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Apr 18 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Beaufort County
Court of General Sessions
The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2021-001254

THE STATE,

Respondent,

v.

DEMETRIUS DEON THOMPSON,

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	3
STANDARD OF REVIEW	5
ARGUMENT	6
I. The trial judge correctly refused to instruct the jury on the lesser included offenses of first-degree and second-degree assault and battery because a jury could not find Appellant guilty of these offenses when there was evidence of injury, and that injury was great bodily injury	6
CONCLUSION.....	13

TABLE OF AUTHORITIES

Cases

State v. Bowers, 428 S.C. 21, 832 S.E.2d 623 (2019) 5

State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976) 10

State v. Geiger, 370 S.C. 600, 635 S.E.2d 669 (2006) 11

State v. Johnson, 119 N.E.3d 914, 2018 -Ohio- 3670 (2018)..... 11

State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014)..... 8, 9, 10

State v. Williams, 427 S.C. 148, 829 S.E.2d 702 (2019)..... 5

State v. Workman, 437 S.C. 62, 876 S.E.2d 151 (Ct. App. 2022)..... 12

State v Stukes,416 S.C. 493, 787 S.E.2d 480 (2016)..... 5

Statutes

S.C. Code Ann. § 16-3-29 (Supp. 2019)..... 9

S.C. Code Ann §16-3-600(D)(3) 11

S.C. Code §16-3-600..... 8, 9, 10, 12

S.C. Code §16-3-600(B)(1)(b)..... 11

S.C. Code §16-3-600(A)(1) 11

Rules

Rule 211(b), SCACR 3

STATEMENT OF ISSUE ON APPEAL

The trial judge correctly refused to instruct the jury on the lesser included offenses of first-degree and second-degree assault and battery because a jury could not find Appellant guilty of these offenses when there was evidence of injury, and that injury was great bodily injury.

STATEMENT OF THE CASE

Appellant was indicted in May 2021 for attempted murder and in September 2021 for possession of a weapon during the commission of a violent crime. Appellant proceeded to a jury trial October 20-21, 2021, in Beaufort County in front of the Honorable Carmen T. Mullen. Melissa G. Rogers, Esquire, represented the Appellant. The jury found Appellant guilty as charged. He was sentenced to twelve years for the attempted murder and five years for the weapons charge to be served concurrently. This appeal follows.

STATEMENT OF FACTS

On December 5, 2020, Michael Gargiulo of the Beaufort County Sherriff's Office (BCSO) responded to a call about a female victim stabbed in the neck. (R. 51-52). Paramedics responded to the scene and found a female victim lying in front of the house holding her neck. (R. 47). Katie Foskey, the paramedic, testified that the injury was a deep four-inch laceration, and that she could see the Victim's "gross anatomy," specifically her "veins and carotid." (R. 48).

Officers Daniel Mooney and Nicolas Thomas (BCSO) also arrived at the scene and were told that the suspect was a "black male wearing a green sports-like jacket." (R. 60). Tiffany Thompson-Betanco (Appellant's sister) testified that Appellant came in to her house and told her that he had messed up and needed her to drive him off Lady's Island. (R. 67). As they were leaving, they came across the ambulances and Appellant told his sister that he was going to turn himself in. (R. 70). Mooney testified that he and Thomas observed a black sedan coming down the street and that a man matching the suspect's description exited the vehicle and approached officers with raised hands. (R. 60).

Officer Robert Byrd (BCSO) conducted an interview of Appellant. Appellant was Mirandized and gave a verbal and written statement. (R. 81, State's Exhibit 52). Appellant stated that he and Victim, Joelette Holloway, had been staying together at the hotel and partying all night. (State's Exhibit 52). Victim was supposed to pay for another night at the Super 8, but Appellant was awakened by the housekeeper saying he needed to leave and Victim was already gone. (State's Exhibit 52). Appellant stated that he walked about an hour and a half from the Super 8 to Rue Du Bois Lane, where the incident occurred, to ask Victim for the money. (R. 86, State's Exhibit 52). Byrd testified Appellant told him he was clenching the razorblade used to stab Victim during the entire walk. (R. 86). Appellant stated that when he arrived at the Victim's

house, he asked her for the money and when she told him to talk to her mom he got angry. (State's Exhibit 52). Appellant said after a few words, Victim "swung on me" and he responded by taking the razorblade to the back of her neck." (State's Exhibit 52). No injuries were observed on Appellant. (R. 88).

A canine search of the incident location was conducted. (R. 61). The dog alerted to a trash bag located roughly 400 yards from where the incident occurred. (R. 61). In the trash bag, a jacket and pants were found that Appellant was wearing earlier in the day. (R. 61-65, 121). Byrd and Appellant went to the scene following the interview because Appellant stated he had thrown the razorblade, but it had yet to be located. (R. 89). Appellant told officers a particular area to search, but officers were unable to find it that day. (R. 89). Officers conducted a line search the next day and the razorblade was located then. (R. 90-91). Byrd testified that when the razorblade was located it had been closed or folded up. (R. 91). Swabs from the jacket and blade matched both the Victim and Appellant. (R. 171-173).

STANDARD OF REVIEW

“In reviewing jury charges for error, [The Supreme Court] 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) “When reviewing a jury charge for error, an appellate court considers the charge as a whole; the charge must be prejudicial to the appellant to warrant a new trial.” State v Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016). “But an instruction must be erroneous and prejudicial to warrant reversal.” State v. Bowers, 428 S.C. 21, 28, 832 S.E.2d 623, 627 (2019).

ARGUMENT

- I. **The trial judge correctly refused to instruct the jury on the lesser included offenses first degree and second degree assault and battery because a jury could not find Appellant guilty of these offenses when there was evidence of injury, and that injury was great bodily injury.**

Appellant argues the trial judge erred by refusing to instruct the jury on the lesser included offenses of first degree and second degree assault and battery. Appellant seems to argue that assault and battery 1st degree should have been charged, however if the assault and battery 1st degree charge requires an injury than the trial judge erred in charging assault and battery 2nd degree because it does not require an injury. Appellant further argues that assault and battery 2nd degree should have been charged because the jury could have found that the injury was moderate bodily injury and not great bodily injury. Appellant's argument lacks merit because assault and battery 1st degree does not require an injury and an injury was found. Further, the injury that occurred was great bodily injury and not moderate bodily injury which is required for assault and battery 2nd degree.

Relevant Facts

After the jury rested Appellant requested a jury instruction for the lesser included offense of assault and battery 1st degree (R. 182). The State argued that the 1st degree charge was improper and that if a lesser included was to be given it should be assault and battery of a high and aggravated nature (ABHAN) (R. 182-188). The following exchange took place:

State: Assault and battery first is not appropriate because we have an injury and as directly contemplated by the statute itself when it says, offers or attempts. He was successful on his offer or attempt if you want to characterize it that way. He accomplished his goal of injuring her, which is outside of assault and battery first. How I look at assault and battery first is if somebody shoots a gun at somebody and misses—

Court: Misses, uh-huh.

State: -- that's an assault and battery first because there is no injury. If they would have hit them, that's ABHAN. Then a potential attempted murder if I can prove specific intent. But we don't have assault and battery first here. We have malice. We have specific intent. We've charged him with attempted murder. At best, we have ABHAN.

Court: I think we have an attempted murder case or assault and battery of a high and aggravated nature case.

(R. 188).

The trial judge then states she is going to charge attempted murder and ABHAN. (R. 189). Prior to charging the jury, Appellant asked for an assault and battery 2nd degree charge. (R. 193). The trial judge responded

If I charge that, I have to do assault and battery in the first degree, so it goes all the way down the line. It's already assault and battery in the second degree if the person commits the offense of assault and battery in the second degree if a person unlawfully injures another person or offers or attempts to injure another person and either moderate bodily injury to another person results or moderate bodily injury to another person could have resulted.

Moderate bodily injury means physical injury that involves prolonged loss of consciousness or the cause is temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ or injury that requires medical treatment and the treatment requires the use of regional or general anesthesia. Moderate bodily injury does not include one-time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, splinters or any other minor injuries that do not ordinarily require extensive medical care.

(R. 193-194). The State argued that the injury that occurred in this case was not moderate bodily injury, so it was not an appropriate charge. (R. 194). The State further argued that to charge 2nd degree, 1st degree needed to be charged and that had already been determined inappropriate. (R. 194).

The trial judge addressed concerns about the moderate versus great bodily injury, pointing out that she was not at trial, therefore the permanent disfigurement could not be seen and a medical expert did not testify to it. (R. 195). The trial judge also stated concerns that

having the jury go through attempted murder, ABHAN, assault and battery first, and assault and battery second was a lot. (R. 196).

The next day the State brought State v. Middleton¹ to the court's attention in support of not instructing assault and battery 1st degree stating that "according to this case, it was proper for the Court not to have charged assault and battery first degree as a result of Victim suffering an injury." (R. 198). Appellant responded arguing unlike in Middleton where the Supreme Court found that although not charging the lesser included was error, it was harmless because the jury could only reach one conclusion, here the jury had the ability to reach more than one conclusion because there was no testimony from the Victim and no testimony from the physician. (R. 199). Ultimately the trial judge ruled that she was not going to charge 1st degree or 2nd degree but would charge attempted murder and ABHAN. (R. 202).

Assault and Battery 1st degree

Appellant argues the trial judge erred in refusing to charge the jury assault and battery first degree, arguing that it is a lesser included offense of the attempted murder, for which he was being tried. S.C. Code §16-3-600 provides:

(C)(1) A person commits the offense of assault and battery in the first degree if the person unlawfully:

- 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 (Supp. 2019). Assault and battery first is completely inapplicable in this case and should not have been given because there was an injury that occurred while first

¹ State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014)

degree assault and battery is the offer or attempt. State v. Middleton clarified that first degree assault and battery under section (C)(1)(b) does not require an injury. State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014). Here, there is clearly an injury, and, therefore, the trial judge did not err in refusing to give the first degree assault and battery charge because a jury could not have found Appellant guilty of the lesser rather than the greater offense of ABHAN which was charged.

Assault and Battery Second Degree

Appellant argues that the trial judge erred in refusing to charge assault and battery second degree. Appellant argues that second degree should have been charged because the jury could have found that Victim's injury was a moderate bodily injury as opposed to the great bodily injury required in the ABHAN charge. At trial the jury was charged with attempted murder and ABHAN. South Carolina law defines attempted murder:

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.

S.C. Code Ann. § 16-3-29 (Supp. 2019). Section 16-3-600 of the Code of Laws of South Carolina provides:

(A) For purposes of this section

(1): "Great Bodily Injury" means bodily injury which causes a substantial risk of death or which causes serious permanent disfigurement or protracted loss of impairment of the function of a bodily member or organ.

(2): "Moderate Bodily Injury" means physical injury that involves prolonged loss of consciousness, or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ, or injury that requires medical treatment when the treatment requires the use of regional or general

anesthesia or injury that results in a fracture or dislocation. Moderate bodily injury does not include one-time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that do not ordinarily require extensive medical care.

(B)(1) A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and:

(a) Great bodily injury to another person results; or

(b) The act is accomplished by means likely to produce death or great bodily injury.

...

(D)(1) A person commits the offense of assault and battery in the second degree if the person unlawfully injures 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; or

(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 (Supp. 2019).

A trial judge's determination of what law should be charged is made from the evidence presented. State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976). "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). Assault and battery in the second degree is a lesser-included offense of attempted murder, assault and battery of a high and aggravated nature, and assault and battery in the first degree. (S.C. Code Ann. §16-3-600(D)(3)).

“The [circuit court] is to charge the jury on a lesser included offense if there is any evidence from which the jury could infer that the lesser, rather than the greater, offense was committed.” Id. “To justify charging the lesser crime, the evidence presented must allow a rational inference the defendant was guilty only of the lesser offense.” State v. Geiger, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (2006). The trial court should refuse to charge the lesser included offense where there has been no evidence tending to show the defendant may have committed solely the lesser offense.” Id. In order for the defendant to commit solely the lesser offense of assault and battery second degree, the wound on the victim would have to be categorized as moderate bodily injury instead of great bodily injury S.C. Code §16-3-600(B)(1)(b).

A great bodily injury is described as an injury that causes a substantial risk of death. (S.C. Code §16-3-600(A)(1). “A substantial risk of death” does not mean that the injury must result in death. Although South Carolina has not defined substantial risk, Ohio has defined it as “a strong possibility, as contrasted with a remote or even a significant possibility, that a certain result may occur, or that a certain circumstance may exist.” State v. Johnson, 119 N.E.3d 914, 923, 2018 Ohio 3670 (2018). Here, a photo of the injury was submitted to the jury. The photo is extremely graphic showing a roughly four-inch laceration to Victim’s neck where the Victim’s gross anatomy can be seen. (R. 47-48, State’s Exhibit 2). There was also testimony that the wound was deep, and you could see the Victim’s veins and carotid artery. (R. 48). The Victim could have bled out in seconds had the cut been a minor millimeter either direction and cut either her carotid artery or jugular vein. There is no way that a jury could find that the lesser charge of assault and battery second degree could have been found rather than the charge of ABHAN based on the great bodily injury that the Victim suffered. More importantly, as mentioned in S.C. Code §16-3-600(B)(1)(b), “the act is accomplished by means likely to produce death or great bodily injury.

Appellant intentionally took the knife to Victim's neck millimeters away from the carotid artery and jugular vein which is highly likely to produce death and great bodily injury. Therefore, the jury could not find Appellant guilty of the lesser charge rather than the charge of (ABHAN). Therefore, the trial judge properly refused to instruct the jury on the lesser included offense of assault and battery second degree.

Further, as evidenced by the conviction, the jury did not even get to the determination of the bodily injury. The jury convicted Appellant of attempted murder finding that he had the specific intent to kill which is not a requirement of ABHAN. The jury had the option of a lesser included and chose to convict Appellant of attempted murder. See State v. Workman, 437 S.C. 62, 876 S.E.2d 151 (Ct. App. 2022). Therefore, the trial judge did not err in refusing to give the charge of assault and battery 2nd degree.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL


The undersigned certifies that this Final Brief of Respondent 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."

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