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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

PETITIONER,

V.

JOSEPH BOWERS

RESPONDENT.

APPELLATE CASE NO. 2019-001776

BRIEF OF RESPONDENT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

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STATE'S ISSUE PRESENTED

Even assuming Bowers's appellate challenge to the mutual combat jury instruction was properly preserved for appellate review and the trial judge erred by instructing the jury on mutual combat, did the Court of Appeals nonetheless err by reversing Bowers's assault and battery of a high and aggravated nature conviction when the mutual combat instruction could not have resulted in any actual prejudice to Bowers in regard to that specific conviction since the trial judge directly instructed the jury the doctrine of mutual combat did not apply to the charge stemming from the shooting of Green and neither mutual combat nor self-defense was factually applicable to that particular charge based on the evidence presented, which only supported a conclusion Bowers shot Green in the back as that unarmed individual merely attempted to flee?

COUNTER ISSUE PRESENTED

Whether the Court of Appeals also correctly reversed respondent's conviction for ABHAN where all of respondent's charges were intertwined from a single continuous shooting incident at a club where this unwarranted jury instruction on mutual combat not only negated respondent's self-defense case, it also superimposed an erroneous charge on the law over a correct statement of law, at best, which only fostered confusion for the jury?

STATEMENT OF THE CASE

Procedural History

Respondent was indicted for two counts of murder, two counts of attempted murder, and possession of a firearm during the commission of a violent crime. App. 362 – 374. The indictments alleged that respondent committed murder by killing Dante Bailey and Michael Morgan. App. 365-366; app. 369-370. The indictments alleged that respondent committed the crimes of attempted murder as to Richard Green and Robert Goodwine. App. 359; app. 367.

His case came on for trial on September 29, 2014, before the Honorable R. Markley Dennis, Jr., and a jury. App. 5. The state dismissed one count of murder as to Dante Bailey during the trial, App. 368, and the other count went to the jury after the judge stated that him directing a verdict on the other murder count would constitute him weighing the evidence.

On October 1, 2014, the jury found respondent guilty of voluntary manslaughter on the remaining count of murder as to Michael Morgan. App. 352. The defense objected to the jury being given the verdict option of voluntary manslaughter because there was no evidence respondent killed anyone in a sudden heat of passion upon a sufficient legal provocation. The jury found respondent guilty of assault and battery of a high and aggravated nature (ABHAN) as to Richard Green, on one count of attempted murder, and not guilty on the other count of attempted murder as to Robert Goodwine. The jury also found respondent guilty of possession of a firearm during the commission of a violent crime. App. 352, l. 17 – 353, l. 3.

Judge Dennis sentenced respondent to fifteen years imprisonment for voluntary manslaughter, fifteen years imprisonment for ABHAN, and five years imprisonment for possession of a weapon during the violent crime. All sentences were concurrent. App. 360, ll. 2 – 13.

The Court of Appeals reversed respondent's convictions in State v. Bowers, 428 S.C. 21, 832 S.E.2d 623 (2019), holding that the "mutual combat" jury instruction was error given the facts of this case. Given the reversal, the Court of Appeals declined to reach the issue of whether the trial court also erred by instructing the jury on voluntary manslaughter where respondent argued there was no evidence supporting that jury verdict option. App. 456 – 469. The Court of Appeals denied rehearing. App. 454 – 455.

The state sought certiorari on the issue of the Court of Appeals finding reversible error in charging "mutual combat" in this case. This Court denied certiorari on that issue. The state also sought certiorari on whether the Court of Appeals erred by reversing respondent's ABHAN conviction arguing that ABHAN conviction was not tainted by the erroneous "mutual combat" jury instruction. This Court granted certiorari on that issue. See Order dated May 22, 2020.

ARGUMENT

The Court of Appeals also correctly reversed respondent's conviction for ABHAN where all of respondent's charges were intertwined from a single continuous shooting incident at a club where this unwarranted jury instruction on mutual combat not only negated respondent's self-defense case, it also superimposed an erroneous charge on the law over a correct statement of law, at best, which only fostered confusion for the jury

Introduction

The evidence in this case showed that respondent went to the club with a couple of people he knew after those people had been to another club that evening without respondent, and without incident. There was no evidence before the jury that respondent went to this club with the intention of engaging in "mutual combat." An altercation occurred between two other men that did not involve respondent, and armed individuals outside the club began shooting when one decedent fired a flare gun. The trial judge correctly did *not* instruct the jury on accomplice liability – "the hand of one is the hand of all." App. 316, l. 16 – 344, l. 2.

Respondent objected to instructing the jury on "mutual combat" and voluntary manslaughter. The judge instructed on voluntary manslaughter and mutual combat over respondent's objection. App. 281, l. 23 – 284, l. 4; app. 295, l. 3 – 297, l. 16. Again, in the opinion of the Court of Appeals the Court (Geather, J., Lockemy, C.J. and Thomas, J.) which reversed because the trial judge gave an inapplicable instruction on mutual combat, the Court citing Edwards v. State, 372 S.C. 493, 496–97, 642 S.E.2d 738, 740 (2007) refused to reach respondent's voluntary manslaughter jury instruction error issue since it reversed respondent's convictions on the erroneous "mutual combat" instruction issue. State v. Joseph Bowers, Op. No. 5677 at app. 469.

There was no evidence in this case of a tacit agreement or otherwise to engage in mutual combat. The "mutual combat" instruction was extraordinarily prejudicial because it negated the jury's ability to find respondent not guilty by reason of self-defense in what certainly appeared to be a self-defense case *if* respondent fired a gun during the chaos that ensued after the flare gun was fired outside the club. Further, ABHAN victim Richard Green was directly implicated by the mutual combat instruction in the judge's charge on the law, and the trial judge's recharge after a jury question was at a minimum, as seen infra, extremely confusing. App. 341. See Brief of Petitioner at 14, n. 10.

Moreover, the jury found respondent guilty of voluntary manslaughter as to Michael Morgan where defense counsel correctly argued there was no evidence supporting that jury verdict option being given to the jury. There was no evidence respondent killed another person in a sudden heat of passion upon a sufficient legal provocation. See State v. Knoten, 347 S.C. 296, 302-03, 555 S.E.2d 391, 394-95 (2001); State v. Cole, 338 S.C. 97, 101-02, 525 S.E.2d 511, 513 (2000). While the voluntary manslaughter instruction is not an issue on certiorari, a jury charge must be considered as a whole. "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Marin, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016).

Finally, and importantly, when the jury asked: "Does a determination of mutual combat require a finding of culpability in each of the charges?," the judge instructed that "The day may come where we will be able to really answer that charge in detail." App. 351, ll. 13-17. The charge becomes, *at a minimum, more hopelessly confusing from there* after defense counsel had already objected to a jury charge on mutual combat negating self-defense. App. 351, l. 13 – 354, l.7. Yet, the purpose of a trial judge's jury instructions is "to enlighten the jury and aid it in

arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). Further, "merely superimposing a correct statement of law over an erroneous charge only fosters prejudice and confusion." State v. Robinson, 306 S.C. 399, 412 S.E.2d 411, 413 (1991), *citing* State v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986).

There was no subsequent jury instruction separately distinguishing ABHAN victim Richard Green from the remaining case by name of otherwise. Green's name was never mentioned in the recharge as it (strangely) was in the original charge at App. 341. Respectfully, as seen more fully infra, ABHAN victim Green was not separated out from the tainted jury instructions in this case. App. 341, l. 4 - 354, l .7. State v. Joseph Bowers, Op. No. 5677 at app. 469, n. 6.

Trial Evidence

Stanley Humphries was that state's first non-law enforcement witness at trial. Stanley went by the nickname "Hump." App. 78, ll. 10 – 20.

Stanley remembered that on June 21, 2012, he was with Dante Bailey. Dante went by the nickname "Cole." That night Stanley went with Dante and "Janey" to the Sand Dollar, and they played pool there until the Sand Dollar closed. Respondent Joey Bowers was *not* with them. App. 79, l. 13 – 81, l. 3.

The men then went by Dante's house to get a pack of cigarettes. "Some other people got in the van with us, and we went to the Midnight Soul Patrol [club], I believe is the name of it." Joey Bowers was one of the men who got in the green minivan with them. Respondent's nickname was "Opie." Stanley was driving the green minivan at the time. App. 78, l. 15 – 79, l. 14. Stanley did not even know where the Midnight Soul Patrol was located so he had to get directions. App. 79, l. 13 – 81, l. 3.

Stanley had known Dante since he was about fourteen or fifteen years old, and he was thirty-seven at the time of the trial. The following occurred on direct examination of Stanley:

> Q. Tell us what happened when you got to the [Soul Patrol] club.
>
> A. We went inside. Some people got drinks. I got a bottle of water. *Asked where the pool table was,* they said it was off in the side room. Stood around and talked for a little while, walked outside, and this whole incident started. *We never even got to shoot pool that* night.
>
> *Q. All right. And is that why you went there?*
>
> *A. Yes, ma'am.*
>
> Q. And when you say this whole incident started, tell us exactly what started.
>
> A. We were outside smoking, and this guy Krum, they call him Krum, came over there and started *some trouble with Dante. And somebody said, Come on, let's go. And as we went to leave the gunshots rang out.*
>
> Q. Do you actually get in your van?
>
> A. Yes, ma'am.
>
> Q. All right. Did Dante get in the van?
>
> A. No, ma'am. He was backing us out. There was cars parked real close to us. There was a telephone pole beside us, and *he was actually directing us out. He was standing at the back passenger side of the van.*
>
> Q. *Did Opie get in the van?*
>
> *A. Yes, ma'am.*
>
> *Q. Did he get out of the -- did he stay in the van?*
>
> *A. We all got out of the van once we realize that Cole [Dante] had been shot.*
>
> Q. All right. What did you see after Cole had been shot?

A. I actually went over there to him and pulled his shirt up, and he had a bullet hole on his right side.

Q. Did you see anyone tending to him?

A. No, ma'am. He was -- he was -- he was already dead.

App. 81, l. 4 – 82, l. 11. (emphasis added).

On direct-examination, Stanley initially said that he thought Respondent Joey Bowers left with them but now maintained that he was wrong about that initial assertion. However, he acknowledged on cross-examination that Respondent Bowers was actually the person who "*called out and said, C'mon, let's go.*" App. 82, l. 14 – 84, l. 24. (emphasis added).

Stanley said he did not have a gun that night, Dante Bailey did not have a gun that night, and to the best of his knowledge *Respondent Joey Bowers did not have a gun that night.* Stanley confirmed that they were attempting to leave in the van, and that someone shot and killed Dante. Stanley did not know where the shots came from before Dante dropped to the ground, dead. Stanley obviously feared for his life at the time. Stanley also acknowledged that respondent, who was near him, was also under fire. They both wanted to get away to save their lives. App. 84. l. 25 – 86, l. 15.

There was evidence that respondent Joseph Bowers, "Opie," and Stanley Humphries, "Hump," were the only two white young men at the club that night. Joe Pope remembered seeing respondent, Stanley, "Mike G., and "Corleon" when he arrived at the club, but he admitted "It happened so fast." App. 87, l. 4 – 88, l. 23.

Pope acknowledged that Lucas Morgan was the only person he saw with a gun at the club that night. Lucas Morgan was also the only person he saw shooting his gun. Pope acknowledged that Irvin Smalls got into an argument with Lucas Morgan and that Lucas Morgan crouched down by a propane tank. Morgan then began firing his weapon. App. 97, l. 11 – 98, l.

11. (Lucas Morgan was acquitted in a separate trial held about two weeks before respondent's trial. This Court can also take judicial notice of the fact that the South Carolina Incarcerated Inmate Locater website does not list Lucas Morgan as being incarcerated). App. 8, l. 19 – 9, l. 24. The following occurred during the cross-examination of Pope:

> Q. Isn't it true, Mr. Pope, that you never saw Joseph Bowers with a gun, right?
>
> A. No, ma'am.
>
> Q. Okay. And you never saw Joseph Bowers in an argument with anybody that night, right?
>
> A. I don't -- I don't think I know to about.
>
> Q. Okay. Well, that's helpful. Thank you. And isn't it true, Mr. Pope, that you called 911?
>
> A. Yes, ma'am.
>
> Q. *And you told 911, Hey, look, Lucas Morgan's out here shooting this place up, right?*
>
> *A. Yes, ma'am.*
>
> Q. Okay. And you told them, Richard Green's been hit, right?
>
> A. Yes, ma'am.
>
> Q. Okay. *And you said, Michael Morgan's* [the decedent] *been hit, too?*
>
> *A. Yes, ma'am.*
>
> *Q. Right. And did you see Michael get shot?*
>
> *A. No, ma'am.*
>
> Q. Did not. And you didn't see Robert Goodwine get shot, correct?
>
> A. No, ma'am.

Q. Do you know when Michael Morgan got shot? Was it while Lucas was firing? Do you have any idea?

A. Well, when them guys came running through the parking lot, Mikey was standing over Richard with a flare gun, holding it like this, and he didn't see them guys coming.

Q. *Right. Michael had a flare gun, right?*

A. Yes, ma'am.

Q. You saw that flare gun in his hand?

A. Yes.

App. 98, l. 15 – 99, l. 23. (emphasis added).

Pope said all of the four or five men he remembered running across the parking lot shooting toward Michael were black men -- meaning respondent was not one of those men. App. 100, ll. 1 – 17.

Robert Goodwine was one of the men shot at the club that night, and the subject of one of the "attempted murder" indictments. Goodwine testified he was shot by Lucas Morgan. He remembered Morgan "shot at me from the front, but he hit me from the back." Goodwine testified he was running at the time because Morgan was shooting at him. App. 104, l. 25 – 105, l. 19.

Goodwine confirmed the only two people he saw shooting that night were Lucas Morgan and Dante Bailey, "Cole." As already seen, Dante Bailey was shot and killed that evening.

Goodwine remembered he got in the van with "Hump," and "Hump," who was Stanley Humphries, took him to the hospital. Goodwine said he had seen respondent earlier that evening at the club, but he did not remember respondent being with them when he was driven to the hospital. App. 105, l. 22 – 106, l. 23.

On cross-examination, Goodwine confirmed that he was around Dante Bailey and Joey Chaplin while at the club. App. 107, l. 14 – 108, l. 8. Goodwine acknowledged that Chaplin was black.

Richard Green was the victim of the other attempted murder charge. App. 108, l. 14 – 109, l. 23. Green remembered "hanging out" for a while at the club before he went to the owner's house nearby. "That's when I heard the first gunshot, so I moved. I walked off a little bit, and that's when I felt I got shot, with a second one." App. 110, ll. L – 5. Green did not know who shot him. Green was paralyzed as a result of the shot, and he was in a wheelchair. App. 110, ll. 9 – 10.

Alvin Wilson was also at the club that night. He estimated there were about seventy-five people at the club – it was a busy night. Wilson did not know respondent, but he confirmed he only saw two white people at the club. App. 113, l. 10 – 115, l. 16.

Wilson was in the DJ booth in the club, and he played music. Wilson said he "shut the music down" because "an altercation was going on, like I said, I said, the party is over." App. 116, ll. 8 – 25.

Wilson did not see anyone shooting but he saw his cousins, Michael Morgan and Richard Green, "laying on the ground outside." App. 117, ll. 5 – 25. Lucas Morgan was also related to Wilson. App. 118, l. 24 – 119, l. 1. Wilson, nonetheless, admitted that he saw Lucas Morgan with a gun that evening. App. 124, ll. 13 – 15.

Magnum Smalls was a regular at the Midnight Soul Patrol club. On the night of the shooting he remembered shaking hands with Dante Bailey. Smalls recalled about fifteen minutes later that Dante Bailey and a man named Arthur were "having words." App. 125, l. 6 – 126, l. 25. Another man, "D Grant," got in-between the two men, and "was pretty much walking away

from everybody else, like diffusing the problem . . . after that guns [were] flashed . . . like I said, they walked away pretty much from like everybody else, and they were talking – D Grant was talking to both of them. And then the flare gun went off, after the flare gun went off, all chaos broke loose. Everybody pretty much started shooting." Smalls confirmed that decedent Michael Morgan was the person who fired the flare gun. App. 127, l. 1 – 128, l. 22. (emphasis added).

Smalls said when the shooting ended, he saw Dante Bailey, Michael Morgan, and Richard Green on the ground. As seen, Dante Bailey and Michael Morgan were killed, and Richard Green was badly wounded. App. 130, ll. 2 – 8.

Smalls saw Respondent Joey Bowers standing near his friend Decedent Dante Bailey, and he maintained respondent picked up Dante's semi-automatic handgun while they were attempting to get Dante inside of the vehicle. App. 130, l. 10 – 131, l. 16. Smalls then gave contradictory statements, saying he saw respondent earlier with a gun, but he admitted at a prior deposition that he said he never saw respondent shoot a gun that evening. App. 131, l. 12 – 135, l. 7.

On cross-examination, defense counsel pointed out the different statements given by Smalls. Smalls admitted he did not see respondent with a gun that night, and that he only saw respondent pick up Dante's gun when they were helping him into the vehicle after Dante had been fatally shot. Smalls repeated he did *not* see respondent shoot the gun however. App. 136, l. 14 – 138, l. 1.

The following occurred on cross-examination of Smalls:

> Q. But you've also -- but, you know, *you actually saw the first shot go off, and that was Mikey Morgan, right?*
>
> *A. Right.*

Q. Okay. And that was him firing his flare gun?

A. Yes.

Q. So, that's one shot right there?

A. Right.

Q. And then you saw Lewis Melvin Johnson, Dolla, shooting out the side door of the club, right?

A. Yes.

Q. Okay. So that's two. And they're not firing at the same time, right?

A. Right.

Q. Okay. *So, it's the flare gun, and then Dolla, and then Lucas firing, correct?*

A. Correct.

Q. Okay. And then I think also you would say that you saw *Arthur Chaplin firing his gun across the parking lot, right?*

A. Correct.

Q. Okay. *Would it also be fair to say that you saw Joseph Bowers trying to assist Cole while Cole was on the ground and had been shot?*

A. Yes.

Q. Now, you, I guess, would also agree with me that you saw people with guns that night, at that Midnight Soul Patrol?

A. (Nods in the affirmative.)

Q. *And the people that you saw were Arthur Chaplin?*

A. Yes.

Q. Also known as Krum?

A. Correct.

Q. Okay. Dante Bailey?

A. Yes.

Q. Also known as Cole?

A. Yes.

Q. And these are the two gentlemen that you say were in a little verbal altercation over something?

A. Yes.

Q. How about, didn't you see Derrick Grant with a gun that night?

A. Yes, I did.

Q. And is that the man you say kind of separated those two?

A. Yes.

Q. And you saw Terry Thornton with a gun that night, T Dog?

A. Yes.

Q. And, of course, you -- we established that you saw Lucas Morgan with a gun?

A. Correct.

Q. And you saw Mikey with a gun?

A. Correct.

Q. And you saw Dolla, Lucas Melvin Johnson, with a gun?

A. Correct.

Q. And you also saw Stanley Humphries, the other white fellow, with a gun, didn't you?

A. Yes.

App. 137, l. 7 – 139, l. 15. (emphasis added).

Investigator Jeremiah Fraser testified that he talked to Michael Morgan, who "was in obvious pain," after being shot, and Lucas Morgan. Fraser said he took respondent into custody the same day. App. 189, l. 1 – 192, l. 18.

Investigator Fraser testified respondent told him he was pulling Dante Bailey, "Cole," back into the van, that Cole "wouldn't listen to him," and that "Cole stepped out from behind the van and he was shot. That was pretty much the extent of it." App. 194, l. 13 – 195, l. 11.

On cross-examination, Investigator Fraser admitted that he told respondent five times "look, Joe, just tell me you picked up the gun. If you picked up the gun, you did it in self-defense." Fraser acknowledged that respondent nonetheless told him he did not have a gun, and that he did not shoot anyone. App. 201, l. 21 – 202, l. 10.

The state also introduced a phone call made by respondent from the jail in which he said "I ain't killed the boy. I only shot the boy." When moving for a directed verdict, defense counsel said this statement was in "essence a denial of killing anyone, and at best an admission that, to his own internal belief, that he may have shot someone." App. 207, l. 24 – 210, l. 6. App. 275, l. 9 – 277, l. 5. The judge said the jail call now raised a jury question, and that he could not end the trial by directing a verdict given that jail call. App. 277, l. 6 – 279, l. 20; 281, ll. 1 – 10.

Mutual Combat Instruction

The judge told defense counsel that he, in addition to charging self-defense, had been reading about the legal concept of "mutual combat". App. 281, l. 23 – 284, l. 4. The judge observed that he was concerned about that charge because he had read one case where Judge John Hayes had been reversed "for submitting" a mutual combat instruction. That case was State v. Taylor, 356 S.C. 227, 589 S.E. 2d 1 (2003). App. 283, l. 25 – 284, l. 4.

At the charge conference, defense counsel objected to the judge instructing the jury on "mutual combat." App. 295, l. 3 – 296, l. 15. In addition to objecting to the "mutual combat" instruction, defense counsel also told the judge that she objected to him charging voluntary manslaughter over her objection. App. 295, l. 3 – 297, l. 16.

Following the charge conference, the solicitor told the judge that the state was dismissing the murder indictment against respondent involving Dante Bailey, who went with respondent to the club that night, and who there was evidence respondent was trying to keep out of danger's way at the time Dante was shot and killed. App. 297, l. 21 – 298, l. 23.

Instructions on the Law

The judge, over objection, charged the jury on the lesser-included offense of voluntary manslaughter. App. 329, l. 18 – 331, l. 19. As to "mutual combat" the judge charged the jury:

> Now, I want to discuss with you a part of the theory that you'll have to consider, and it's known as mutual combat. And this law provides that *if a Defendant voluntarily participated in mutual combat for the purpose other than protection, the killing of a victim would not be self-defense. This is true even if during the combat the Defendant feared death or serious bodily injury.*
>
> However, if before the killing is committed the Defendant withdraws and tried in good faith to avoid further conflict, and either by word or act makes that fact known to the victim, he would be without fault in bringing on the difficulty.
>
> For mutual combat there must be a mutual intent and a willingness to fight. This intent may be shown by the acts and conduct of the parties and circumstances surrounding the combat.
>
> In addition, it must be shown by that -- be shown that both parties were armed with a deadly weapon.

App. 333, l. 15 – 334, l. 8. (emphasis added).

The judge also charged the jury on self-defense. App. 334, l. 9 – 337, l. 9. The judge reminded the jury as to self-defense that if the jury found "mutual combat," he told the jurors

"*Then self-defense goes out the window, so to speak. Not available.*" App. 340, ll. 13 – 23. (emphasis added).

In discussing the jury verdict forms as to attempted murder, the judge charged:

> The next form is attempted murder, and they are the same. **There are two; one for Richard Green and one for Mr. Robert Goodwine. The choices, as with the murder, are three. One, guilty of the crime of attempted murder, same language. The only difference is it's attempted murder. Guilty of a lesser included offense of assault and battery of a high and aggravated nature**, *or not guilty. Again, you would be looking at basically the same analysis that you conducted on the murder.*
>
> The first -- if the first is there, if you find that there was malice and that he took -- he committed the act and attempted -- and shot, fired a weapon, which he was alleged to have done and then -- **and the State has disproved any self-defense or has proven that mutual combat, then your verdict would be guilty.**
>
> If the State has failed to establish malice, but you believe that he did fire a shot, *and, again, mutual combat and/or there was no self-defense*, then -- *of course, it can't be self-defense if it's mutual combat, based on what I have instructed you, then your verdict would be of the lesser included offense.*
>
> Not guilty, *State's failed to disprove self-defense* or failed to establish that he fired anything or did it. So, whatever your verdict, again, must be unanimous.

App. 341, l. 4 – 342, l. 2.

Later in answering a jury question, the judge charged:

> THE COURT: The question which is Court's Exhibit 6, *does a determination of mutual combat require a finding of culpability in each of the charges*?
>
> ***The day may come where we will be able to really answer that charge in detail. There is a provision in our Constitution that prohibits the Court from charging on the facts. And when we get into answering specific questions we are getting close to charging on the facts.*** And the Federal court they are permitted to do that, but we are not since it is a provision of our state Constitution. So, it's not that I don't want to specifically address it,

but I'll address it in this fashion: **I'll remind you of the charge by reading the mutual combat charge. And I'm going to preface what I'm saying. Remember, the State has the burden of proof here. They have the burden of proving all elements of the mutual combat. They have the burden of disproving self-defense.**

And in the mutual combat it states that if the Defendant voluntarily participated in mutual combat for purposes other than protection, the killing of the victim would not be self defense. In fact, if you find mutual combat in the killing of someone self-defense is negated by the finding of mutual combat as a matter of law. That means that you would then be determining whether or not the State proved that this Defendant actually took the action necessary to kill that particular person. And then you. would be dealing with whether, whether the killing was with malice or not as to what proof if at all. And of course, the State has the burden again of proving each element of the specific offense in that regard.

It goes on further, this is true *if even during the combat the Defendant feared death or serious bodily injury, however, if before the killing is committed the Defendant withdraws and tries in good faith to avoid further conflict and either by word or act makes that fact known to the victim he would be without fault in the bringing on the difficulty. That means simply there would not be any mutual combat at that point, if that was concluded.*

For mutual combat there must be a mutual intent and a willingness to fight. This intent may be shown by the acts and conduct of the parties and circumstances surrounding the conduct. In addition, it must be shown that both parties were armed with a deadly weapon. That being said, that creates an answer as a matter of law without addressing specifics. And that is, there can only be one mutual combat defense in the indictments. That is the indictment with respect to Michael Morgan because there are -- **I find as a matter of law there is no evidence to support the other victims being armed at any point.**

But you would still, as to the other victims, since there's no mutual combat, <u>you would have to consider whether or not the State has disproved self-defense</u> because that would apply as to those particular persons because mutual combat would not be there to negate that consideration as to those particular indictments. As to the remaining indictment, obviously, as I indicated to you, the weapons charge is dependent upon your findings of some of

> the other charges. So, I think that I have addressed that to the extent that I'm permitted to address by law.
>
> Please remember again, the burden of proof is beyond a reasonable doubt. As I stated to you, that is a doubt that would cause you to hesitate to act or take some action. So, with that further discussion, I'm going to ask you to retire and resume your deliberations.

App. 351, l. 13 – 354, l. 7. (emphasis added).

This second instruction did not mention Richard Green or Robert Goodwine, and it was hopelessly confusing. As seen, the first instruction mentioned both Richard Green and Robert Goodwine. The defense objected to the "mutual combat" instruction and that objection carried forward. The judge told the jurors that he could not charge them on the facts, and he did so anyway by instructing them there was no evidence the other victims were armed. The judge also instructed the jury still had to consider whether the state disproved self-defense while continuing to mention mutual combat. This was confusing.[1]

Standard of Review

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

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[1] The failure to object to this instruction as a charge on the facts, and as confusing is not the point at this stage in the process. The state is now attempting to argue that this recharge answering a jury question saved the earlier erroneous instruction on mutual combat in general, and as to ABHAN victim Green specifically. App. 341. Since the recharge was confusing at a minimum, and it superimposed good law over bad at an absolute best, it cured nothing.

On appeal, an appellate court reviewing a trial judge's jury charge must view the charge as a whole and in light of the evidence and issues form trial. State v. Simmons, 384 S.C. 145, 682 S.E.2d 19, 36 (Ct. App. 2009); see Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation in analyzing whether the defendant's due process rights have been violated.") When reviewing a jury charge, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004).

Discussion

The purpose of a trial judge's jury instructions is "to enlighten the jury and aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). "Merely superimposing a correct statement of law over an erroneous charge only fosters prejudice and confusion." State v. Robinson, 306 S.C. 399, 412 S.E.2d 411, 413 (1991), *citing* State v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986).

This case involves a shooting at a club where the evidence showed respondent had gone there with friends to shoot pool, and tried to get away when trouble, which he was not responsible for in anyway, started. The shooting in the parking lot then got out of control.

As the Court of Appeals correctly found, the judge's erroneous charging on mutual combat in this case, where all the charges from the facts of continuous chaotic free-form shootout were intertwined, likely confused the jury. See State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). ("If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury."). Court of Appeals opinion at app. 469, n. 6. The Court of Appeals correctly found that all of the charges against respondent were intertwined and that the reversal would apply to all of respondent's convictions, including the ABHAN conviction. The

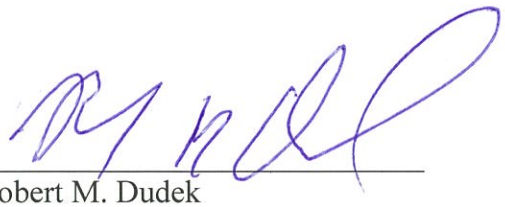
state's current argument that the subsequent charge cured the problems with the prior erroneous jury instruction, including at App. 341 – where that subsequent jury instruction as seen above was confusing – should fail. App. 469, n. 6.

The jury was not engaged in solving a math problem. The Court of Appeals correctly included the ABHAN conviction in its reversal, and order of a new trial for respondent, given the confusion and prejudice the unwarranted jury instructions caused as seen above. See State v. Robinson, 306 S.C. 399, 412 S.E.2d 411, 413 (1991), *citing* State v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986).

The state's argument was that while the judge's instruction at App. 341 was erroneous as the Richard Green, that the judge's recharge in answering a jury question cured that confusion. As seen above, it did not, the subsequent instruction was confusing as well. "Merely superimposing a correct statement of law over an erroneous charge only fosters prejudice and confusion." State v. Robinson, 306 S.C. 399, 412 S.E.2d 411, 413 (1991), *citing* State v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986). Respondent received a concurrent sentence of fifteen years for the ABHAN conviction as to Green that was tainted by the erroneous confusing jury instructions in this case. The opinion of the Court of Appeals granting respondent a new trial on the voluntary manslaughter conviction, the ABHAN conviction, and the gun charge should respectfully be affirmed.

CONCLUSION

By reason of the foregoing arguments, the opinion of the Court of Appeals should be affirmed on this issue.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

This 22nd day of July, 2020.