STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KYLE MAURICE ROBINSON,

APPELLANT

APPELLATE CASE NO. 2019-001256

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to direct a verdict of acquittal on the charge of assault and battery in the first degree where the state failed to produce any evidence the complaining witness suffered an injury as required by the plain language of the statute?

STATEMENT OF THE CASE

On December 7, 2017, a York County grand jury indicted Appellant for criminal solicitation of a minor (2017-GS-46-05084). R. 240 - R. 241. On July 18, 2019, a York County grand jury indicted Appellant for assault and battery in the first degree (2019-GS-46-04368). R. 243 – R. 244. The state, represented by Erin Joyner, called the case to trial before the Honorable William McKinnon and a jury on July 22-24, 2019. R. 1. Jonathan Bonds and Melissa Inzerillo represented Applicant. R. 1. Ultimately, the jury found Appellant guilty as charged. R. 225, l. 20 – R. 226, l. 4. Judge McKinnon sentenced Appellant to five years imprisonment on each charge and ordered the sentences to be served concurrently. R. 239, ll. 11-15; R. 242; R. 245.

On July 26, 2019, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

"The determination of legislative intent is a matter of law." State v. Morgan, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (Ct. App. 2002). "Questions of statutory interpretation are questions of law, which [the reviewing courts] are free to decide without any deference to the court below." CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

"On appeal of the denial of a directed verdict of acquittal, [the appellate court] must look at the evidence in the light most favorable to the state." State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 777 (2011); see also State v. Hepburn, 406 S.C. 416, 429 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. Hepburn, 406 S.C. at 416, 429 S.E.2d at 409.

ARGUMENT

The trial judge erred in failing to direct a verdict of acquittal on the charge of assault and battery in the first degree where the state failed to produce any evidence the complaining witness suffered an injury as required by the plain language of the statute.

Relevant facts

State's case-in-chief

On July 27, 2017, sixteen-year old Minor was at home watching her ten-year old sister while her mother and grandparents, who also lived in the home, were at work. R. 11, l. 24 – R. 12, l. 1; R. 12, ll. 6-7; R. 12, ll. 12-19; R. 13, ll. 17-19. During the late afternoon, she and her sister were in her bedroom playing cards when they first noticed a car outside. R. 16, ll. 8-23. Minor went to the front door. R. 16, ll. 22-24. Appellant then got out of the car and greeted Minor. R. 17, l. 23 – R. 18, l. 1. Minor was well acquainted with Appellant because he was the father of her cousin, who was also living in the home at the time. R. 11, ll. 8-23; R. 12, ll. 6-9. After some small talk between the two outside of the home, Appellant asked if his daughter were home. R. 18, ll. 6-7. When Minor told him, his daughter was not there, Appellant asked to use the bathroom. R. 18, ll. 6-8. Minor readily agreed. R. 21, ll. 1-5.

Minor claimed that when she was showing him to the bathroom, he grabbed her. R. 21, ll. 15-22. Specifically, Minor explained that Appellant grabbed her "in front of [her] shirt." R. 23, ll. 3-4. Then, according to Minor, Appellant pulled her into the bathroom by her shirt. R. 23, ll. 11-13. She further claimed that Appellant's "hands [were] like on [her] neck." R. 23, ll. 16-17. She was clear he was not "choking" her. R. 23, ll. 17-18. Later, Minor would tell the jurors that Appellant had his left hand on her neck while his other hand was "just grabbing [her]." R. 25, ll. 14-18. In response to a leading question from the solicitor, Minor said his hand on her

neck was "uncomfortable", but it was not squeezing or trying to choke her. R. 25, ll. 23-25. The hand "was just like holding [her] in place." R. 25, l. 25 – R. 26, l. 3. Minor claimed that Appellant was grabbing her breasts, which she described as "squeezing." R. 27, ll. 5-12. Then, according to Minor, Appellant started tugging at her shorts and said, "I got $60 if you let me do you." R. 28, ll. 8-13.

Minor claimed she heard footsteps, which she assumed belonged to her sister. R. 31, ll. 13-18. When Minor heard these footsteps, Appellant stopped and ran from the bathroom. R. 31, ll. 15-18.

The case agent, Jerry Sanders, responded to Minor's home shortly after the encounter allegedly occurred. He looked at Minor's neck, and he saw no signs of any injuries. R. 108, ll. 10-20.

Motion for directed verdict

After the state rested its case, Appellant moved for a directed verdict on the charge of assault and battery in the first degree. R. 160, ll. 19-24. Appellant argued the state failed to present evidence of an injury. R. 160, ll. 21-24. According to Appellant, a plain reading of the statute called for "an actual injury" and "nonconsensual touching of person's private parts. It requires both." R. 161, ll. 10-13. To support his argument, Appellant pointed to the entire statutory scheme for offenses involving assaults and batteries. R. 161, ll. 17-25. Appellant noted that assault and battery of a high and aggravated nature required great bodily injury, which the legislature defined to include physical injuries. R. 161, ll. 19-22. Further, the legislature defined moderate bodily injury under assault and battery in the second degree to include only physical injuries. R. 161, ll. 22-24. Although the statutory scheme did not define "injury" alone, the other parts of the statute where injury was defined in the context of either "great" or "moderate,"

the legislature included only actual physical injuries. R. 161, ll. 17-25. Appellant noted that the legislature created criminal sexual conduct in the third degree as a criminal offense to cover situations in which a person was assaulted in a sexual way, but no injury resulted from the assault. R. 163, ll. 8-16. Appellant argued that injury is defined as "any physical harm or irritation or ailment even slight." R. 164, ll. 22-24.

The state argued that "the word injure within the statute" did not require "specific physical injury." R. 162, ll. 4-6. The state argued that the legislature's inclusion of "modifiers" to describe injury in other portions of the statute supported its position that "for purposes of defining the word 'injure' within the statute, that we are not looking for a specific finding of that bodily injury or physical injury, or the legislature would have said so." R. 162, ll. 4-23.

Ruling

Judge McKinnon concluded that "unlawful touching, a touching without permission is a legal injury." R. 165, ll. 3-5. His "read of the statute is that this provision is basically using the injury standard from A and B third," which meant it was "not bodily injury. It's not great bodily injury. It's just basic injury." R. 165, ll. 5-9. He was compelled to this conclusion because the statute did not use the phrase "bodily injury." R. 165, ll. 9-10. He acknowledged that interpreting the statute gave him "pause" and caused "confusion" because the statute had "two separate requirements." R. 166, ll. 13-23. In his view, a nonconsensual touching on a person's private parts as an injury." R. 166, ll. 15-17. He saw no purpose of adding the additional language in the statute of an injury and nonconsensual touching. R. 166, ll. 17-18. This was made clear when he explained that it was his "understanding [that] nonconsensual touching is an injury. Somebody being groped is an injury." R. 166, l. 24 – R. 167, l. 2. Ultimately, the judge ruled that "[l]acking further guidance from our Court of Appeals or Supreme Court [he was]

going to interpret injury in the tradition[al] legal sense that nonconsensual touching is a legal injury and does require some sort of vital injury to nonconsensual touching." R. 168, ll. 17-24.

Discussion

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against the

defendant was his fingerprint at the scene of the burglary. Likewise, the Lollis Court directed a verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. The Court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), the Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51. As explained by the Court, although our courts have abandoned the traditional circumstantial evidence jury charge, the language of the charge is instructive in making a directed verdict determination. The traditional charge provided:

> Every circumstance relied upon by the State be proven beyond a reasonable doubt; and … all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009)).

In State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Supreme Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the

state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the victim in a burn pile behind the home of Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim's home, and DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

The state alleged Appellant committed assault and battery in the first degree. R. 243 – R. 244. Specifically, the state alleged Appellant committed "the crime of assault and battery in the first degree against the victim, Minor, in that the defendant injured the victim 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 – R. 244. "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." S.C. Code Ann. § 16-3-600 (C)(1)(a)(i) (emphasis added).

The question is presented is whether the state presented any evidence that Appellant injured Minor *and* engaged in a nonconsensual touching of her private parts.

"Penal statutes are strictly construed against the state and in favor of the defendant." State v. Morgan, 352 S.C. 359, 365, 574 S.E.2d 203, 206 (2002). "The cardinal rule of statutory construction is to ascertain and effectual the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." Id. "Where the statute's

language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Id. "What a legislature says in the text of a statute is consider the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Id. (internal quotation omitted). Only "if the language gives rise to doubt or uncertainty as to legislative intent" may the construing court "search for that intent beyond the boards of the act itself." Morgan, 352 S.C. at 366, 574 S.E.2d at 206.

"The legislature's intent should be ascertained primarily from the plain language of the statute." Id. at 367, 574 S.E.2d at 207. "Words must be given their plain and ordinary meaning without resorting to subtle or forced constructions which limits or expands the statute's operation." Id. "When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning." Id. "The terms must be construed in context and their meaning determined by looking at the other terms used in the statute." Id. "Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law." Id. "Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction." Id.

The reviewing court must "seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless." Hinton v. South Carolina Dept. of Probation, Parole and Pardon Services, 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004). The court "must read the statute so that no word, clause, sentence, provision or

part shall be rendered surplusage, or superfluous." CFRE, LLC v. Greenville County Assessor, 395 S.C. 67,74, 716 S.E.2d 877, 881 (2011) (internal quotations omitted).

The Omnibus Crime Reduction and Sentencing Reform Act of 2010 (the Act) "substantially overhauled the state's criminal law." State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014). "Through the passage of the Act, the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses." Id. In place of these offenses, the Act codifies attempted murder in section 16-3-29 and four degrees of assault and battery in section 16-3-600." Id. "The new 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." Id.

The state charged Appellant with assault and battery in the first degree, which required the state prove Appellant unlawfully injured Minor and the injury involved nonconsensual touching of the private parts. There was not 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. The judge ruled the state was not required to prove an injury because the nonconsensual touching itself was an injury; however, 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. Nevertheless, the judge ruled in a way that made the "injure" language superfluous, in direct contradiction of 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. 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.

Thereafter, 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).

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(A)(1). In other words, the legislature contemplated a nonconsensual touching that did not involve an injury. Specifically, the Act provides that "[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 … (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). 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 the trial judge found, then there would *never* be an instance where there would be an attempt to injure involving a nonconsensual touching. The trial judge's ruling would render 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.

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). The statutory offense of assault and battery in the first degree found within section 16-3-600(

The plain language of S.C. Code Ann. § 16-3-600 (C)(1)(a)(i) requires the state to present some evidence of an injury. Further, the statutory construction as a whole supports this interpretation.

CONCLUSION

Appellant respectfully requests this Court direct a verdict of acquittal on the charge of assault and battery in the first degree based upon the state's failure to present evidence of an injury as required by the plain language of the statute.

s/*Susan B. Hackett*
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ATTORNEY FOR APPELLANT

This 18th of August, 2020.

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."

August 18, 2020.

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