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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable R. Kirk Griffin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID L. HILL, JR.,

APPELLANT.

APPELLATE CASE NO. 2021-000749

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

1.

Did the trial judge abuse his discretion by admitting a portion of the 911 call in which the store clerk described part of the altercation between Appellant and his wife since the evidence was not relevant given that Appellant had already pled guilty to second degree domestic violence, and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE?

2.

Did the trial judge abuse his discretion by admitting portions of the video from Officer Rutan's body worn camera that occurred after Appellant was arrested and placed in handcuffs since the evidence was not relevant to the offense of assault on an officer while resisting arrest and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE?

3.

Did the trial judge err by refusing to instruct the jury on the lesser included offense of second degree assault and battery when there was evidence upon which the jury could have found Appellant committed only the lesser offense instead of the indicted offense of attempted murder?

STATEMENT OF THE CASE

A Sumter County grand jury indicted Appellant on March 12, 2020 for attempted murder, second degree domestic violence, first degree assault and battery, and two counts of assault on an officer while resisting arrest. R. 467-469. Appellant's case was called to trial on May 24, 2021 before the Honorable R. Kirk Griffin, and a jury. Before the start of trial, Appellant pled guilty as indicted to second degree domestic violence and was sentenced to three years. R. 12, l. 25 – 21, l. 2. Assistant Solicitor Bronwyn McElveen represented the state. R. 1. Shaun Kent, John Furse, Marvin McMillian, and Hugh McMillian represented Appellant. R. 1.

On May 26, 2021, the jury found Appellant guilty of attempted murder, the lesser included offense of second degree assault and battery, and two counts of the lesser included offense of resisting arrest. R. 456, l. 13 – 457, l. 7. Judge Griffin sentenced Appellant to twelve years for attempted murder, three years for second degree assault and battery, and one year for each count of resisting arrest. All sentences were ordered to be served concurrently. R. 458, l. 14 – 460, l. 13.

On June 4, 2021, Appellant filed a motion for a new trial pursuant to Rule 29, SCRCrimP. R. 461. By order filed July 1, 2021, Judge Griffin denied the motion. R. 466.

On July 8, 2021, Appellant timely filed a notice of appeal. This brief of appellant follows.

ARGUMENT

1.

The trial judge abused his discretion by admitting a portion of the 911 call in which the store clerk described part of the altercation between Appellant and his wife since the evidence was not relevant given that Appellant had already pled guilty to second degree domestic violence, and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE.

Relevant Facts

Appellant moved pretrial to exclude any evidence related to the domestic violence offense that appears on the 911 call. R. 76, l. 2 – 77, l. 7. Defense counsel explained that Jennifer Hill, Appellant's wife, initially called 911 to report the domestic violence. Hill was screaming, "He's going to kill me. He's going to kill me." Eventually, the clerk obtained the phone from Hill. He described some of the allegations regarding the domestic violence and then told the operator about what occurred related to the charges of attempted murder and assault and battery. Counsel argued any statements related to the domestic violence offense were not relevant and should be excluded pursuant to Rule 403, SCRE, since the evidence had no probative value and "offer[ed] nothing but prejudice towards [Appellant]." R. 79, l. 9 – 80, l. 9.

After listening to the 911 call, the trial judge ruled the statements made by Jennifer Hill were inadmissible based on his prior ruling that any evidence related to the domestic violence offense for which Appellant had already pled guilty was not relevant and was unfairly prejudicial. However, the judge found the remainder of the call was admissible. R. 80, l. 16 – 81, l. 6. He asserted, "[Y]ou can start it [the call] from the point in time when the clerk gets on the phone relaying what his present sense impression of what occurred that evening . . . I think that is certainly relevant to show why law enforcement arrived on scene." R. 80, l. 25 – 81, l. 6.

The recording of the 911 call was marked as State's Exhibit No. 36, and admitted over Appellant's objection during the testimony of Andrew Bauler, the clerk at the convenience store where the events occurred. R. 223, ll. 4-23. When the tape was published to the jury, the jury heard Jennifer Hill screaming at the beginning of the call before the assistant solicitor was able to fast forward to the portion of the call ruled admissible by the judge. R. 223, l. 24 – 224, l. 18; R. 226, l. 6 – 227, l. 11.

During the portion of the call to which Appellant objected, the clerk, Andrew Bauler, provided a detailed description about the altercation leading to Appellant's conviction for second degree domestic violence. Specifically, Bauler told the operator, ". . . this lady, uh, she was in the car, and, uh, the man was pulling her hair, and she, she got out, she got out of the car, and he was in there choking her . . ." State's Exhibit No. 36 (00:47 to 01:00).

In his written posttrial motion, Appellant moved for a new trial in part because of the judge's erroneous admission of this irrelevant and unfairly prejudicial portion of the 911 call. R. 461. However, the judge summarily denied the motion. R. 466.

Standard of Review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (citing State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. (citing State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)).

Discussion

The trial judge abused his discretion by admitting the portion of the 911 call in which Andrew Bauler, the clerk at the convenience store, described part of the altercation between

Appellant and his wife since the evidence was not relevant given that Appellant had already pled guilty to second degree domestic violence, and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE.

"All relevant evidence is admissible." Rule 402, SCRE; See State v. Pagan, 357 S.C. 132, 142, 591 S.E.2d 646, 651 (Ct. App. 2004). "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." Pagan, 357 S.C. at 142, 591 S.E.2d at 651 (citing In re Corley, 353 S.C. 202, 577 S.E.2d 451 (2003)). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) (citing State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146 (1991)).

The clerk's statement that Appellant allegedly pulled Jennifer Hill's hair and choked her while they were in the car was not relevant to the offenses for which Appellant was on trial or to any other matter in controversy during the course of the trial. Appellant had already pled guilty to the domestic violence charge. As the trial judge recognized, "[H]e's [Appellant is] not on trial for what occurred in the car. He's on trial for what happened after she [Jennifer Hill] got out of the car." R. 67, ll. 2-5. The judge had already ruled and reemphasized numerous times that any evidence related to the domestic violence charge was inadmissible pursuant to Rule 401, SCRE, Rule 403, SCRE, and Rule 404(b), SCRE. See R. 51, l. 11 – 67, l. 5; R. 88, l. 16 – 89, l. 19 ("[T]he specifics of what actually happened in the car, bear no real relation to proving the elements of attempted murder. . . . They're not relevant to proving assault while resisting arrest, and . . . there

not relevant to proving assault and battery in the first degree. Why he [Roger Goden] became involved is the issue, not what happened in the car."); R. 217, l. 25 – 218, l. 2. ("I don't know how many times I can say it. This is not a domestic violence case."). Yet for whatever reason, the judge inconsistently ruled that the clerk's statement was admissible. This was error.

Not only was the evidence not relevant, but it was also extremely prejudicial to Appellant and had zero probative value. For the same reasons the evidence was not relevant, it was also not probative. The allegation that Appellant pulled Jennifer Hill's hair and choked her before she fled the car had absolutely no bearing on whether Appellant was guilty of the attempted murder of Roger Goden or of the assault and battery of Trenton Brown. However, the evidence was unfairly prejudicial to Appellant because it was improper propensity evidence as well as bad character evidence. It suggested to the jury that because Appellant committed domestic violence moments before, he was also guilty of attempted murder and assault and battery. It also made Appellant appear to be a bad person. Consequently, the evidence should have been excluded pursuant to Rule 403, SCRE.

Respectfully, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

2.

The trial judge abused his discretion by admitting portions of the video from Officer Zachary Rutan's body worn camera that occurred after Appellant was arrested and placed in handcuffs since the evidence was not relevant to the offense of assault on an officer while resisting arrest and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE.

Relevant Facts

Appellant moved pretrial to exclude the portion of the video from Officer Rutan's body worn camera that occurred after Appellant was arrested and placed in handcuffs. Defense counsel argued the evidence was not relevant and any probative value was "far outweighed" by "the prejudicial impact." R. 68, l. 9 – 69, l. 24. He explained that Appellant was indicted for two counts of assault on an officer while resisting arrest. The indictment alleged Appellant "hit, beat, or attempted to wound" two separate officers. R. 68, l. 18 – 69, l. 8. Consequently, counsel asserted that the events which occurred after the arrest had been completed should be excluded. R. 69, ll. 15-24. He maintained, "[W]hat they're [the state is] trying to do is say, okay, well, we have a hit, but how can we make Mr. Hill [Appellant] look worse, oh wait, he says a bunch of [vile], nasty stretch [sic] to all of the officers out there, not just these two who are hit which goes in the face of what's actually mentioned in the indictment. It's not necessary. A lot of it occurred after the arrest has already been completed." R. 69, ll. 9-17.

The assistant solicitor asserted that Appellant was charged with "not just beating or wounding an officer," but also "assaulting" an officer. "Assaulting" includes "threats that are made." Therefore, the solicitor argued that "any threats that were . . . made while transporting him [Appellant] to the jail and while trying to place him in the car, that would be continuing of a resisting arrest and the assaulting of an officer." R. 70, ll. 1-11. She further maintained that

Appellant threatened to kill Officer Rutan while Appellant was being transported to the jail and then threatened Officer McKnight when he got out of the patrol car at the jail. According to the solicitor, "those statements and those threats" constitute assault. R. 70, ll. 11-22.

In brief response, defense counsel contended that "case law on assaults . . . specifically require[s] a present ability to carry out the assault." R. 70, l. 24 – 71, l. 2.

The trial judge ruled that the events captured on the body camera footage that occurred before Appellant was placed in the patrol car were admissible. R. 71, ll. 4-24. He determined that Appellant's "actions at the scene prior to being placed in the vehicle" were relevant as to "whether he knew or should have known these folks were law enforcement officers," an "element of the offense charged." Specifically, the judge referenced Appellant's repeated requests to be advised of his *Miranda* rights. R. 71, ll. 4-24.

Based on the judge's ruling, the assistant solicitor indicated she would publish the body camera video, which was marked as State's Exhibit No. 38, starting at "the 2 minute mark" until "the 16 minute and 45 second mark." R. 72, l. 25 – 73, l. 18. The first two minutes of the video show Officer Rutan questioning the clerk of another convenience store about whether he had seen anyone matching Appellant's description. R. 73, ll. 3-13; See State's Exhibit No. 38.

Appellant made a contemporaneous objection when the exhibit was entered into evidence and published to the jury. R. 278, l. 20 – 279, l. 23. In his posttrial motion for a new trial, Appellant also argued that the erroneous admission of the portion of the video after Appellant was arrested and placed in handcuffs was grounds for a new trial. R. 461. The judge denied the motion based his prior ruling on the record. R. 466.

Standard of Review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265

(2006) (citing State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. (citing State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)).

Discussion

The trial judge abused his discretion by admitting a portion of the video from Officer Zachary Rutan's body worn camera that occurred after Appellant was arrested and placed in handcuffs since the evidence was not relevant to the offense of assault on an officer while resisting arrest, or for any other purpose, and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE.

"All relevant evidence is admissible." Rule 402, SCRE; See State v. Pagan, 357 S.C. 132, 142, 591 S.E.2d 646, 651 (Ct. App. 2004). "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." Pagan, 357 S.C. at 142, 591 S.E.2d at 651 (citing In re Corley, 353 S.C. 202, 577 S.E.2d 451 (2003)).

The events captured on Officer Rutan's body camera after Appellant was arrested and placed in handcuffs had no bearing on whether Appellant resisted arrest or assaulted an officer while resisting arrest. The trial judge found the evidence was relevant as to whether Appellant knew or should have known that Officers Rutan and McKnight, the subjects of the resisting arrest charges, were law enforcement officers since Appellant repeatedly requested the officers advise him of his *Miranda* rights. However, at the time Appellant made such requests, he was already

under arrest. Consequently, the evidence was not relevant to whether Appellant knew the men were officers at the time of the alleged assaults.

Even if the evidence was relevant, it should have been excluded pursuant to Rule 403, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) (citing State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146 (1991)). While the evidence may have had some probative value, it was extremely limited. On the other hand, the evidence was unduly prejudicial because it showed Appellant in a belligerent state and was riddled with profanity. Simply put, it reflected poorly on Appellant's character and was meant to inflame the jury. Moreover, it suggested to the jury that Appellant was guilty for an improper reason. Because any probative value of the evidence was outweighed by the danger of unfair prejudice, the trial judge abused his discretion by failing to exclude the evidence pursuant to Rule 403.

Respectfully, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

3.

The trial judge erred by refusing to instruct the jury on the lesser included offense of second degree assault and battery when there was evidence upon which the jury could have found Appellant committed only the lesser offense instead of the indicted offense of attempted murder.

Relevant Facts

Appellant requested the trial judge charge numerous lesser included offenses. As to the attempted murder of Roger Goden, Appellant requested the judge charge assault and battery of a high and aggravated nature (ABHAN), first degree assault and battery, and second degree assault and battery. R. 375, l. 17 – 376, l. 7.

The assistant solicitor opposed the trial judge charging any lesser included offenses whatsoever since Appellant's defense was accident. R. 376, l. 10 – 377, l. 17. She asserted, "Your Honor, since they're [the defense is] saying that it was an accident so he's innocent of everything . . . if it's an accident and he's innocent of everything, how can he be guilty of assault and battery first degree or ABHAN or second degree. It's all or nothing. They're claiming all or nothing defense. They can't say, oh, but I want the lesser includeds." R. 377, ll. 10-17.

Citing to State v. Williams, 427 S.C. 148, 829 S.E.2d 702 (2019), the judge correctly stated the standard that must be applied when determining whether to charge a lesser included offense: "the trial court is required to charge a jury on a lesser included offense if there is any evidence from which it could be inferred that the lesser rather than the greater offense was committed." R. 377, ll. 18-24. He found that if the jury rejected Appellant's accident defense and further found the state failed to prove Appellant had a specific intent to kill, an element of attempted murder, then it could find Appellant guilty of one of the lesser included offenses. Consequently, the judge properly rejected the state's argument. R. 377, l. 24 – 378, l. 24. He agreed to charge the lesser included offenses of assault and battery of a high and aggravated nature and first degree assault

and battery. R. 381, ll. 6-8. However, he erroneously refused to charge second degree assault and battery. The judge found there was no evidence Goden's "injury was anything less than great bodily injury" and, therefore, there was no evidence to support a charge on second degree assault and battery. R. 381, ll. 8-16.

Standard of Review

"In reviewing jury charges for error, we examine the trial court's charge as a whole in light of the evidence and issues presented at trial." State v. Williams, 427 S.C. 148, 156, 829 S.E.2d 702, 706 (2019) (citing State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010)). "The trial court is required to charge a jury on a lesser-included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." Id. (quoting Suber v. State, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007)) (internal quotation marks omitted); State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). "In determining whether the evidence requires a charge on a lesser-included offense, we view the facts in the light most favorable to the defendant." Id. (citing State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996)).

Discussion

The trial judge erred by refusing to instruct the jury on the lesser included offense of second degree assault and battery when there was evidence upon which the jury could have found Appellant committed only the lesser offense instead of the indicted offense of attempted murder.

Attempted murder is codified in S.C. Code Ann. § 16-3-29, which states in relevant part, "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." The "degrees of assault and battery are, in descending order of severity, assault and battery of a high and aggravated nature (ABHAN), and assault and battery in the first, second, and third degrees." State v. Middleton, 407

S.C. 312, 315, 755 S.E.2d 432, 434 (2014) (citing S.C. Code Ann. § 16-3-600). "Under the statute, ABHAN is a lesser-included offense of attempted murder." Id. (citing § 16-3-600(B)(3)). "Assault and battery in the first degree is a lesser-included offense of both attempted murder and ABHAN." Id. (citing § 16-3-600(C)(3)). "Further, assault and battery in the second and third degree are each lesser-included offenses of every preceding offense." Id. (citing § 16-3-600(D)(3) and § 16-3-600(E)(3)).

Section 16-3-600(D)(1) states in relevant part, "A person commits the offense of assault and battery in the second degree if the person unlawfully injuries another person, or offers or attempts to injure another person with the present ability to do so, and: (a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted." Moderate bodily injury is defined as "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, slinters, or any other minor injuries that do not ordinarily require extensive medical care." S.C. Code Ann. § 16-3-600(A)(2).

Based on the evidence presented, the jury could have found Appellant unlawfully injured Roger Goden, the subject of the attempted murder charge, and that "moderate bodily injury" resulted. Goden testified that his finger was "bust open real bad" from being caught between Appellant's car and Trenton Brown's car. R. 134, ll. 12-16. His foot was also injured. He suffered a "gash" that was "down to the bone" and burns caused by his foot scraping against gravel. R. 136, l. 21 – 138, l. 14. Goden also had a burn on his leg from the radiator of one of the vehicles. R. 138, ll. 4-14. He was transported to the hospital by ambulance. R. 139, ll. 10-15. Goden testified

that he had two surgeries on his foot. His first surgery occurred that same morning. After four days, he was released from the hospital. However, he was readmitted several days later and underwent a second surgery after his foot became infected because the surgeon failed to remove all the gravel from the wound. R. 137, ll. 1-23. Goden also had to have skin grafts on his foot and wear a "wound vac" for eight to nine months to prevent infection. R. 137, ll. 1-8.

When viewed in the light most favorable to Appellant, the jury could have found Goden's injuries constituted "moderate bodily injury" as they involved "temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ" and needed "medical treatment" which "require[d] the use of regional or general anesthesia." See S.C. Code Ann. § 16-3-600(A)(2); see also State v. Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014) ("In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant.").

Accordingly, if the jury concluded Appellant acted without malice and without a specific intent to kill, it could have found him guilty of the lesser included offense of second degree assault and battery. Consequently, the trial judge erred by refusing to instruct the jury on this lesser included offense. Respectfully, this Court should reverse Appellant's convictions and sentence and remand for a new trial. See State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993) (charge must be given if there is any evidence to support it; trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence); State v. Crosby, 355 S.C. 47, 53, 584 S.E.2d 110, 113 (2003) (same).

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully Submitted,

Lara M. Caudy
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Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of September, 2022.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 29, 2022

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