ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. **2016-001603**

The State of South Carolina,

Respondent,

vs.

Kevin Lamar Gary,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in declining to require the State to open in full in closing argument and be restricted to only rebuttal in reply to defense counsel's argument. Appellant's due process rights were not violated. At the conclusion of the prosecution's closing argument, defense counsel did not make a claim the defendant was prejudiced by defense counsel's inability to reply to the prosecution's argument, therefore appellate counsel's arguments to that effect are not preserved for review.

II.

Because the uncontroverted evidence is the victim lost his eyeball and his injuries could have resulted in his death if not treated, no evidence supports the victim suffered only moderate bodily injury as opposed to serious bodily injury as required for assault and battery of a high and aggravated nature. Therefore, the trial court did not err in declining to instruct the jury on the lesser offense of assault and battery in the second degree.

STATEMENT OF THE CASE

Gary was indicted for assault and battery of a high and aggravated nature (ABHAN) and mayhem. Gary argued for immunity under the Protection of Persons and Property Act. This was denied by the Honorable James R. Barber, III, on April 20, 2015. Gary was tried by jury on July 25-27, 2016 before the Honorable William P. Keesley. Judge Keesley granted a directed verdict for mayhem. The jury found Gary guilty of ABHAN and Judge Keesley sentenced Gary to twelve years' imprisonment suspended to ten years' imprisonment and two years' probation.

STATEMENT OF FACTS

On March 24, 2014, Appellant Gary beat the victim, Jaranamo Cone, Jr., to the point Cone suffered memory loss of the life-changing assault. Cone was a maintenance worker at Gary's apartment complex who was fixing Gary's toilet.

The only non-biased witness who saw the altercation was Vanetta Riley, a neighbor who knew both Cone and Gary. She testified she was in her apartment when she heard a loud bang, like a door slamming, and looked out the window. She saw Cone walking from the apartment towards the parking lot. Cone was facing the parking lot when Gary attacked Cone from behind and beat Cone. When Cone started trying to get up, Gary hit him while Cone was pinned against Riley's truck. When Cone fell down, Gary hit Cone's head "into" the concrete. R. pp. 68-71. Contradicting Gary's later version of events, she testified Cone never threw any punches – he was unable to because he was constantly being beaten. Riley observed a man pull Gary off Cone, then Gary ran into his house. Next, the man and Gary threw something in a car. At this point, Gary stepped on Cone. The man left and Gary started beating Cone again. Cone yelled for help, but struggled and failed to stand up. R. pp. 72-74. Riley heard Gary yell out of anger, "You came at me about a little bit of weed." R. p. 74, lines 13-15. Riley admitted on cross-examination she confronted Gary and his housemate one time about the smell of marijuana emanating from Gary's apartment, although defense counsel did not seek any further elaboration on that unrelated incident. R. p. 77.

Cone performed maintenance for St. Andrews Pointe Apartments where Gary resided. Cone testified he responded to a request to fix the toilets in Gary's apartment and started fixing the upstairs toilet before Gary arrived. Gary asked Cone to move his truck even though other spaces were

available. Gary continued to complain about it. R. pp. 30-34. Because Cone was in the middle of cleaning a clogged toilet, Cone admitted he "kind of was . . . blowing [Gary] off . . . ." R. p. 35, lines 13-22. Cone moved from bathroom to bathroom with the goal of getting at least one toilet unclogged, however he decided to leave as Gary continued to escalate the conflict. The last thing Cone remembered was walking back to his truck, then he woke up in the hospital with horrific injuries. R. pp. 35-38.

Gary explained he woke up with a bandaged eye (he now has a prosthetic eye), a lacerated tongue (he lost taste on one side of the mouth), two "brain bleeds," a shattered left shoulder, a stomach tube, and a "trach" in his throat. R pp. 38. As a result of the attack, Cone is no longer working. Cone testified the injuries were still inhibiting his daily activities at the time of trial. R. p. 39. Gary's counsel declined to cross-examine Cone. R. p. 40, lines 7-8.

Officer Trevor Holt observed and photographed injuries to Gary's right hand. He also went to the hospital and photographed Cone's injury. R. p. 43. Officer Holt testified he photographed Cone's right hand to document the absence of injury. R. p. 45.

Agent Shawn Gause with the United States Secret Service in Brooklyn was a deputy with the Sheriff's Office at the time of the assault. However, he came from Brooklyn to testify in this trial. When he arrived at the crime scene, Cone was already transported from the apartment to the hospital. There was blood on the door, on the asphalt in the parking lot, and on a vehicle. R. pp. 50-51.

Gary told Agent Gause he and Cone argued over feces in the toilet. Gary claimed he demanded Cone leave the apartment. Gary claimed Cone brushed against him then slammed the door which brushed Gary's diaper-clad child. Gary chased Cone because of his "disrespect" and

outside, Cone started choking Gary. Gary in return hit Cone and they started hitting each other. Gary claimed he stopped hitting Cone when Cone stopped hitting him. R. pp. 55-56. On redirect, Agent Gause specified Gary said he felt disrespected as if he was challenged in his own apartment, and that is why he followed Cone outside. R. p. 65, lines 10-12.

Gary did not report any injuries, although Agent Gause observed lacerations on Gary's hand. R. p. 56. Deputy John Sullivan drove Gary to jail. At the jail, Gary complained about his hand, not about any other injuries. R. p. 113. In contrast, Deputy Sullivan needed to wait several weeks to get a statement from Cone because of his lacerated tongue. R. pp. 111-12.

Tammy Cook with the Richland County EMS responded and found Cone on the ground. He was conscious and moving around. She described Cone as "combative" in her report. She explained she did not mean he was fighting, but meant he was moving around while EMS attempted to treat him. The ground was bloody. Cone suffered lacerations to the head, face, and mouth. His eye was protruding out of his eye socket. Cook explained, "There was blood in the eye and looked like there might have been blood behind the eye causing the eye to push out." R. pp. 90-92 (quote at R. p. 92, lines 1-3).

Dr. Mark Allen Jones was Cone's surgeon. Dr. Jones noted trauma to Cone's head and face when Cone arrived at the hospital. He was called into the emergency room out of concern about Cone's ability to maintain breathing due to his injuries. Cone suffered facial fractures and lacerations to the tongue. R. pp. 129-30. Dr. Jones explained his recollection of the facial fractures: "My recollection through review of the record is that he had fractures to his nasal bone or the bones of the nose as well as to some of the sinuses, which are the bones, I don't know if I'm allowed to

point, but of the face here (indicating) along where the sinus is inside of the face." R. p. 130, line 21 – p. 131, line 1. Dr. Jones explained the doctors put a breathing tube through Cone's passageway out of concern that swelling and bleeding would compromise the airway so air could not pass or bleeding could aspirate into the lungs. R. p. 131, lines 4-17. Cone suffered both subdural hematoma and subarachnoid hemorrhages. R. p. 132. The eyeball was ruptured, in other words, broke open. R. p. 133. The eye later needed to be removed. R. p. 134. Dr. Jones testified the injuries could be fatal without treatment. R. p. 134. Further, Dr. Jones testified the injuries were not consistent with being the result of a low-level fall. R. p. 137.

Dr. Jones agreed Cone's medical history indicated congenital blindness in Cone's left eye. However, Dr. Jones, on redirect, testified he did not know whether Cone suffered from complete, or merely partial, blindness in his left eye. R. pp. 141-43.

Antonio Adams was Gary's housemate at the time of the assault. R. p. 162. He was impeached with his grand larceny conviction. R. p. 174. He was present at the house when Gary arrived home and Cone was working on the upstairs toilet. He heard Gary and Cone yelling at each other. Adams told **Gary** to calm down. Cone left, but on the way out, Cone slammed the door. Adams opened the door and from the doorway asked Cone why he slammed the door. Meantime, Gary went out the door and ended up in an altercation with Cone. R. pp. 164-67. Adams testified that he saw Gary and Cone exchange blows. Gary knocked Cone down. Adams claimed he then saw Gary try and help Cone a couple of times. Cone tried to stand up, but would fall down. But Adams was not present the whole time because he left to dispose of his drug paraphernalia. R. pp. 167-69; p. 180. He agreed he did not tell law enforcement that Gary attempted to help Cone after he

knocked Cone down. R. pp. 176-77. Adams agreed he did not call 911. R. pp. 178-79.

From a defense point of view, Adams did not hold up well on cross-examination. The following exchange occurred:

> Q: And, at some point, you actually had to get [Gary] to stop hitting him.
>
> A: No, I didn't have to get [Gary] to stop hitting him.
>
> Q: You didn't stop him and say, "Come on, bro?"
>
> A: Yeah, but that's not me getting him to stop hitting him. I just told him –
>
> Q: What does, "Come on, bro," mean?
>
> A: Stop.

R. p. 179, line 21 – p. 180, line 4.

Mary Beth Hale was the mother of Gary's children and lived with Gary in the apartment. R. pp. 185-88. Cone and Gary were upstairs when she heard Cone talking loud. Gary and Cone came downstairs, exchanging words, and Gary told Cone to leave. R. pp. 188-89. As he passed Gary, Cone bumped into Gary's chest. Cone slammed the front door on his way out, and the door hit Gary's son, who cried. Gary followed Cone outside and Cone began choking Gary. After brining the children inside, she went outside to go to the manager's office. At that point, Cone was on the ground, and Gary stood over him, telling him not to get up. R. pp. 192-93. She claimed the child had scratches on him and she begged law enforcement to take pictures. R. pp. 197-98. She admitted she missed about five minutes of the fight. R. p. 203. She also admitted that in a prior proceeding, she testified Gary was mad when he chased after Cone. R. p. 204. She claimed she saw marks on

Gary's throat. She admitted there was a lot of blood outside. R. pp. 207-08.

Gary testified before the jury and it did not go well. He testified an argument broke out between himself and Cone over feces in the toilet. When he left the apartment, Cone slammed the door and it hit Gary's son. R. pp. 237-39. Gary testified about how Cone did not want to fix the toilet and Gary told him to just leave then. Gary digressed further, which illuminated his frustration that perhaps led to the extreme injuries he inflicted on Cone when he testified:

> We're paying $800 a month for rent without no government assistance, that's my hard-earned money and I was paying to house crap in my bathroom for six months. My kids can't use the bathroom, we can't use it. But we were paying for access to that bathroom and we didn't have it. So I was going to go report him and I told him that. I'm not trying to be rude or anything.

R. p. 239, lines 18-25.

Gary claimed he was going to the main office to report Cone, and so he followed Cone out. Cone turned around and choked him. He swung at Cone to get him off and they were exchanging blows. Gary is not sure if he landed a good blow, but Cone slipped. R. pp. 240-42. Gary claimed he watched Cone get up and fall again, this time hitting his face on the sidewalk. Gary claimed Cone tried to get up a third time and Gary noticed Cone's eye was bleeding badly. Gary testified at this point it was no longer a fight. He screamed for Hale to go get help. R. pp. 240-44.

Gary claimed he tried to help Cone:

> I was trying to tell Mr. Jaranamo to stay down because he was you know, he was still – I don't know if he was still trying to fight or what his deal was, but he was still trying to get up and make moves, like – and I was just trying to tell him to stay down because he was hurt pretty bad and I didn't think he needed to be moving.

R. p. 245, lines 7-13. He claimed Cone tried to get up two or three times and the third time Cone's

eye just popped. R. p. 246, lines 2-8. Gary told the jury Cone's injuries were the result of Cone attacking Gary, and Gary was just defending himself. He could not understand why the police were arresting him. R. p. 249, lines 12-19. He claimed he asked the officers why he could not press charges against Cone. R. p. 250.

On cross examination, Gary claimed he was in jail for two weeks as the reason why he did not seek medical attention, then admitted it was only two days, explaining, "when you're in jail, time drags out. . . . Like it felt like a year to me honestly." R. p. 270, lines 21-24. On direct examination, Gary claimed he was concerned about not being able to park right in front of his apartment based on his understanding of the apartment complex rules. R. p. 227. However on cross-examination, he admitted he told law enforcement that he likes to park his car in front of his apartment rather than claiming it was because of a rule. He explained to the solicitor, "My whole thing . . . it was a brand new Dodge Avenger, like we just got it. . . . We like to park our car like, you know, any other American in front of our home so we can look outside and see it and make sure nothing happens, which is normal." R. p. 276, lines 15-21.

The solicitor asked Gary if he remembered telling law enforcement what he did was excessive. Gary explained this as follows: "[W]hen they went to the hospital and took a bunch of pictures of him bleeding in the bed and they showed them to me, yeah, I told them that looks excessive. I didn't say that me defending myself was excessive because I saw [Cone] fall several times and inflict damage upon himself. So I admitted that that damage done to Mr. Jaranamo Cone did look excessive." R. p. 286, lines 11-18. He claimed there was a second written statement, but he left it at his house. R. pp. 287-88. Gary also needed to explain to the jury what he meant when he

said Cone got what he deserved. R. pp. 289-90. Gary explained he did not know what damages were caused by him and caused by Cone. R. p. 291. The first question Gary was asked on redirect examination was how he felt, and Gary said, "Kind of disappointed." R. p. 291, lines 21-22.

On reply, the prosecution entered Gary's statement into evidence through Deputy John Sullivan. R. p. 308. Deputy Sullivan explained he did not show Gary any pictures of Cone's injuries to Gary. In fact, he did not receive the pictures until later in the day after Gary gave his statement. Gary reported only injuries to his hand. He did not report any other injuries. R. pp. 312-13. Gary claimed he hit Cone only two or three times and then attempted to render aid to him. R. p. 310. At one point, Deputy Sullivan asked Gary if he felt his actions were excessive and Gary replied, "Yes, sir, they were excessive. It just wasn't my intention to fight that man." R. p. 311, lines 19-22.

ARGUMENT

I.

The trial court did not err in declining to require the State to open in full in closing argument and be restricted to only rebuttal in reply to defense counsel's argument. Appellant's due process rights were not violated. At the conclusion of the prosecution's closing argument, defense counsel did not make a claim the defendant was prejudiced by defense counsel's inability to reply to the prosecution's argument, therefore appellate counsel's arguments to that effect are not preserved for review.

Gary complains the trial court erred in not requiring the State to open on both the facts and law and be restricted to a rebuttal argument to Gary's closing in its reply. The trial court followed the proper procedure and Gary's due process rights were not violated. At trial, Gary's defense counsel presented no argument after closing arguments concluded that he was prejudiced by the procedure followed. Gary did not object to any portion of the State's closing argument.

At the conclusion of evidence, defense counsel requested the trial court to follow a proposed, and not yet adopted, rule of criminal procedure (Rule 21) that would require the State to open on both the law and the facts and only argue rebuttal in reply to defense counsel's closing argument. Because it was only a proposed rule, the trial court declined this request. R. pp. 336-39. Proposed Rule 21 was subsequently rejected by the legislature. State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (refiled April 25, 2018).

Gary relies in his brief on the initial opinion filed for Beaty, Op No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse 2017 Adv. Sh. No. 1 at 13). However, the Supreme Court granted the State and Beaty's petitions for rehearing and following argument, issued a new opinion. In that opinion, the Supreme Court recognized it was unable to make new rules of procedure without

legislative approval and that its role in Beaty was to only correct errors of law. Beaty, 423 S.C. at 41, 813 S.E.2d at 510.

The Supreme Court confirmed that when a defendant presents any evidence of any kind, the State has final closing argument. Id. at 42, 813 S.E.2d at 510-11. The Supreme Court then reviewed claims Beaty's due process rights were violated and observed the State's arguments represented a fair reply to the defendant's theories advanced in his closing argument. The Supreme Court also found the State's advancement of its theory of the case was a proper response to the sequence of events advanced by Beaty in his closing argument. It further concluded even if considered a new matter, the advancement of the theory was relatively insignificant. Id. at 44-45, 813 S.E.2d at 511-12. The Supreme Court concluded, "Neither the State's reply arguments . . . nor the trial court's refusal to allow Appellant to respond" denied Appellant "the fundamental fairness essential to the concept of justice." Id. at 45-46, 813 S.E.2d at 512.

In the instant case, Gary attempts to establish prejudice by complaining the prosecution responded to defense counsel's closing argument with specificity. As discussed above, this was recognized as proper in Beaty. Gary claims the State misconstrued his argument as advancing the concept that the victim was "a jerk." But defense counsel, after eliciting testimony from defense witnesses to this effect, argued during closing that Gary, "has been dying for somebody to hear his story about the fact that he had to defend himself from a man that not only was in his house yelling and cursing, brushed into him, however you want to describe it, who stared him down, hit his child with the door." R. p. 355, lines 13-18. The prosecution's argument was a fair response to the evidence and the closing arguments. It is disingenuous to say that it was not part of defense

counsel's tactics to portray victim as rude in the events leading up to the physical confrontation.

Gary also points to the fact that the prosecution noted defense counsel did not discuss proximate cause and then proceeded to tell the jury about proximate cause. Gary was not prejudiced by the prosecution's discussion of proximate cause. Certainly Gary anticipated this argument after presenting absurd testimony that Cone injured himself from trying to get up after Gary knocked him down. Further, the trial court instructed the jury extensively on proximate cause. R. pp. 392-94. The instruction on proximate cause was discussed before closing arguments. **The prosecutor and trial court compared their versions of the instruction.** R. p. 332, line 25 – p. 333, line 9. **The proposed instructions were distributed to the attorneys.** R. p. 333, lines 13-17. It is therefore misleading to claim on appeal that Gary was surprised by any discussion of proximate cause and its application to the present case. Gary's criticism of the prosecutor in this regard is simply not fair.

Gary also complains the prosecutor pointed out the four prongs of self-defense and did not mention the State's burden to disprove the elements of self-defense. First, if Gary thought the prosecution's correct statement of law was improper, Gary could have objected. Second, defense counsel made this point during closing argument, and the trial court instructed the jury on the requirement of the State to disprove self-defense beyond a reasonable doubt. R. p. 342, line 23 – p. 343, line 9. The jury was fully advised of the State's burden of disproving self-defense.

Gary finishes his argument with a laundry list of ten items to claim prejudice from not being able to respond to the State's closing argument. The problem is Gary's trial counsel never made these assertions and made no argument that he was actually prejudiced by the inability to respond to any of those points. In Beaty, the defense attorney claimed at trial he was "sandbagged." In the

present case, Gary's defense counsel never made that claim, probably because defense counsel was not caught by surprise by any of the State's arguments. The ground asserted on appeal must be supported by the objection raised at trial. State v. Silver, 314 S.C. 483, 486, 431 S.E.2d 250, 251 (1993). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373 628 S.E.2d 902, 919 (Ct. App. 2006). "[I]t is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 306 S.E.2d 750, 759 (1997). The laundry list was compiled by Gary's appellate counsel who was not there. That is insufficient to establish prejudice.

II.

Because the uncontroverted evidence is the victim lost his eyeball and his injuries could have resulted in his death if not treated, no evidence supports the victim suffered only moderate bodily injury as opposed to serious bodily injury as required for assault and battery of a high and aggravated nature. Therefore, the trial court did not err in declining to instruct the jury on the lesser offense of assault and battery in the second degree.

Gary argues the trial court erred in declining to charge second degree assault and battery as a lesser included offense of assault and battery of a high and aggravated nature. As the trial court observed, uncontroverted evidence established Cone suffered great bodily injury. Therefore the evidence only supported assault and battery of a high and aggravated nature or arguably acquittal. No evidence supported guilt of the lesser offense to the exclusion of the greater offense.

Following the close of evidence and a directed verdict motion, defense counsel requested the trial court charge several lesser included offenses to assault and battery of a high and aggravated nature. The trial court observed the only evidence was Gary suffered great bodily injury. Defense counsel asserted a perfunctory argument that the jury should decide the extent of the injuries and offered a limpid claim the jury could find the lesser offense. Defense counsel did not discuss any facts supporting a lesser included offense to the exclusion of the greater offense and did not offer any explanation as to why Cone's life threatening injuries and his ruptured eyeball did not preclude an instruction on lesser included offenses. R. pp. 333-34.

The trial court, in response to the perfunctory argument, noted the testimony indicating Cone suffered a ruptured eyeball that needed to be replaced and the doctor's uncontroverted testimony the injuries were life threatening. The trial court found an instruction on the lesser included offense was

not supported by the evidence. R. pp. 335-36.

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). 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). "It 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). The statute further provides:

> (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; . . . .
>
> . . . .
>
> (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).

"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).

"Moderate bodily injury" is defined as physical injury that involves prolonged loss of consciousness, or 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).

While severity of injuries may at times be a fact for the jury to decide, uncontroverted evidence of severe or 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.").

No evidence was presented showing Gary committed a lesser offense to the exclusion of ABHAN. First, the uncontroverted evidence is that Gary's eyeball was ruptured, resulting in his eyeball being removed and replaced with a prosthetic eye. This constitutes the loss of a bodily organ or member. In Williams v. State, 588 S.E.2d 755 (Ga. Ct. App. 2003), the Georgia Court of Appeals found evidence supported aggravated battery when the victim lost his eye after Williams hit him in the eye and his eye was removed at the hospital. The Georgia court rejected Williams' argument that evidence was insufficient because the victim could not see out of the eye before the fight, finding: "Even though [victim's] eye was not functional before the fight, evidence shows it was removed as a result of the fight, depriving [victim] of that body part, which is sufficient harm to show aggravated battery by depriving [victim] of a 'member of his body.'" Id. at 756. Because Cone's eye was removed as a result of the fight means he suffered great bodily injury regardless of whether his eye was functional prior to the fight.

Cone suffered subdural hematoma and subarachnoid hemorrhages, and memory loss, which constitutes a serious bodily injury. Jackson v. State, 726 S.E.2d 63 (Ga. Ct. App. 2012) (noting where evidence shows the battered victim suffered severe injuries to the brain resulting in loss of normal brain functioning, they have been deprived of use of their brain and therefore suffering aggravated battery). In State v. Livings, 487 So.2d 475, 478-79 (La. Ct. App. 1986), the Louisiana Court of Appeals found the swelling of an elderly women's brain leading to a comatose or

unconscious condition and attributed to a blow struck by the defendant constituted a serious injury under Louisiana's statute with a similar definition of serious bodily injury. In State v. Methfessel, 718 S.W.2d 534, 537 (Mo. Ct. App. 1986), under the Missouri statute with a similar definition of serious physical injury, the Missouri Court of Appeals found a "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 . . . .'" Because Cone's memory loss still remained at the time of trial, approximately two years later, means Cone's brain injury was a serious bodily injury that precludes instructing the jury on a lesser-included offense.

Cone also testified to partial loss of taste due to the severe laceration of his tongue. This also establishes a permanent or protracted loss of a bodily member. See generally Commonwealth v. Kinney, 157 A.3d 968, 973 (Pa. Super. Ct. 2017) (finding "protracted loss impairment of the function" of four teeth sufficient to support aggravated assault charge under a statute with identical definition of "serious bodily injury" as S.C. Code §16-3-600(A)(1)).

Further, the uncontroverted evidence was Cone's injuries could have resulted in death if he did not receive medical attention. R. p. 134. See Commonwealth v. Burton, 2 A.3d 598, 603 (Pa. Super. Ct. 2010) ("In this case, the evidence unequivocally establishes that the victim sustained serious bodily injury; his injuries placed him at a substantial risk of dying.").

Since evidence was uncontroverted as to all these injuries, no jury issue existed as to whether Gary suffered serious bodily injury as supposed to some hypothetical less serious injury. Accordingly the trial court did not err in denying the request for an instruction on any lesser included offenses.

CONCLUSION

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

Respectfully submitted,

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August 28, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2016-001603

The State of South Carolina,

Respondent,

vs.

Kevin Lamar Gary,

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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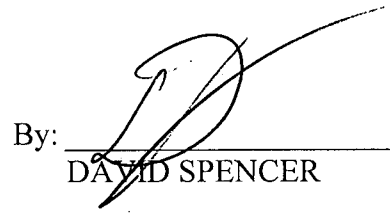
By: 
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