STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Honorable Alex Kinlaw Jr., Circuit Court Judge

Appellate Case No. 2018-001769

THE STATE,

Respondent,

v.

ORLANDIO R. WORKMAN,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

A trial court should not instruct the jury on irrelevant matters. In this DVHAN case, the jury was instructed on DV 1st as a lesser included offense. Defense counsel requested the court to define DV 2nd because it may form an element of DV 1st in some circumstances, but it was not the pertinent aggravating circumstance here. Did the trial court err by refusing to define DV 2nd?

STATEMENT OF THE CASE

On February 21, 2017, a Greenville County Grand Jury indicted Appellant, Olandio R. Workman, for domestic violence of a high and aggravated nature (DVHAN), kidnapping, and possession of a weapon during the commission of a violent crime. Appellant proceeded to jury trial before the Honorable Alex Kinlaw, Jr., on September 17–20, 2018. The State presented testimony from the victim, Loretta Workman, as well as the law enforcement officers who investigated the case and an expert in delayed disclosure of domestic violence. The evidence showed that Appellant confined and beat Mrs. Workman over a period of three days, and used two guns to intimidate, and at one point strike, Mrs. Workman. The events happened in the presence of the couple's two children and Appellant took Mrs. Workman's phone during the incident. Appellant did not testify. The court instructed the jury on the law of domestic violence first degree (DV 1st) as a lesser included of DVHAN. The parties agreed a charge on domestic violence second degree (DV 2nd) as a lesser included offense was not warranted by the evidence. Appellant was convicted as charged of each offense and sentenced to 12 years for DVHAN, 15 years for kidnapping, and 5 years for possession of a weapon during the commission of a violent crime, with the sentences to run concurrently. This direct appeal follows. Though Appellant conceded at trial that it was not appropriate to charge DV 2nd as a lesser included offense, he contends the trial court erred by refusing his request to define DV 2nd and its element of moderate bodily injury as it related to a potential basis of guilt for DV 1st.

STATEMENT OF FACTS

On August 29, 2016, Deputy Shannon McHale was dispatched to 440 Davis Rd. in Greenville County regarding a welfare check on Loretta Workman. (Tr. p. 138, ll. 7-9). One of Mrs. Workman's coworkers had called 911 because Mrs. Workman had not shown up for work. (Tr. p. 138, ll. 9-12). Deputy McHale arrived just before 7:00 p.m. and Appellant, Orlandio Workman, answered the front door. (Tr. p. 139).

Deputy McHale informed Appellant she was there to speak to Mrs. Workman, but Appellant replied that Mrs. Workman was not home. (Tr. p. 139, ll. 22-24). Appellant told Deputy McHale that she could not search the residence and that Mrs. Workman was with her mother and would be back in an hour. (Tr. p. 140). Appellant claimed Mrs. Workman's cell phone was broken and he did not know her mother's phone number. (Tr. p. 141, ll. 14-21).

Deputy McHale spoke with neighbors who informed her that they had not seen Mrs. Workman in a few days, but if Mrs. Workman's vehicle was in the driveway and the children were home, then Mrs. Workman was home. (Tr. pp. 141, l. 25 – 142, l. 4). Deputy McHale had dispatch contact local hospitals and learned none of them had admitted Mrs. Workman as a patient. (Tr. p. 142, ll. 16-19). Police contacted Mrs. Workman's boss who stated she had not been at work and that this was out of the ordinary for her. (Tr. p. 142, ll. 20-24). Mrs. Workman's boss further informed police that Mrs. Workman left her a voicemail on Saturday but it was "garbled" and she had been unsuccessful at reaching Mrs. Workman since then. (Tr. pp. 142, l. 25 – 143, l. 4). Police also made contact with the original complainant, Mrs. Workman's co-worker. (Tr. p. 223, ll. 6-15). She told police she had noticed scratches on Mrs. Workman a few weeks earlier and it was enough to "raise an eyebrow." (Tr. p. 223, ll. 17-22). Deputy McHale testified that Mrs. Workman's cell phone provider informed them that Mrs.

Workman's cell phone had been off for at least 27 hours but the last known location was 440 Davis Rd. (Tr. p. 143, ll. 11-20). After conducting a thorough investigation, Deputy McHale believed that Mrs. Workman was inside the home and obtained a search warrant and the assistance of SWAT. (Tr. p. 144, ll. 7-13).

SWAT officers responded to the scene and attempted to get the occupants of the home to come out, calling over a loudspeaker for over an hour. (Tr.p.242). Around this time, police received a 911 call from a male caller stating he had been stabbed at an address that backed up to the Workmans' home through the woods. Police were unable to locate any stabbing victim. (Tr. pp. 147, l. 15 – 148, l. 4). The phone number that called to report the stabbing belonged to Appellant. (Tr. p. 148, ll. 1-16).

Eventually, SWAT entered the home and located a battered Mrs. Workman and her two children in a bedroom. Appellant was no longer there. (Tr. p. 146, ll. 15-21). When asked why she refused to come out, Mrs. Workman originally told officers she was asleep and did not hear them calling. (Tr.p.246, lines 6–7). However, the Workmans' 6-year-old son told police he heard them calling but his mother refused to let him leave the bedroom. (Tr.p.248, lines 14–17). He said his parents had been "fighting" and "his daddy" caused the injuries to Mrs. Workman. (Tr.p.297, lines 16–23).

Police searched the home and located two guns in the master bedroom. They found an AK-47-style rifle under the mattress on the bed and a 9mm handgun in a nightstand. (Tr.p.180–81). Each gun was loaded, with a bullet in the chamber. (Tr.p.,155, line 19). They also found a container full of ammunition. (Tr.p.185–87; 200). Mrs. Workman also told officers about a third gun that was never located. (Tr.p.254, lines 13–18).

Deputy McHale testified that Mrs. Workman "had bruising to her face" and two black eyes that were "really badly swollen. I -- I'd assumed she could barely see out of them as to how swollen they were." (Tr. p. 147, ll. 5-9). Sergeant Ramon Rivera testified Mrs. Workman "had two black eyes" and "swelling around her [cheek] bone area" and "finger marks" on her arms and neck. (Tr. pp. 229, l. 21 – 230, l. 21). She also seemed disoriented and confused. (Tr.p.229–30).

Sergeant Robert Perry attempted to interview Mrs. Workman, but she appeared "traumatized . . . irritable, irritated at us for being there." (Tr. p. 243, ll. 15-24). Mrs. Workman originally told him her injuries occurred during a bar fight. (Tr. p. 245, ll. 6-8). Sergeant Perry testified he wanted to get Mrs. Workman into a shelter for battered women, but Mrs. Workman and her children left to stay with her sister-in-law. (Tr. pp. 249, l. 9 – 252, l. 9). Sergeant Perry set up a meeting with DSS with Mrs. Workman for the following morning, but learned that Mrs. Workman had left the state with her children. (Tr. pp. 257, l. 21 – 258, l. 19).

Days later, Mrs. Workman contacted Sergeant Perry. (Tr. pp. 261, l. 17 – 263, l. 10). Sergeant Perry testified Mrs. Workman was "very apologetic . . . for not cooperating more [on the] night of the incident." (Tr. p. 263, ll. 11-17). Sergeant Perry recounted Mrs. Workman's "story of a continual cycle of domestic violence, control, abuse, fear, intimidation" at the hands of Appellant. (Tr. p. 264, ll. 15-18). Mrs. Workman told him the last incident began after Appellant accused her of cheating and this was not the first time she and Appellant had had issues. (Tr. p. 264–65).

Mrs. Workman testified and described the incident in detail. She explained that on Saturday the 27th, Appellant arrived home that evening and immediately began asking: "Where's your phone? Who have you been talking to? I know you've been cheating on me, you cheating,

lying bitch . . . ." (Tr. p. 310, ll. 8-24). Mrs. Workman testified that this was common behavior for Appellant and she gave him her phone to search. (Tr. p. 311, ll. 1-5). Appellant then began "constantly" and "repeatedly" punching Mrs. Workman about her face and body. Mrs. Workman testified that the children were present and were "running in and out, watching TV, playing." (Tr. p. 311, ll. 20-25). The abuse "continued the whole three days." Mrs. Workman testified Appellant kept accusing her of cheating: "Every time I even opened my mouth, 'you're lying.' And he'd smack me again, or he'd punch me again, or choke me, and throw me to the floor." (Tr. p. 312, ll. 5-14).

Mrs. Workman did not go to work on Monday because Appellant told her the trailer would blow up if she attempted to open any of the doors or windows.[1] (Tr. pp. 316, l. 21 – 317, l. 11). She testified Appellant "wasn't allowing me to go anywhere. He took the keys to the cars, everything." (Tr.p.317, lines 4–5). Mrs. Workman no longer had access to a phone because Appellant "broke it." (Tr.p.318, lines 18–19). She testified she would have called her mom if she could have. (Tr.p.318–19).

Mrs. Workman further testified that Appellant at various times held a gun as he beat her. When asked why he was holding the guns, Mrs. Workman responded, "I guess for intimidation. And he was threatening me with them." (Tr.p.315, lines 14–15). She testified that at one point Appellant struck her with the pistol as she raised her hands to defend herself. (Tr.p.316, lines 1–13). She testified Appellant was "holding [the gun], carrying it around the house" in front of the children. (Tr.p.316, lines 13–20).

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[1] She testified, "I don't know what he's capable of. You see what he did to my face." (Tr.p.317, lines 10–11).

On Monday when the police arrived to check on her, Mrs. Workman did not hear the initial knock on the door because she was in the shower. (Tr. p. 322, ll. 2-4). Appellant told her the police were at the door and ordered her to put makeup on to "cover up the bruises on [her] face" and "lay down in the bedroom with the kids and not to make a sound." (Tr. p. 322, ll. 10-20). Mrs. Workman also testified that she was unaware that the guns were in the bedroom at that time because she thought Appellant had kept them in the living room with him. (Tr. pp. 322, l. 25 – 323, l. 1). Mrs. Workman testified she could hear the police horn asking them to exit the home, but she did not leave because she thought Appellant was still there and would hurt her. (Tr. p. 323, l. 4-18). She testified she wanted the police to "rescue" her. (Tr.p.323, line 22).

Charge conference

Before closing arguments, the court held a charge conference. The attorneys agreed that DV 1st should be charged as a lesser included offense of DVHAN. (Tr.p.443, lines 21–23). The attorneys also agreed DV 2nd should not appear on the verdict form as a lesser included offense. (Tr.p.453, lines 8–21). However, defense counsel argued the court should nevertheless define the offense of DV 2nd and moderate bodily injury "as it relates to" DV 1st because the presence of moderate bodily injury forms a potential basis of guilt for DV 1st when combined with other aggravating factors. (Tr.p.443–53). Defense counsel argued, "my fear is that we're going to get a question from the jury about what is criminal domestic violence second degree." (Tr.p.451, lines 15–17). The trial court declined to charge the jury on DV 2nd, reasoning it would confuse the jury to instruct them on an uncharged offense. (Tr.p.450). However, the court agreed to define DV 2nd for the jury "if they have that question." (Tr.p.452–53).

STANDARD OF REVIEW

"To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. A trial judge's failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues. An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Brandt, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011) (internal citation omitted).

ARGUMENT

The trial court correctly refused to instruct the jury on the uncharged offense of DV 2nd and moderate bodily injury because Workman's use of a gun made the degree of injury immaterial. Even if erroneous, the court's instruction on the lesser included offense was harmless because the jury convicted Workman of the more serious offense.

Appellant claims the trial court erred by refusing to define DV 2nd and "moderate bodily injury" within its charge on DV 1st. Specifically, Appellant contends that the definition of "moderate bodily injury" was necessary because it provides a potential basis for guilt for DV 1st. His argument fails because the presence of DV 2nd or "moderate bodily injury" was not an issue in this case. The State did not rely on the degree of injury as a circumstance of aggravation. Instead, the case was based primarily on Appellant's use of a gun, an aggravating circumstance that stands apart from the degree of injury. There was no evidence that Appellant committed the lesser, rather than the greater, offense and a charge on DV 2nd would only have confused the jury. Furthermore, even if the DV 1st charge was deficient, Appellant suffered no prejudice because the jury found him guilty of DVHAN and never reached DV 1st. This Court should affirm.

a. Structure of the domestic violence statute.

Domestic violence is "causing physical harm or injury to a person's own household member," or offering or attempting to do the same "with the apparent present ability under circumstances reasonably creating fear of imminent peril." S.C. Code Ann. § 16-25-20 (A)(2015). Domestic violence may be enhanced to DV 2nd, DV 1st, or DVHAN depending on the presence of certain aggravating factors. Many of the aggravating factors overlap between the various degrees of DV. For example, the presence of minor children will enhance a simple DV to a DV 2nd. If combined with moderate bodily injury, the presence of minor children will

enhance a DV 2nd to a DV 1st. S.C. Code Ann. § 16-25-20 (2015). Combined with "great bodily injury," the presence of minor children will enhance the crime to a DVHAN. S.C. Code Ann. § 16-25-65 (A)(1)(2015). The same is true with other aggravating factors, including kidnapping or limiting access to a telephone. In these scenarios, the degree to which an aggravating factor will enhance a DV depends on the degree of injury. DVHAN may also be accomplished without bodily injury if committed by actions causing fear of "imminent great bodily injury or death" along with another circumstance of aggravation. S.C. Code Ann. § 16-25-65 (A)(2)(2015).

However, there is one aggravating circumstance that automatically enhances a simple domestic violence to a DV 1st or DHVAN: the use of a gun. Under § 16-25-20 (B), an act constituting domestic violence will be enhanced to a DV 1st if "the person uses a firearm in any manner." S.C. Code Ann. § 16-25-20 (B)(4). This enhancement, unlike those enumerated in subsection (5), does not depend on the person accomplishing the act while "in the process of committing domestic violence in the second degree." S.C. Code Ann. § 16-25-20 (B)(5). Likewise, an act constituting domestic violence will be enhanced to a DVHAN if the person uses a deadly weapon in circumstances which "would reasonably cause a person to fear imminent great bodily injury or death." S.C. Code Ann. § 16-25-65 (D)(1). This is true "with or without an accompanying battery." S.C. Code Ann. § 16-25-65 (A)(2). This distinction—fear of imminent great bodily injury or death—separates DV 1st and DVHAN when a gun is involved. The degree of injury, if any, is not relevant.

b. It was unnecessary to define DV 2nd and moderate bodily injury because these were not issues in the case.

The State did not present evidence or argue that Mrs. Workman suffered moderate bodily injury. In fact, it is questionable whether her injuries met the statutory definition of moderate

bodily injury.[2] Instead, the case was based on Appellant's use of a gun and other facts showing an extreme indifference to the value of human life that would cause Mrs. Workman to fear death or great bodily injury. Accordingly, the definition of moderate bodily injury and DV 2nd were not at issue and the trial court was not required to instruct the jury on these irrelevant matters. State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944) ("The trial court should not instruct the jury on irrelevant matters because it may confuse the jury."); State v. Leonard, 292 S.C. 133, 138, 355 S.E.2d 270, 273 (1987) (explaining that defining an uncharged offense runs the danger of confusing the jury).

The trial court wisely decided not to muddy the waters by instructing the jury on inapplicable portions of the DV statute when the jury was already tasked with deciphering the complicated DV 1st and DVHAN provisions. These portions of the statute are confusing in their own right. Adding additional elements related to factors not at issue would have frustrated the purpose of a jury charge—helping jurors understand the key issues they are being asked to decide. State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) ("The purpose of a trial judge's jury instructions should be to enlighten the jury and aid it in arriving at a correct verdict."); State v. Gates, 269 S.C. 557, 561, 238 S.E.2d 680, 681 (1977) ("The evidence in a case determines the law which must be charged and every charge of the law must be reviewed in

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[2] "'Moderate bodily injury' means 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. 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." S.C. Code Ann. § 16-25-10 (4). Mrs. Workman's injuries consisted of severe bruises and facial swelling.

the light of the evidence."). When asked to introduce complicated, extraneous statutory language into the charge, the trial court correctly recognized: "that's confusing." (Tr.p.450, line 6).

There was no view of the evidence where Appellant was guilty of DV 2nd. Defense counsel conceded it would have been improper to charge DV 2nd as a lesser included offense. (Tr.p.453). But he nevertheless requested a definition of DV 2nd because moderate bodily injury combined with other aggravating factors is one way to enhance a DV 2nd to a DV 1st. However, the State did not rely on this aggravating circumstance in the presentation of its case. Instead, the State presented evidence that Appellant used guns while committing domestic violence. Appellant did not testify or offer any evidence to rebut this testimony. The possibility that the jury may have disbelieved part of Mrs. Workman's testimony is insufficient to warrant a charge on a matter not supported by the evidence. See State v. Fields, 356 S.C. 517, 523–24, 589 S.E.2d 792, 795–96 (Ct. App. 2003) (collecting cases standing for the proposition that "the [p]resence of evidence to sustain the crime of a lesser degree determines whether it should be submitted to the jury and the 'mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice.'") (emphasis added); State v. Cooney, 320 S.C. 107, 110, 463 S.E.2d 597, 599 (1995) (explaining in order to be entitled to an instruction, the "Appellant must have presented facts" putting a matter in controversy) (emphasis added).

The unrebutted fact that Appellant used a gun to strike and intimidate Mrs. Workman made the issue of moderate bodily injury immaterial. If the State had based its case on Mrs. Workman's degree of injury, arguing that the combination of moderate bodily injury and another aggravating factor listed in § 16-25-20 (B) transformed what would have been a DV 2nd into a DV 1st, it would have been necessary to define moderate bodily injury. But in the under the specific facts of this case, such a charge would not have aided in the jury's understanding of the

true issue in the case—whether Appellant's conduct manifested an extreme indifference to the value of human life reasonably causing Mrs. Workman to fear death or great bodily injury. As it relates to DV 1st, the use of a firearm "in any manner" will enhance a domestic violence to a DV 1st regardless of the degree of injury, if any. Because of Appellant's use of a firearm, moderate bodily injury was not an issue in the case. See State v. Golston, 399 S.C. 393, 400, 732 S.E.2d 175, 179 (Ct. App. 2012) (explaining trial court was not required to charge lesser included offense of simple CDV because "the State necessarily proved at least one aggravating circumstance—serious bodily injury. The fact that there may be conflicting evidence as to other aggravating circumstances, or that there may be other serious bodily injuries the victim did not sustain, does not affect the existence of some serious bodily injury, and therefore the necessity that, on these facts, Golston was either not guilty or guilty of CDVHAN."). The trial court correctly refused to introduce yet another complicated, confusing statute into the jury's deliberations when it would have served no useful purpose to do so.

Looming large over this discussion is the standard of review: "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Brandt, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011). The trial court's judgment that giving the requested charge would be confusing is entitled to deference from this Court. This is not a case where the trial court erroneously defined the charged crime. Instead, he merely declined to elaborate on the definition of an aggravating factor that was not at issue in the case. His decision was based on sound logic: that the extraneous instruction was irrelevant, unnecessary, and potentially confusing. Where reasonable minds can differ on the propriety of giving an instruction, the trial court's ruling should stand. This Court should affirm.

c. Workman suffered no prejudice because he was convicted of the greater offense.

Even if the court's instruction on the lesser included offense of DV 1st was erroneous, Workman cannot show prejudice because the jury never reached DV 1st. Instead, they convicted him of DVHAN, which bears no relationship to moderate bodily injury or DV 2nd. Accordingly, Workman has not demonstrated reversible error.

In order to merit reversal, "a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Patterson, 367 S.C. 219, 232 (Ct. App. 2006). "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining issues." Id. Such was the case here, where the instructions correctly and adequately defined the offense charged and the lesser included offense according to the evidence. That the jury did not even consider DV 1st is evidenced by their note asking whether they were required to consider DV 1st "if one point is met" for DVHAN. (Tr.p.566, lines 4–7). Because the jury found Workman guilty of the greater offense, any deficiency in the definition of the lower offense is harmless. See State v. Bunnell, 340 N.C. 74, 82, 455 S.E.2d 426, 430-431 (N.C. 1995) (finding no error in the trial judge's refusal to instruct the jury on voluntary manslaughter where the jury was instructed on the greater offenses of first-degree murder and second-degree murder and convicted Bunnell of first-degree murder).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the conviction and sentence of the lower court should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

January 13, 2020

STATE OF SOUTH CAROLINA
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APPEAL FROM GREENVILLE COUNTY
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THE STATE,

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by delivering two copies of the same addressed to his attorney of record, Kathrine H. Hudgins, Esquire, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.
This 13th day of January, 2020.

Anne Mueller

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ALAN WILSON
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January 13, 2019

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RE: State v. Olandio R. Workman
Appellate Case No. **2018-001769**

Dear Ms. Hudgins:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Joshua A. Edwards
Assistant Attorney General
Bar # 101188

JAE/aam
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Advocacy Division