial court erred in declining to instruct the jury on second degree assault and battery as a lesser included offense. The trial court instructed the jury on attempted murder, assault and battery of a high and aggravated nature (ABHAN), and first degree assault and battery; the jury finding White guilty of ABHAN. White argues it was a jury issue as to whether the ten centimeter gash on his victim's throat constituted "great bodily injury" as required by ABHAN. No evidence exists that the wound was anything less than a great bodily injury.

Dr. Samir Fakhry treated Victim and testified that when Victim arrived at the hospital, EMS already placed a breathing tube in Victim's neck. Dr. Fakhry explained:

> Because of his condition and our concern about whether or not he was being adequately ventilated or getting enough air and because of the amount of bleeding the emergency medicine doctors who were helping us manage his airway decided to exchange his tube and put in a better tube for him.

R. p. 298, lines 19-23. Dr. Fakhry noted the medical personnel were only able to partially control the bleeding: "[The bleeding] continued but it wasn't as severe as it would have been if we were not applying pressure but it wasn't satisfactory. We did not consider it satisfactorily controlled bleeding." R. p. 299, lines 11-15.

Dr. Fakhry testified, "The blood loss that we were aware of – I can't quantitate what he lost before he arrived to us particularly well but he lost somewhere in the vicinity of 750 to 1000 milliliters so that would be about two or three pints of blood in layman's description." R. p. 301,

lines 8-13. Dr. Fakhry noted the average person has about fifteen pints of blood, so Victim lost close to twenty percent of his blood at the hospital. Dr. Fakhry explained, "And that's **where shock starts**. Severe shock and death begins to happen at about 35 to 40 percent blood loss." R. p. 301, lines 14-20. After the operating room, Victim needed to be put on a breathing machine and needed additional blood and fluids, so he went to the intensive care unit. R. pp. 301-02. Dr. Fakhry explained that "no patients are placed in intensive care who don't have risk of complications **and death** so almost by definition the fact that you are in an ICU means that you are at risk." R. p. 302, lines 10-13.

Dr. Fakhry noted three structures in the neck that are most worrisome when examining for injury: (1) the trachea, through which oxygen is inhaled and carbon dioxide is exhaled; (2) the carotid arteries that takes blood up to the brain – there is one on each side of the neck; and (3) the jugular vein, in which blood is brought back from the brain. Dr. Fakhry noted injuries to any of those structures are serious injuries with the risk of loss of life, although it turned out none of those areas were injured. R. pp. 303-04.

However, when asked by the prosecution if Victim could have died from his injuries, Dr. Fakhry answered, "Oh absolutely, yes." R. p. 305, lines 11-13. On redirect examination, Dr. Fakhry confirmed that Victim lost two to three pints of blood at the hospital alone and Victim needed surgical intervention to stop bleeding. R. p. 311.

Spencer Washington described the bleeding as "humoungous." Adding, "It was a towel of blood." R. p. 80, lines 13-14. Victim testified his hand went inside his neck when he was checking his injury. R. p. 109. For a while, Victim could not speak. R. p. 145. Henry Washington testified he needed to hold his hand to Victim's neck to stop the bleeding as Victim fell into his arms. R. p.

164-65.

Joshua Sims with the Charleston County EMS testified that Victim "had damage to his neck, which would include major vessels and his airway **and with direct pressure we weren't able to completely control or stop the bleeding at the wound site.**" R. p. 201, lines 10-13 (emphasis added).

Sims noted, "Initially when we were getting him loaded we placed him on high flow tube by a non rebreather mask at 15 liters per minute. That proved to be insufficient to help his oxygenation issues simply because his respiratory drive was not sufficient." R. p. 202, lines 18-23. Next EMS tried manual respiration with a bag valve mask. R. p. 202, lines 23-25. Due to the bleeding and the damage, Sims decided this measure was insufficient and the trachea needed to be isolated to prevent blood from leaking into the patient's lungs. After applying sedative, EMS installed a breathing tube through the mouth into the trachea. R. pp. 202-06.

Sims explained why the event vividly stuck in his memory as follows:

> It is the tear that existed in the cricothyroid membrane when I went to intubate the patient initially using a laryngoscope, it's a device that has a light on the end of it.
>
> When it was placed into his oral pharynx and lifted so that I could see the vocal cords and pass the ET tube through you could physically see the light shining through the hole in the cricothyroid membrane onto his chest, which is not something that you see almost ever so.

R. p. 209, lines 8-17.

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by

the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). The trial court only commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993).

"A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Green, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012). When the evidence could support an inference that the defendant is guilty of **only** a lesser-included offense and not the greater offense, the trial judge has a duty to instruct the jury on the lesser-included offense. State v. Lambright, 279 S.C. 535, 537, 309 S.E.2d 7, 8 (1983). However, "[i]t is well settled that a jury instruction on a lesser included offense is required only when the evidence warrants such an instruction." State v. Coleman, 342 S.C. 172, 175, 536 S.E.2d 387, 389 (Ct. App. 2000). "The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty only of the lesser offense." State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006).

In reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). An appellate court will not reverse a trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006).

In relevant part, the statute provides:

(B)(1) 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.

S.C.Code Ann. § 16-3-600(B)(1) (Supp. 2013) (emphasis added).

(C)(1) A person commits the offense of **assault and battery in the first degree** if the person unlawfully:

(b) offers or attempts to injure another person with the present ability to do so, and the act: (i) is accomplished by means likely to produce death or great bodily injury; . . . .

S.C.Code Ann. § 16-3-600(C)(1) (Supp. 2013) (emphasis added). It goes on to provide:

(D)(1) 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:

(a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted; or

(b) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing.

. . . .

(3) Assault and battery in the second degree is a lesser-included offense of assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29.

S.C. Code Ann. § 16-3-600(D) (Supp. 2013) (emphasis added).

While severity of injuries may at times be a fact for the jury to decide, uncontroverted evidence of severe, life-threatening injuries does not warrant an instruction on a lesser included offense. For instance, in State v. Golston, 399 S.C. 393, 732 S.E.2d 175 (Ct. App. 2012), this Court

noted:

> In most prosecutions for CDVHAN, there will be evidence the defendant committed acts which constitute only CDV in addition to acts which constitute CDVHAN. In this case, for example, Golston's statement to the victim "you ain't going nowhere" and his admitted "slap[ping] her face" could be found by a jury to amount only to CDV and not CDVHAN. However, the mere existence of evidence that Golston committed these acts in addition to other acts which could constitute CDVHAN, **such as beating the victim with his fists so severely that her own son could not recognize her and she could not open one of her eyes for ten days, does not warrant a jury charge on simple CDV.** Rather, to warrant a jury charge on the lesser offense, the evidence viewed as a whole must be such that the jury could conclude the defendant is guilty of the lesser offense *instead of* the indicted offense.

Id. at 397-98, 732 S.E.2d at 178 (citation omitted, italics in the original, additional emphasis added); see also State v. Price, 400 S.C. 110, 114-15, 732 S.E.2d 652, 654 (Ct. App. 2012) (finding where the shooter pointed the gun at the victim and shot him in the neck at close range, no evidence supported ABHAN as a lesser included offense of ABWIK, "it was not possible to interpret the evidence to support any conclusion other than that the person who shot [the victim] committed ABWIK."); State v. Methfessel, 718 S.W.2d 534, 537 (Mo. Ct. App. 1986) ("Robinson suffered a brain concussion that may have lasting effects. The loss of consciousness and memory attendant to a brain concussion represents a protracted impairment of the function of the brain, and thus constitutes a 'serious physical injury' under [a Missouri statute].").

In the instant case, as in Golston, the nature of injuries left no question of fact to show White committed the lesser offense to the exclusion of the greater offense. White's argument for the lesser instruction is based on what was not damaged, the trachea, jugular vein, or artery. However, the only evidence is White suffered severe blood loss that put his life in danger, and he required a breathing

tube. The exorbitant blood loss and the necessity for a breathing tube being installed to the trachea demonstrated that the injury constituted great bodily injury as defined by statute. No evidence showed the injury was anything but life threatening. Further, the nature of White's act, swinging a knife at another person, was an act "accomplished by means likely to produce death or great bodily injury." Accordingly, the trial court did not err in declining to instruct the jury on Assault and Battery in the second degree as no evidence supported White being guilty of the lesser included offense to the exclusion of the greater offense.

IV.

The trial court did not err in declining to instruct the jury on self-defense since no evidence was presented that Appellant was in imminent danger of death or great bodily injury or that he had a reasonable fear of death or great bodily injury.

White complains that the trial court erred in declining to instruct the jury on self-defense. This argument is clouded by White continuing to perseverate over the trial court's comments about the inconsistency between accident and self-defense. The jury was instructed on accident. However, no evidence supports an instruction on self-defense. White admitted he did not feel threatened when he was allegedly hit from behind, and he did not have a reasonable fear of death or great bodily injury based on his own testimony.

"The law to be charged must be determined from the evidence presented at trial." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Mattison, 388 S.C. at 479, 697 S.E.2d at 583.

The elements of self-defense are as follows: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have actually believed he was in actual danger of losing his life or sustaining serious bodily injury, or he must have been in actual imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based on his belief of imminent danger, the defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances

were such that would warrant a person of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or loss of his life; and (4) the defendant had no other probable means of avoiding the danger. State v. Rivera, 389 S.C. 399, 699 S.E.2d 157 (2010).

"Because all of the elements are required to establish self-defense . . . [i]t is an axiomatic principle of law that [self-defense] has not been established **if any one element is disproven.**" In re Tracy B., 391 S.C. 51, 704 S.E.2d 71 (Ct. App. 2010) (emphasis added) *quoting* State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010). If evidence is lacking supporting a single element of self-defense, then a defendant is not entitled to an instruction on self-defense. See State v. Lockamy, 369 S.C. 378, 631 S.E.2d 555 (Ct. App. 2006) (noting all four elements must exist for a defendant to be entitled to a self-defense instruction and concluding appellant was not entitled to an instruction on self-defense because the evidence failed to show the appellant did not have any other means to avoid the danger).

In State v. Bruno, 322 S.C. 534, 536, 473 S.E.2d 450, 452 (1996), the defendant claimed he was riding with a friend from a bar and fell asleep. He testified he was awakened when the car hit a curb. He asked what happened, and the driver told him the victim tried to run them off the road. The defendant testified he saw the victim going into his car trunk and felt the victim "was coming toward him." The defendant claimed "something snapped" and he shot the victim. Id. at 535, 473 S.E.2d at 451. The Supreme Court found the defendant was not entitled to a self-defense instruction "because he presented no evidence that he believed he was in imminent danger of losing his life or sustaining serious bodily injury." The Supreme Court noted, "On direct examination, his only testimony was that he felt Victim was coming at him with something. He testified, 'It happened so

quick, you know. I didn't mean to kill him. I just wanted him to keep away from me.'" Id. at 536, 473 S.E.2d at 452. Similar to the facts in Bruno, in the instant case, White admitted he was not in fear and explained he just reacted. Retaliation is not self-defense.

In State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994), Goodson and victim argued over a dollar bet during a pool game at a bar. Victim threatened Goodson with a pool stick, Goodson drew his gun. Goodson was escorted outside by the bar owner. Goodson subsequently shot victim. He testified the gun "just went off" as victim was "coming at him." Id. at 279, 440 S.E.2d at 371-72. The Supreme Court found, "Here, Goodson presented no evidence which shows that he believed he as in imminent danger of losing his life or sustaining serious bodily injuries at the time he shot [victim]. There also is no evidence that Goodson was actually in imminent danger at the time he shot [victim]." Id. at 280, 440 S.E.2d at 372; see also Tate v. State, 308 S.C. 163, 417 S.E.2d 553 (1992) (where there is no evidence to suggest defendant believed she was in imminent danger of loss of life at the time she killed, counsel's failure to secure expert on self-defense was not ineffective assistance because the defense was not applicable).

Likewise, in the instant case, there was no evidence White was in fear of losing his life or sustaining serious bodily injury or he was in imminent danger of losing his life or sustaining serious bodily injury.

Further, under White's version of events, he was bumped on the back of his head and did not know who hit him. Based on his version of events, White did not even know if he was intentionally hit or whether it was an accident. By no stretch was his response proportional to the "danger" from being bumped or hit. See State v. Wood, 1 S.C.L. 351 (1 Bay 351) (1794) (key to self-defense is the defendant can only respond with proportionality). In State v. Quin, 5 S.C.L. 515 (S.C. Const. App.

1815), the court held: "Proof that the prosecutor was the aggressor would not justify an enormous battery; nor, indeed, any, beyond the bounds of self-defense."

In State v. Campbell, 111 S.C. 112, 96 S.E. 543 (1918), the Supreme Court held, "The defendant, if without fault, had the right to use such **necessary** force as required for his complete protection from loss of life or serious bodily harm, and could not be limited to the degree or quantity of attacking opposing force." Id. 111 S.C. at 112, 96 S.E. at 544 (emphasis added). White's response to merely being bumped in the back of the head did not warrant the use of deadly force. Accordingly, his testimony failed to support self-defense. Therefore, the trial court did not err in declining to instruct the jury on self-defense.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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May 22, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable J.C. Buddy Nicholson, Circuit Court Judge

Appellate Case No. 2016-000616

THE STATE,

Respondent,

vs.

DAVID ALAN WHITE,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

Respectfully submitted,

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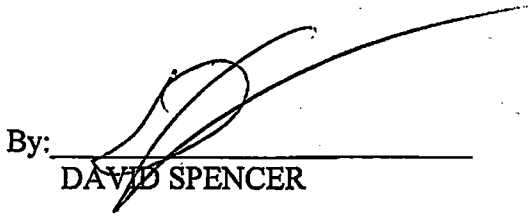
By: 
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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record Laura R. Baer, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

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

This 22nd day of May, 2017.

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