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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Orangeburg County
Court of Common Pleas
The Honorable Diane S. Goodstein, Resident Judge

Appellate Case No. 2021-000975

LINDY LAMONT JONES, #335250, PETITIONER,

vs.

STATE OF SOUTH CAROLINA, RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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ISSUE RAISED ON PETITION FOR WRIT OF CERTIORARI

Petitioner's Question on Petition for Writ of Certiorari

Did the PCR judge err in refusing to find trial counsel ineffective for failing to object when the trial judge charged the jury with the law on assault with intent to commit criminal sexual conduct with a minor when Petitioner was indicted for criminal sexual conduct second degree and there was no evidence that there was only an assault with intent to commit criminal sexual conduct?

Respondent's Counter-Statement of Question on Petition for Writ of Certiorari

Did the post-conviction relief court properly find Petitioner failed to establish counsel was constitutionally ineffective for failing to object to the lesser-included jury charge of assault with intent to commit criminal sexual conduct with a minor because the charge is a lesser-included offense of criminal sexual conduct second, because ample evidence in the record supports the lesser-included charge, and because Petitioner was not prejudiced by the proper jury instruction?

STATEMENT OF THE CASE

Petitioner Lindy Lamont Jones is presently confined in the South Carolina Department of Corrections. During its April 2009 term, the Orangeburg County Grand Jury indicted Petitioner for criminal sexual conduct with a minor – victim 16 years of age or under (2005-GS-38-1817)[1]. Assistant Public Defenders Sara Ford and Douglas Mellard of the Orangeburg County Public Defender's Office represented Petitioner. Assistant Solicitors Bryan Jeffries and Tommy Scott of the First Circuit Solicitor's Office prosecuted the case. On June 8-10, 2009, Petitioner proceeded to a jury trial before the Honorable James C. Williams, Jr., circuit court judge. At the conclusion of trial, the jury found Petitioner guilty of the lesser-included offense of criminal sexual conduct with a minor – assault with intent to commit criminal sexual conduct with a minor. Judge Williams sentenced Petitioner to a term of imprisonment of sixteen years.

Petitioner filed a notice of appeal and was represented by Appellate Defender Elizabeth A. Franklin-Best of the South Carolina Commission on Indigent Defense. Petitioner raised one issue on appeal:

1) Did the trial court judge err when he charged with the jury, over defense objection, with assault with intent to commit criminal sexual conduct with a minor (AWCSC) as a lesser-included offense of criminal sexual conduct with a minor, 2nd degree because AWCSC is not a lesser-included offense of CSC with a minor, 2nd degree?

On August 19, 2011, the South Carolina Court of Appeals affirmed Petitioner's convictions, finding the issue raised in Petitioner's appeal was not preserved because an issue regarding a jury charge is not preserved when appellant argued one ground at trial and argued another ground on

[1] Petitioner was also indicted for lewd act or attempting or committing a lewd act on a child under sixteen (2005-GS-38-1816). At the conclusion of trial, the jury returned a verdict of not guilty on lewd act charge.

appeal. State v. Jones, Op. No. 2011-UP-396 (S.C. Ct. App. filed August 19, 2011). The remittitur was returned to the circuit court on September 8, 2011.

Petitioner filed his first application for post-conviction relief on September 12, 2011, alleging the following grounds for relief:

1. Ineffective assistance of counsel
   a. "Counsel failed to properly object to jury charge;"
2. "U.S. Constitutional Violation(s) 14th"
   a. "Lack of subject matter;" and
   b. "Denial of due process and equal protection."

Respondent made its return on February 14, 2012. On October 31, 2012, the PCR court convened an evidentiary hearing at the Dorchester County Courthouse before the Honorable Carmen T. Mullen. Assistant Attorney General Megan Harrigan Jameson represented Respondent. Charles H. Williams, III, Esquire, appearing on behalf of C. Bradley Hutto, Esquire, represented Petitioner. By order signed November 29, 2012, and filed December 6, 2012, Judge Mullen denied Petitioner relief and dismissed the PCR application with prejudice. Petitioner filed a *pro se* motion pursuant to Rule 59, SCRCP, to alter or amend judgment on December 28, 2012. On January 11, 2013, Petitioner's PCR Counsel filed a subsequent motion to alter or amend. Respondent made its return to the motion and requested it be summarily dismissed as untimely and without merit. By order signed February 1, 2013, and filed on February 11, 2013, Judge Mullen issued an order summarily dismissing the motion as untimely and without merit.

Petitioner filed a notice of appeal from the PCR court's dismissal on February 21, 2013.[2] On July 29, 2013, the Supreme Court of South Carolina transferred the case to the South Carolina

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[2] Petitioner's notice of appeal stated: "Lindy Jones appeals the Order of the Honorable Carmen T. Mullen dated November 29, 2012. [Petitioner] received written notice of entry of this Order on December 14, 2012, and subsequently filed a Motion to Alter or Amend on December 28, 2012. [Petitioner] received written notice of the Order of the Honorable Mullen denying the Motion to Alter or Amend on February 19, 2013. Mr. Jones now wishes to appeal the Order dated November

Court of Appeals pursuant to Rule 243(l), SCACR. On March 21, 2014, the South Carolina Court of Appeals dismissed the appeal as untimely, finding written notice of entry of the trial court's order of dismissal was received on December 14, 2012, and therefore Petitioner's motion to alter or amend was due by December 27, 2012[3]. The remittitur was issued on April 24, 2014. Petitioner thereafter attempted to file his own *pro se* motion to reinstate the appeal, which was stricken because he was represented by counsel and because the sending of the remittitur ended appellate jurisdiction.

On May 4, 2014, Petitioner filed his second application for post-conviction relief alleging:

1. "Ineffective Assistance of PCR Counsel"
    a. "PCR Counsel failed to subpoena witnesses/produce exhibits;"
    b. "PCR Counsel failed to file a timely motion to alter of Amend. 59(e);" and
2. Austin Claim
    a. "PCR Counsel failed to timely file for appellate review."

Respondent made its return on August 14, 2017, and moved to dismiss all allegations beyond Austin[4] review as successive, filed after the statute of limitations, and improper because post-conviction relief was not the proper ground for the relief sought by Petitioner. Respondent further requested an evidentiary hearing be held solely on the issue of Petitioner's request for a belated appeal of his first application for post-conviction relief pursuant to Austin. An evidentiary hearing on the matter was convened on December 14, 2017, before the Honorable Kristi L. Harrington, then-circuit court judge. The sole issue before the Court was whether Petitioner was entitled to seek belated appellate review of the denial of his first post-conviction relief action

29, 2012."

[3] The Court of Appeals found that because Petitioner's motion to alter or amend was not filed until December 28, 2012, the motion did not stay the time for appeal. Therefore, the period for Petitioner to serve his notice appeal expired January 14, 2013 – over a month before the notice of appeal was served.

[4] Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

pursuant to Austin. The State consented to Petitioner's limited relief pursuant to Austin and Judge Harrington granted relief. Additionally, Judge Harrington requested Petitioner submit a proposed order for the Court's review. It appears Judge Harrington then signed an order granting Petitioner the right to seek belated appellate review and sent the order to the Orangeburg County Clerk of Court for filing. The public index reflects that a "Consent Order Granting Right to Seek Belated Appellate Review" was filed on May 7, 2018. However, a copy of this order was not sent to either party. Additionally, the order cannot be located by the clerk's office.

Judge Harrington retired from the bench before the original order could be located or an amended order could be issued. Thereafter, by written order signed August 18, 2021, and filed August 23, 2021, the Honorable Judge Diane S. Goodstein issued an "Amended Consent Order Granting Right to Seek Belated Appellate Review Pursuant to Austin v. State" pursuant to Rule 63, SCRCP, with the consent of both parties.[5]

[5] As provided in Rule 63, SCRCP, Judge Goodstein thoroughly reviewed the entire record, including the transcript of the evidentiary hearing before Judge Harrington. After review of the record, Judge Goodstein certified familiarity with the record and determined the matter could be completed based on the record without prejudice to Petitioner or Respondent.

STATEMENT OF THE FACTS

Relevant Facts Adduced at Trial

Petitioner dated fourteen-year-old child-victim's aunt, whom the child-victim (Victim) would stay with while her mother was working. (App. pp. 141; 143). Usually, Victim's aunt was home with Petitioner, Victim, and Victim's siblings. The aunt, however, would occasionally work a different shift and not be present at the home, so Victim would stay with Petitioner. (App. pp. 143-144).

On two occasions when Petitioner was the only adult in the home, he assaulted Victim. On one occasion, he placed or attempted to place his penis into the Victim's anus. She testified he put his penis to her anus when she had clothes on, but later he put his penis into her anus after her clothes were down. The Victim stated she did not remember all details of the incident. (App. pp. 145-147; 167-169).

On the second occasion, Victim was asked to wake Petitioner up at a certain time so he could get ready for work. When she went in to wake him, he told her to return in five minutes. She returned and Petitioner was standing nude in the bedroom waiting on her. He told her to come over and when she got close, he pulled her pants and panties down. (App. p. 149). He put her on the bed and had sexual intercourse with Victim. (App. p. 149-150). After Petitioner left the home for work, Victim called a teacher with whom she had become friends to report what took place. (App. pp. 150-151). The teacher called police, who responded to the scene. (App. pp. 151-152). Victim was taken to Charleston for an examination. (App. p. 212).

Dr. Gibbs testified she performed the examination on Victim. (App. pp. 212-214). She indicated Victim had a tear of the fossa navicularis, which would be consistent with the Victim's reported sexual assault. (App. pp. 215-216; 218-219; 228). She also admitted the tear could occur

in ways unrelated to sexual assault and could occur without actual penetration by Petitioner. (App. pp. 224-225).

Relevant Testimony Adduced at Hearing on Post-Conviction Relief Application

During the evidentiary hearing, Petitioner testified his trial counsel was ineffective for failing to timely object to the jury instruction on the lesser-included charge of assault with intent to commit criminal sexual conduct with a minor. (App. p. 427). Petitioner testified he believed the State proved beyond a reasonable doubt that a sexual battery took place, and therefore the trial court erred in instructing the jury on the lesser-included offense of assault with intent to commit criminal sexual conduct on a minor. (App. p. 427). In support of that contention, Petitioner posited there was evidence produced by Petitioner, a doctor, and Victim that indicated a battery occurred in this case. (App. p. 428). Petitioner testified he did not believe the lesser-included charge was supported by evidence. (App. p. 428). Petitioner acknowledged trial counsel did object to the jury instruction of assault with intent to commit criminal sexual conduct with a minor, but further asserted the objection was insufficient to preserve the issue for appellate review as trial counsel did not state the grounds for the objection on the record. (App. p. 429). Petitioner further testified regarding his belief that the State proved beyond a reasonable doubt that a sexual battery did take place, further asserting he had given a statement to police that he and the Victim had had a sexual encounter. (App. p. 433).

Trial counsel Robert Mellard (Mellard) also testified at the evidentiary hearing. Mellard stated that he has been practicing law since 1997 and his practice is exclusively criminal defense. (App. p. 436). Mellard testified he did not research whether assault with intent to commit criminal sexual conduct with a minor was a lesser-included offense of criminal sexual conduct with a minor prior to it being brought up preceding jury instructions. (App. p. 434).

Mellard testified he had tried numerous cases before Judge Williams, and Judge Williams' routine practice was to hold jury charge conferences in-chambers and off the record. (App. p. 434, 437). Mellard confirmed argument was made in chambers regarding the charge – elaborating he also made a post-trial motion addressing his position that the facts presented at trial did not support the lesser-included charge. (App. pp. 434-435). Mellard further posited he believed that was the argument made in chambers as well. (App. pp. 434-435). Mellard testified that based on the evidence presented at trial, including Victim's testimony, Petitioner's statement to police, and Petitioner's testimony at trial, there was enough evidence to convict Petitioner of criminal sexual conduct a minor as indicted. (App. p. 441).

Following Mellard's testimony, trial counsel Sara Ford (Ford) testified. Ford testified the State requested the charge of assault with intent to commit criminal sexual conduct with a minor during the in-chambers charge conference. (App. p. 443). Ford testified the charge was never requested on the record, so there was not an opportunity for her or Mellard to object on the record. (App. p. 445). Ford testified Mellard objected to this charge during the in-chambers discussion, as well as on the record after Judge Williams instructed the jury. (App. pp. 445-446). She testified that she did think that there was sufficient evidence for the lesser-included charge to have gone to the jury and to convict Petitioner. (App. p. 444).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's finding of fact and will uphold them if there is any evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

> The post-conviction relief court properly found Petitioner failed to establish counsel was constitutionally ineffective for failing to object to the lesser-included jury charge of assault with intent to commit criminal sexual conduct with a minor because the charge is a lesser-included offense of criminal sexual conduct second, because ample evidence in the record supports the lesser-included charge, and because Petitioner was not prejudiced by the proper jury instruction.

On petition for writ of certiorari, Petitioner contends the PCR court erred in denying his allegation trial counsel was ineffective for failing to timely object when the trial court charged the jury on assault with intent to commit criminal sexual conduct with a minor, the lesser-included charge of the originally indicted offense, criminal sexual conduct second degree. Petitioner contends,

> "[I]f assault with intent to commit criminal sexual conduct with a minor is **not** a lesser included offense of criminal sexual conduct with a minor second degree, trial counsel was ineffective in failing to timely object to the charge. If assault with intent to commit criminal sexual conduct is a lesser included offense of criminal sexual conduct with a minor second degree, trial counsel was also ineffective for failing to timely object because there was no evidence that Petitioner was only guilty of the lesser offense."

(Petition for Writ of Certiorari Pursuant to Austin v. State, p. 6).

However, the post-conviction relief court properly rejected Petitioner's argument trial counsel was ineffective for failing to object to the lesser-included jury instruction, finding trial counsel Mellard objected to the assault with intent to commit criminal sexual conduct with a minor charge both on and off the record. (App. p. 453). The post-conviction relief court also properly found Mellard made a post-trial motion for a new trial and stated specific grounds on the record, finding Counsel's performance reasonable and effective. (App. p. 453). Furthermore, the post-conviction relief court properly found Petitioner was not prejudiced by counsel's alleged failure to

object. (App. p. 453). These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

Strickland*[6] *Standard and Burden of Proof

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. Id. at 689. "Counsel is strongly presumed to have rendered adequate assistance and

[6] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

made all significant decisions in the exercise of reasonable professional judgment." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690); see also Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021) (noting counsel's strategic decisions are to be afforded "'strong presumption' of reasonableness that the defendant must overcome); Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in "countless" ways. Strickland, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). The court makes this determination based upon the totality of the evidence. Id. at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Harrington v. Richter, 562 U.S. 86, 112 (2011).

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at

690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

Assault with Intent to Commit Criminal Sexual Conduct with a Minor is a Lesser-Included Offense of Criminal Sexual Conduct with a Minor

The test for determining whether an offense is a lesser-included offense of a charged crime is whether the greater of the two offenses includes all the elements of the lesser offense. State v. Northcutt, 372 S.C. 207, 215, 641 S.E.2d 873, 877 (2007). If the lesser offense contains an element not included in the greater offense, then it is not a lesser-included offense of the greater offense. Id. When an offense fails to meet the elements test, the appellate court may nevertheless construe it as a lesser-included offense if the offense has traditionally been considered a lesser-included offense of the greater offense charged. See State v. Burton, 356 S.C. 259, 264, 589 S.E.2d 6, 8 (2003).

According to section 16-3-655:

> (B) A person is guilty of criminal sexual conduct with a minor in the second degree if:
>
> > (1) the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age; or
> >
> > (2) the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial,

> custodial, or official authority to coerce the victim to submit or is older than the victim.

S.C. Code Ann. § 16-3-655(8) (Supp. 2008). "An assault with intent to commit criminal sexual conduct with a minor ... is more aptly designated as an "attempt" to commit criminal sexual conduct with a minor." State v. Sosbee, 371 S.C. 104, 109,637 S.E.2d 571, 573 (Ct. App. 2006); see also State v. Elliott, 346 S.C. 603, 552 S.E.2d 727 (2001), overruled on other grounds, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

The elements of the offenses are the same, except assault with intent to commit criminal sexual conduct is an unsuccessful attempt to commit criminal sexual conduct. An unsuccessful attempt would logically be included in the elements of a successful attempt. As a result, assault with intent to commit criminal sexual conduct is a proper lesser-included offense of criminal sexual conduct under the elements test. Additionally, an attempt to commit a crime has long been held to be a lesser-included offense of the main offense. See State v. Hiott, 276 S.C. 72, 80,276 S.E.2d 163, 167 (1981) (finding attempted armed robbery is a lesser-included of armed robbery); see also, Elliott, 346 S.C. at 616, 552 S.E.2d at 734 (Pleicones, J. dissenting).

Further, the historical common law provides support for the finding assault with intent to commit criminal sexual conduct is a lesser-included offense of criminal sexual conduct. As the South Carolina Supreme Court explained in Elliott, the predecessor crime to assault with intent to commit criminal sexual conduct is assault with intent to rape or ravish (AIR). Elliott, 346 S.C. 603, 607, 552 S.E.2d 727, 729 ("The predecessor to assault with intent to commit criminal sexual conduct was assault with intent to ravish (AIR).") (citing See State v. Stewart, 283 S.C. 104,109,320 S.E.2d 447, 451 (1984)). In the same vein, when the legislature enacted the

comprehensive criminal sexual battery act in 1977,[7] it replaced the crime of rape with the various crimes for criminal sexual conduct. AIR has long been considered a lesser-included offense of the crime of rape. See e.g. State v. Collins, 228 S.C. 537, 91 S.E.2d 259 (1956); State v. Gatlin, 208 S.C. 414, 418-419, 38 S.E.2d 238, 240 (1946), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). As a result, the historical common law supports the trial court's finding that assault with intent to commit criminal sexual conduct is a lesser-included offense of criminal sexual conduct. If the legislature had intended assault with intent to commit criminal sexual conduct not to be a lesser-included, the legislature could have provided that it is not treated as a lesser offense of criminal sexual conduct. See e.g., Elliott, 346 S.C. at 607, 552 S.E.2d at 729 (citing State v. Bridgers, 329 S.C. 11,495 S.E.2d 196 (1997) (the legislature is presumed to be aware of the common law)).

The designation of assault with intent to commit criminal sexual conduct as a lesser-included offense of criminal sexual conduct is supported by the elements test, the rule that an attempted offense is a lesser-included offense of the main offense, and the historical common law precedent involving AIR as a lesser-included offense of rape. Accordingly, the trial court did not err in charging assault with intent to commit criminal sexual conduct as a lesser-included offense of criminal sexual conduct.

Ample Probative Evidence Supports the Lesser-Included Charge of Assault with Intent to Commit Criminal Sexual Conduct

In Jones' petition, he asserts there was no evidence to support a jury instruction on the lesser-included charge of criminal sexual conduct second degree – assault with intent to commit criminal sexual conduct. In support of his contention, Petitioner argues he made a statement to the

[7] 1977 Act No. 157, now codified at S.C. Code Ann. §§ 16-3-651 to 16-3-659.1 (Supp. 2008).

police that was admitted at trial. (Petition for Writ of Certiorari pursuant to Austin v. State, p. 6). Petitioner asserts that within the statement admitted, he confirmed he engaged in sexual intercourse with Victim. (Id. p. 6).

Based upon the trial transcript and trial counsels' testimony at the PCR hearing, the PCR court properly found counsel was not ineffective for failing to object to the lesser-included jury instruction. (App. p. 453). At the evidentiary hearing, both Mellard and Ford testified that based on the evidence presented at trial, there was enough evidence to convict Petitioner of criminal sexual conduct as indicted. (App. p. 441; 444). Ford additionally testified she believed there was enough evidence for the lesser-included charge to have gone to the jury. (App. p. 444). Though Petitioner believed the State proved beyond a reasonable doubt a sexual battery[8] took place, not just an attempt, the PCR court properly found counsel was not ineffective, nor was Petitioner prejudiced for the alleged failure to object to the trial court's jury instruction.

"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). "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 tends 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). However, the trial court should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the

[8] A sexual battery as defined by S.C. Code Ann. § 16-3-651(h) as: "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes."

lesser rather than, the greater offense. State v. Smith, 315 S.C. 547, 549, 446 S.E.2d 411, 413 (1994); Suber v. State, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007).

Petitioner errantly argues no evidence supports the trial court's decision to charge the lesser-included offense of assault with intent to commit criminal sexual conduct. Further, Petitioner's contention his statement confirmed that the State proved beyond a reasonable doubt he engaged in sexual battery of Victim, precluding the jury instruction of the lesser-included offense, is a simplification of the statement Petitioner made. At trial, the statement was read into the record by Investigator Anthony Thompson. (App. p. 276). Investigator Thompson testified to the following statement given by Petitioner on August 16, 2005:

> On August the fifteenth, two thousand and five, I was asleep in my room resting for work. I was awoken about nine: forty-five, give or take a few minutes, by somebody playing with my private area at that time. I didn't know who it was. I assumed that it was my girlfriend, Sharon, being that she was the only woman allowed in our bedroom while in there. The female got on top of me as if she was trying to ride me. I proceeded to engage in sexual intercourse with the female, assuming it was my girlfriend, Sharon. When I attempted to put my penis in it wouldn't fit I asked her, what's wrong with you? The female laughed, and when she did I recognized her voice and I immediately pushed her off of me and turned the lights on. (App. pp. 276-277).

Petitioner's statement contained contradictory language. Likewise, Petitioner stated, he "attempted to put [his] penis in [but] it wouldn't fit." Petitioner did not confirm or deny at trial whether his attempt was successful. Therefore, had the jury believed Petitioner pushed Victim off of him before penetration occurred, the jury could have concluded this constituted an attempt rather than criminal sexual conduct. The determination whether Petitioner's actions constituted an attempt, or a battery was a decision for the jury.

Additionally, and in contradiction to Petitioner's assertion the State proved beyond a reasonable doubt a battery occurred, Victim testified that on one occasion, Petitioner came up behind her and placed his privates on her butt when her clothes were on. (App. p. 145). Although

Victim later testified Petitioner put his penis into her anus, she admitted she did not remember all the details. (App. pp. 147; 167-169). The jury could have believed the initial act occurred but not the penetration which would have supported the lesser-included charge of assault with intent to commit criminal sexual conduct.

Also, in conflict with Petitioner's contention no evidence supported the jury instruction, Dr. Elizabeth Gibbs, a forensic pediatrician, testified at trial and indicated she performed an examination on Victim. (App. pp. 212-214). Dr. Gibbs indicated a tear to the specific area of the genitalia on Victim would be consistent with Victim's reported sexual assault. (App. pp. 215-216; 218-219; 228). Although Dr. Gibbs testified her findings were consistent with blunt force trauma to the inside of Victim's genitalia and consistent with Victim's recitation of what caused her injury, Gibbs also admitted the tear could occur in ways unrelated to sexual assault and could occur without actual penetration by Petitioner. (App. pp. 218; 224-225). Based on the foregoing, ample evidence supported the lesser-included jury charge, and counsel was not deficient for not objecting.

Petitioner was Not Prejudiced by Proper Jury Instruction

Based on Judge Williams' remarks on the record following argument on trial counsel's motion for a new trial, it is unlikely he would have declined to charge the lesser-included offense had counsel objected. (App. 366). Specifically, in response to trial counsel's motion for a new trial, Solicitor Scott stated:

> [W]e think there was more than sufficient evidence for the jury's verdict. I think the charge of assault – charging the jury on the lesser included offense of assault with intent to commit CSC, second degree, with a minor was more than proper. There was, I think, there was several questions that were asked regarding penetration, and I think that could have been an issue for the jury, and I think that, in and of itself warranted the charge of the lesser included offense of assault with intent to commit CSC, second degree, with a minor. (App. p. 367).

Following the State's argument, Judge Williams agreed, stating:

> "I think it was a jury question, and I think the jury resolved the question of penetration in favor of your client. And, but I think there was sufficient, I think it was a proper charge, and I think it was a good verdict, and certainly sufficient evidence to support that verdict." (App. p. 368).

Further, because a trial court 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, it is unlikely this issue would have been reversed on appeal had it been adequately preserved. Though the trial court should refuse to charge a lesser-included offense where there is no evidence that the defendant committed the lesser rather than, the greater offense, in this case, ample probative evidence supports the trial court's jury instruction. Therefore, the post-conviction relief court properly found Petitioner was not prejudiced as the court's instruction on the lesser-included offense was proper.

Likewise, Petitioner's contention that if the jury had been instructed only on the greater offense, the jury would have accepted Petitioner's mistake defense and found Petitioner not guilty, lacks merit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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