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Aug 09 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

KYLE MAURICE ROBINSON,

APPELLANT

APPELLATE CASE NO. 2019-001256

Appeal from York County

William A. McKinnon, Circuit Court Judge

Opinion No. 5930

PETITION FOR REHEARING

On August 3, 2022, this Court affirmed Appellant's conviction for assault and battery in the first degree. State v. Robinson, Op. No. 5930 (S.C. Ct. App. filed Aug. 3, 2022) (Howard Adv. Sh. No. 27 at 81). This Court held that despite the plain language of the statute, "a physical, bodily injury is not required for an individual to be guilty of assault and battery in the first degree under subsection 16-3-600(C)(1)(a)(i)." Id. Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter due to significant legal and factual points overlooked by this Court.

As recognized by this Court, Appellant's appeal presented an issue of first impression concerning the interpretation of the newly enacted statute. Within the Omnibus Crime Reduction and Sentencing Reform Act of 2010, the Legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses. State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014). The Legislature then created a statutory scheme to address assault and battery offenses. Id. Despite clear language that the Legislature abolished the common law offenses, this Court relied upon precedent interpreting those common law offenses to affirm Appellant's conviction. This was error.

The state charged Appellant with assault and battery in the first degree. The relevant statute provides as follows:

> A person commits the offense of assault and battery in the first degree if the person unlawfully:
>
> (a) injures another person, and the act:
>
> (i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or
>
> (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or
>
> (b) offers or attempts to injure another person with the present ability to do so, and the act:
>
> (i) is accomplished by means likely to produce death or great bodily injury; or
>
> (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.

S.C. Code Ann. § 16-3-600(C)(1). More precisely, the state alleged Appellant "injured [Minor] and the act involved nonconsensual touching of the private parts of a person, either under or above

clothing, with lewd and lascivious intent. R. 243-244. Thus, state alleged Appellant violated section 16-3-600(C)(1)(a)(i) of the South Carolina Code.

At trial, there was no dispute that Minor claimed Appellant touched her private parts and that the touching was not consensual. The question was whether the state provided evidence of an injury. And, even more specifically, the question presented was what constituted an injury under the statute. Appellant contended, and still does, that "injure" as used in the statute requires a bodily injury. However, the trial judge ruled the state was not required to prove an injury occurred because the nonconsensual touching itself was an injury. Although the judge noted his hesitancy with such a ruling because of the Legislature's decision to include language that required both an injury and nonconsensual touching, he nevertheless, ruled in a way that made the "injure" language superfluous, in direct contradiction of the rules of statutory construction.

Likewise, this Court affirmed the trial judge's ruling and rendered the Legislature's chosen words meaningless. This Court held the plain language of the subsection was "clear" that "the statute requires one injury stemming from a single act and that the Legislature intended the single act that caused the injury to 'involve nonconsensual touching of the private parts of a person ... with lewd and lascivious intent.'" State v. Robinson, Op. No. 5930 (S.C. Ct. App. filed Aug. 3, 2022) (Howard Adv. Sh. No. 27 at 81). In doing so, this Court violated the rules of statutory construction.

Examining the statute as a whole and applying the rules of statutory construction requires this Court give meaning to the Legislature's determination that assault and battery in the first degree involve both an injury and nonconsensual touching. First, the specific statute at issue here includes the conjunctive "and" to show the statute is referring to two different things. This interpretation becomes clearer when the second part of the same subsection is analyzed.

A person commits the offense of assault and battery in the first degree if the person unlawfully injures another person, and the act occurred during the commission of a robbery, burglary, kidnapping, or theft. SC. Code Ann. § 16-3-600 (C)(1)(a)(ii). Under this Court's ruling in the instant case, every robbery, burglary, kidnapping, and theft would likely involve an assault and battery in the first degree as this Court permits psychic injuries to qualify as injuries. This simply cannot be the intent of the Legislature. Would a burglar who brushed past a homeowner while leaving the residence have injured the homeowner due to the brushing past? Under this Court's formulation, the burglar would be guilty of assault and battery of the homeowner where the homeowner suffered no actual physical injury either because a psychic injury would qualify, or the simple touching would qualify. Again, this cannot be the intent of the Legislature. The Legislature intended for the offense to include two distinct elements.

Any question as to what the Legislature meant when it used the term "injure" is answered in the statute itself. The Legislature defined great bodily injury as "bodily injury which causes substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ." S.C. Code Ann. § 16-3-600(A)(1). Further, the Legislature defined moderate bodily injury to mean "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 of dislocation." S.C. Code Ann. § 16-3-600(A)(2). Importantly, "[m]oderate 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." Id.

Thus, for the statutory provisions requiring the perpetrator to injure another, the Legislature created tiers of the types of injuries. The most severe injuries were those causing great bodily injuries. The second most severe injuries were those causing moderate bodily injuries. And, the third category of injuries were those that were neither severe nor moderate. As the Legislature explained, this third category included injuries that required one-time treatment or resulted in scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries not ordinarily requiring extensive medical care. The answer to what the Legislature meant by "injure" is contained right there in the statute.

After providing these definitions, the Legislature explained that a person commits an assault of a high and aggravated nature (ABHAN) if the person unlawfully injures another person *and* either great bodily injury to another person results or the act is accomplished by means likely to produce death or great bodily injury. S.C. Code Ann. § 16-3-600(B)(1). Like assault and battery in the first degree pursuant to subsection (a), ABHAN *requires* an injury based upon simple rules of statutory construction.

The interplay between the two statutory offenses goes even further. If the person is *not* injured, then the offender may *not* be charged with ABHAN, but may be charged with assault and battery in the first degree pursuant to subsection (b), which specifically does *not* require an injury, but does require an offer or attempt to injury accompanied by means likely to produce death or great bodily injury or during the commission of another crime. See S.C. Code Ann. § 16-3-600(C)(1)(b). This Court failed to address Appellant's argument that the interplay between these two statutory provisions is paramount to understanding the Legislature's intent as the Legislature used the same language – "unlawfully injures another person."

In further support of Appellant's contention that S.C. Code Ann. § 16-3-600(C)(1)(a) requires an injury beyond the mere touching, the Legislature provided for a **separate offense** for an offer or attempt to injure involving the nonconsensual touching. See S.C. Code Ann. § 16-3-600(D)(1)(b). Specifically, the Act provides that "[a] person commits the offense of assault and battery in the second degree if the person unlawfully ... offers or attempts to injure another person with the present ability to do so, and ... (b) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing." S.C. Code Ann. § 16-3-600(D)(1)(b).

In other words, the Legislature contemplated a nonconsensual touching that did not involve an injury. This provision makes clear that the injury and the nonconsensual touching must be two different things in the view of the Legislature. If the touching and the injury were the same, as this Court held, then there would *never* be an instance where there would be an attempt to injure involving a nonconsensual touching. This Court's ruling renders the statutory offense found within S.C. Code Ann. § 16-3-600(D)(1)(b) a nullity. The rules of statutory construction forbid such a result. This Court did not address Appellant's argument regarding the significance of this subsection in understanding its companion found in section 16-3-600(C)(1)(a)(i).

As the Supreme Court noted in Middleton, supra, the Act substantially overhauled South Carolina's criminal law. Prior to the Act, "[s]erious bodily harm to the prosecuting witness [was] not necessary to establish an assault and battery of a high and aggravated nature." See State v. DeBerry, 250 S.C. 314, 319, 157 S.E.2d 637, 640 (1967). The Court explained that "[s]hould a stranger on the street embrace a young lady, or a large man improperly fondle a child, the assault and battery would be aggravated though no actual bodily harm was done." Id. at 319-320, 157 S.E.2d at 640. "The Legislature is presumed to be aware of [the appellate courts'] interpretation of its statutes." Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003);

see also State v. McKnight, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003) (explaining "[t]here is a presumption that the Legislature had knowledge of previous legislation as well as of judicial decisions construction that legislation when later statutes are enacted concerning related subjects"). Aware of the court's rulings regarding assault and battery offenses, the Legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses. See Middleton, 407 S.C. at 315, 755 S.E.2d at 434; see also State v. King, 422 S.C. 47, 62-63, 810 S.E.2d 18, 26 (2017) (explaining the South Carolina Sentencing Reform Commission recommended that the General Assembly enact legislation to abolish the common law offense of ABHAN). In writing the assault and battery statutes, the Legislature made clear which offenses required an injury and which did not; thus, the Legislature rejected the prior court decisions that required no actual injury for certain offenses. See State v. King, 422 S.C. 47, 63, 810 S.E.2d 18, 26 (2017) (explaining the Legislature *created* the *new* offenses of attempted murder and degrees of assault and battery). This Court's reliance on the cases concerning "the traditional understanding of assault and battery as delineated by our courts for over a century" is misplaced.

Appellant respectfully requests this Court rehear this matter pursuant to Rule 221(a), SCACR.

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 9th day of August, 2022.

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APPELLATE CASE NO. 2019-001256

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is wblitch@scag.gov; and Kyle Maurice Robinson, at PO Box 1095, Chester, SC 29706, this 9th day of August, 2022.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

From: Stock, Chris
To: SC - BLITCH WILLIAM; SC - COLLINS CAROLINE
Cc: Hackett, Susan
Subject: Kyle Maurice Robinson 2019-001256 Petition for Rehearing
Date: Tuesday, August 9, 2022 9:23:00 AM
Attachments: Kyle Maurice Robinson 2019-001256 Petition for Rehearing - AG Cover Letter.pdf
Kyle Maurice Robinson 2019-001256 Petition for Rehearing.pdf

Mr. Blitch,

Please find attached for service the petition for rehearing for Kyle Maurice Robinson's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock
Administrative Assistant
Commission on Indigent Defense
Appellate Division
(803) 734-1330