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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Honorable Kristi Lea Harrington, Circuit Court Judge

LINDY LAMONT JONES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000975

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in refusing to grant a new trial based on ineffective assistance of trial counsel 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 but Petitioner was indicted for criminal sexual conduct second degree and there was no evidence that there was only an assault?

STATEMENT

In April of 2009, the Orangeburg County Grand Jury indicted Petitioner, Lindy Lamont Jones, for criminal sexual conduct [CSC] with a minor second degree and lewd act on a minor, indictments #05-GS-38-1816, 1817. (App. pp. 374-375). On June 8, 2009, Petitioner proceeded to jury trial before the Honorable James C. Williams, Jr. Mary Ford and Doug Mellard represented Petitioner at trial. Bryan Jeffries and Tommy Scott prosecuted the case. The jury found Petitioner not guilty of lewd act on a minor. The jury found Petitioner guilty of assault with intent to commit CSC with a minor, charged as a lesser included offense of CSC with a minor second degree. Judge Williams sentenced Petitioner to sixteen (16) years in prison. (App. p. 376). A timely notice of intent to appeal was served and the direct appeal perfected. Petitioner argued on direct appeal that the trial judge erred in charging assault with intent to commit CSC with a minor as a lesser included offense of CSC with a minor. (App. pp. 377-389). The Court of Appeals affirmed the conviction finding the issue was not preserved for appellate review. State v. Jones, Op. No. 2011-UP-396 (S.C.Ct.App. filed August 19, 2011. (App. pp. 406-407).

On September 12, 2011, Petitioner filed an application for post-conviction relief. (App. pp. 408-414). The State filed a return on February 14, 2012. (App. pp. 415-420). On October 31, 2012, an evidentiary hearing was held before the Honorable Carmen T. Mullen. Charles Williams represented Petitioner at the PCR hearing. Megan Harrigan represented the State. In a written order signed November 29, 2012, Judge Mullen denied relief and dismissed the application. (App. pp. 448-455). Petitioner filed a *pro se* motion to alter or amend on December 28, 2012. (App. pp. 456-457). PCR counsel filed a motion to alter or amend on January 11, 2013. (App. pp. 458-475). The State filed a return on January 15, 2013, arguing

that the motions to alter or amend should be dismissed because they were not timely filed and were without merit. (App. pp. 476-480). In a written order signed February 1, 2013, Judge Mullen found that the motions to alter or amend were not timely filed and alternatively found no basis to alter or amend. (App. pp. 481-485). In the order denying the motion to alter or amend the PCR judge specifically wrote, "This Court notes that if Petitioner desires to secure appellate review of the Order and the Order of Dismissal, a notice of appeal must be served within thirty days of the service of this Order." (App. p. 485). PCR counsel served the notice of intent to appeal on February 21, 2013, within thirty days of the order denying the motion to alter or amend. (App. pp. 486-487). The South Carolina Court of Appeals, however, dismissed the appeal as untimely on March 21, 2014. (App. pp. 494-495).

On May 14, 2014, Petitioner filed a second PCR application. (App. pp. 498-504). The State filed a return and partial motion to dismiss on August 14, 2017. (App. pp. 505-511). The State did not contest Petitioner's claim pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). On December 14, 2017, an evidentiary hearing was held before the Honorable Kristi Harrington. Jonathan D. Waller represented Petitioner at the PCR hearing. Ruston Neely represented the State. The State consented to Austin review. (App. p. 517, lines 22-24).

It appears from the public index that on May 7, 2018, Judge Harrington signed a consent order granting the right to seek belated appellate review. It appears, however, that this order was not sent to the parties and could not be located. As a result, pursuant to Rule 63, SCRCP, and with the consent of the parties and a certification of familiarity with the record, on August 18, 2021, the Honorable Diane S. Goodstein signed an amended consent order granting the right to seek belated appellate review. (App. pp. 520-525). On September 2, 2021, a timely notice of intent to appeal was served. An Austin petition and a separately filed petition for writ of

certiorari were filed on April 4, 2022. The State filed a return on August 19, 2022. On August 30, 2022, the South Carolina Supreme Court, pursuant to Rule 243(1), SCACR, transferred the case to the South Carolina Court of Appeals. On April 5, 2024, the South Carolina Court of Appeals granted the petition for writ of certiorari. This brief of petitioner follows.

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014))." Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

The PCR judge erred in refusing to grant a new trial based on ineffective assistance of trial counsel 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 but Petitioner was indicted for criminal sexual conduct second degree and there was no evidence that there was only an assault.

The State obtained indictments against Petitioner for lewd act on a minor with regard to a June 2005, alleged incident and criminal sexual conduct [CSC] with a minor second degree with regard to an August 2005, alleged incident. (App. pp. 374-375). The jury found Petitioner not guilty of lewd act on a minor but guilty of assault with intent to commit CSC with a minor, charged as a lesser included offense of the indicted offense of CSC with a minor second degree. There was, however, no evidence presented to support the assault charge only.

Prior to closing arguments the judge told the attorneys, "Alright, in regard to the charge, my standard charge, as you've all heard as far as reasonable doubt, credibility, burden of proof. And I'll charge the statute on lewd act and I'll charge the statute on CSC with a minor, and the lesser included, assault with intent to commit CSC with a minor. I'll charge general intent. What else had we talked about?" (App. p. 296, lines 8-15). Defense counsel failed to object to the judge charging the jury with assault with intent to commit CSC as a lesser included offense at this time.

The judge charged the jury with assault with intent to commit CSC with a minor as a lesser included offense of CSC with a minor second degree. (App. p. 340, lines 19-25). After the jury charge defense counsel told the judge, "We would just like to note for the record that we had previously objected to the charge of assault with intent to commit criminal sexual conduct." (App. p. 346, lines 17-20). Trial counsel moved for a new trial arguing, "It's our position that assault with intent to commit criminal sexual conduct with a minor should have never been

charged. We don't believe that there is any evidence to support a conviction on that particular charge, Your Honor." (App. p. 366, line 23 – p. 367, lines 1-3). The judge denied the motion for new trial. (App. p. 368, lines 1-10).

On direct appeal Petitioner argued that the trial judge erred in charging assault with intent to commit CSC with a minor as a lesser included offense of CSC with a minor. (App. pp. 377-389). Petitioner argued that assault with intent to commit CSC with a minor is not a lesser included offense of CSC with a minor second degree because the two offenses contain different elements. (App. p. 384). Petitioner argued that CSC with a minor second degree required a battery while assault with intent to commit CSC with a minor required an assault with intent to commit a sexual battery. (App. p. 385). Additionally, Petitioner argued that the two offenses required different mental states with assault with intent to commit CSC with a minor requiring a specific intent. (App. pp. 385-386).

The State first argued that the issue was not preserved for appellate review because trial counsel failed to contemporaneously object when the judge announced his intention of charging assault with intent to commit CSC with a minor. (App. p. 397). The State then argued that the objection after the charge failed to state a specific ground. (App. p. 398). The State then argued that the specific issue raised in the post-trial motion, that there was no evidence to support the charge, was different than the issue being raised on appeal. (App. pp. 398-399). The State then addressed the merits arguing that assault with intent to commit CSC with a minor is a lesser included offense of CSC with a minor. (App. pp. 399-401).

The Court of Appeals found that the issue was not preserved for appellate review writing:

> Lindy Jones appeals his conviction for assault with intent to commit criminal sexual conduct with a minor. Jones argues the trial court erroneously instructed the jury assault with intent to commit criminal sexual conduct is a lesser included offense of criminal sexual conduct with a minor in the second degree. We

> affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: Rule 20(b), SCRCrimP ("[T]he parties shall be given the opportunity to object to the giving [of] ... an instruction.... Any objection shall state distinctly the matter objected to and the grounds for objection. Failure to object in accordance with this rule shall constitute a waiver of objection."); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) (finding an issue is preserved for appellate review when it was raised to and ruled upon by the trial court, and the argument presented was on the same ground); and State v. Benton, 338 S.C. 151, 156–57, 526 S.E .2d 228, 231 (2000) (holding an issue regarding a jury charge is not preserved on appeal when appellant argued one ground at trial and argues another ground on appeal).

State v. Jones, Op. No. 2011-UP-396 (S.C.Ct.App. filed August 19, 2011. (App. pp. 406-407).

In the application for post-conviction relief Petitioner alleged that trial counsel was ineffective for failing to properly object to the jury charge. (App. p. 410). During the PCR hearing Petitioner testified, "Well, my attorney was ineffective at trial because my attorney failed to make a timely objection to the charge of assault with intent to commit, being charged as a lesser included of criminal sexual conduct second degree with a minor." (App. p. 427, lines 8-12). Petitioner argued that there was no evidence to support the charge of assault with intent to commit CSC with a minor. (App. p. 427, line 15 – p. 428, 429, lines 1-12). In a statement to police that was admitted in evidence at trial Petitioner admitted engaging in sexual intercourse with the minor but believed that he was having sexual intercourse with his girlfriend. (App. p. 276, line 18 – p. 277, lines 1-23). As a result, there was no question that the battery required for CSC with a minor second degree took place. The question for the jury was whether, as he told the police, Petitioner had sexual intercourse with the minor under the mistaken belief that he was having sexual intercourse with his girlfriend. There was no evidence to support a charge of assault with intent to commit criminal sexual conduct.

During the PCR hearing Petitioner also alleged ineffective assistance of counsel in failing to object because assault with intent to commit CSC with a minor is not a lesser included offense

of the indicted offense of CSC with a minor second degree. (App. p. 429, lines 20-22; p. 430, lines 14-20). "The test for determining when a crime is a lesser included offense is whether the greater of the two offenses includes all the elements of the lesser offense." Murdock v. State, 308 S.C. 143, 144, 417 S.E.2d 543, 544 (1992). CSC with a minor second degree, the greater offense, does not include all of the elements of assault with intent to commit CSC with a minor.

In State v. Sosbee, 371 S.C. 104, 109, 637 S.E.2d 571, 573 (Ct. App. 2006), the South Carolina Court of Appeals wrote:

> An assault with intent to commit criminal sexual conduct with a minor in the first degree is more aptly designated as an "attempt" to commit criminal sexual conduct with a minor. See State v. LaCoste, 347 S.C. 153, 165–66, 553 S.E.2d 464, 471 (Ct.App.2001) ("Assault is an **attempted** battery or an 'unlawful **attempt** or offer to commit a violent injury upon another person, coupled with the present ability to complete the attempt or offer by a battery.' " (emphasis added) (quoting State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000))); *see also* 6 Am.Jur.2d *Assault & Battery* § 1 (1999) (defining assault as the "intentional **attempt** by a person, by force or violence, to do an injury to the person of another, or as any **attempt** to commit a battery, or any threatening gesture showing in itself or by words accompanying it an immediate intention, coupled with a present ability, to commit a battery"); *Black's Law Dictionary* 109; 123 (7th ed. 1999) (defining assault as an "**attempt** to commit battery, requiring the specific intent to cause physical injury;" and defining attempt as "an overt act that is done with the intent to commit a crime but that falls short of completing the crime").

The assault with intent to commit CSC with a minor, charged as a lesser included offense in this case, should be treated as an attempt.

In State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001), the South Carolina Court of Appeals wrote:

> Attempt crimes are generally ones of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime. State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000). "In the context of an 'attempt' crime, specific intent means that the defendant consciously intended the

> completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant's purpose." Id. at 397, 532 S.E.2d at 285 (citing United States v. Calloway, 116 F.3d 1129 (6th Cir.1997)).

Assault with intent to commit CSC with a minor, as an attempt crime, requires specific intent. CSC with a minor second degree, the greater of the two offenses, does not require specific intent. Assault with intent to commit CSC with a minor is not a lesser included offense of CSC with a minor second degree.

If assault with intent to commit CSC with a minor is **not** a lesser included offense of CSC with a minor second degree, as argued on direct appeal but found unpreserved, trial counsel was ineffective in failing to timely object to the charge. If assault with intent to commit CSC is a lesser included offense of CSC with a minor second degree, trial counsel was also ineffective for failing to timely object because the State failed to present evidence that Petitioner was only guilty of the lesser offense. There was no evidence to support the charge of assault.

In the order of dismissal the PCR judge wrote:

> The Applicant has failed to prove that either trial counsel Mellard or Ford were ineffective in their representation of the Applicant for failing to properly object to the jury charge of assault with intent to commit criminal sexual conduct with a minor. Mellard objected to the assault with intent to commit criminal sexual conduct with a minor charge both on and off the record. Additionally, Mellard made a post-trial motion for a new trial based on the assault with intent to commit criminal sexual conduct with a minor charge and stated specific grounds on the record. Mellard and Ford testified that they believed that Mellard's objections properly preserved the issue for appeal. This Court finds that Counsel's performance was reasonable and effective.

(App. p. 453). The PCR judge erred. The specific objection that the evidence did not support the charge of assault with intent to commit CSC with a minor was only made during the post-trial motion and the Court of Appeals found that the issue was not preserved for appellate review.

The PCR judge additionally found that Petitioner failed to establish prejudice writing:

> Applicant testified that the State proved beyond a reasonable doubt that a sexual battery took place. Additionally, he testified that [he] was involved in a sexual encounter with the minor victim. Mellard testified that he believes there was sufficient evidence to convict Applicant of criminal sexual conduct with a minor, as well as the lesser included offense of assault with intent to commit criminal sexual conduct with a minor. Therefore, this Court finds that this allegation of ineffective assistance of counsel must be denied and dismissed.

(App. p. 453). The PCR judge again erred.

During the PCR hearing Petitioner confirmed that in a statement to the police he admitted engaging in sexual intercourse with the minor but believed that she was his girlfriend. (App. p. 428, lines 10-19; p. 433, lines 4-12; p. 276, line 18 – p. 277, lines 1-23). When trial counsel Mellard was asked if he believed the evidence at trial warranted the charge of assault with intent to commit CSC second trial counsel answered, "Judge Williams thought it did. I probably thought it did. But my thing is, I don't like to give the jury a lot of different options. You know, if it's a certain case, I want them to either decide yes or no. I don't want to have where they can split the baby, so if they split the baby, I usually split the baby, so I like all or nothing trials." (App. p. 435, lines 16-22). Trial counsel's testimony reflects that he was not in favor of the assault with intent to commit CSC with a minor jury instruction because he did not want the jury to "split the baby." Trial counsel indicated he preferred an all or nothing approach. Trial counsel confirmed that he argued in the post-trial motion that the facts did not support the charge for assault with intent to commit CSC with a minor. (App. p. 436, line 24 – p. 437, lines 1-3). Petitioner was prejudiced by trial counsel's failure to timely object to the charge based on the fact that the evidence did not support the charge. As there was no evidence of an assault with intent to commit CSC with a minor, the jury should only have decided if Petitioner had sexual intercourse with the minor under the mistaken belief that he was having sexual intercourse with his girlfriend.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective for failing to timely object to the jury instruction for assault with intent to commit CSC with a minor when there was no evidence to support the charge. In Cook v. State, 415 S.C. 551, 559, 784 S.E.2d 665, 669 (2015), the South Carolina Supreme Court found that the trial court erred in charging the jury with the lesser-included offense of voluntary manslaughter because there was no evidence that the defendant was acting in the sudden heat of passion. The Court wrote:

> "The law to be charged to the jury is determined by the evidence presented at trial." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "[D]ue process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." Hopper v. Evans, 456 U.S. 605, 611, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982). "The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the

> evidence." Id. Here, the evidence presented at trial indicates Cook either shot Victim with malice or in self-defense.

Cook, 415 S.C. at 559, 784 S.E.2d at 669. In the present case, if trial counsel had made a timely objection to the assault with intent to commit CSC with a minor charge, the trial judge would have erred in giving the charge because the evidence did not warrant an assault charge. The evidence in the present case indicates that either Petitioner had sexual intercourse with the minor under the mistaken belief that he was having sexual intercourse with his girlfriend or not. Either way, the evidence indicates a battery, not an assault.

In response to the post-trial motion for a new trial based on the judge charging the jury with assault with intent to commit CSC with a minor, the prosecutor argued, "There was, I think, there was several questions that were asked regarding penetration, whether or not it was sufficient 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, lines 18-25). The judge agreed stating, "Alright, sir, I agree. 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. And as far as the other motions that you've made, I would deny your motion to change any of those decisions or rulings that I previously made in the court." (App. p. 368, lines 1-10). Contrary to the argument made by the prosecutor, there is no evidence in the record to suggest that penetration did not occur. The testimony from the minor, Petitioner's statement to police, and the doctor who testified that she observed a tear of the fossa navicularis (App. p. 218, lines 11-13) all indicate penetration.

S.C. Code Ann. § 16-3-656 provides that, "Assault with intent to commit criminal sexual conduct described in the above sections shall be punishable as if the criminal sexual conduct was committed." S.C. Code Ann. § 16-3-655(B)(1) and (2) provide:

> A person is guilty of criminal sexual conduct with a minor in the second degree if:
>
> 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
>
> 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. However, a person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in consensual sexual conduct with another person who is at least fourteen years of age.

S.C. Code Ann. § 16-3-651 defines sexual battery 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." The evidence presented by the State, including the testimony of the minor, the statement by Petitioner, and testimony from the doctor established that a sexual battery or "intrusion, however slight," occurred. There was no evidence that only an assault occurred.

In State v. Fields, 356 S.C. 517, 522–23, 589 S.E.2d 792, 795 (Ct. App. 2003), the South Carolina Court of Appeals wrote:

> A trial judge is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred a defendant committed a lesser rather than a greater offense. State v. Mathis, 287 S.C. 589, 594, 340 S.E.2d 538, 541 (1986).
> Conversely, a trial judge does not err by refusing to charge a lesser-included offense where there is no evidence tending to show that the defendant was guilty only of the lesser offense. State v. Murphy, 322 S.C. 321, 325, 471

S.E.2d 739, 741 (Ct.App.1996); State v. Funchess, 267 S.C. 427, 429, 229 S.E.2d 331, 332 (1976).

If trial counsel had requested a charge on assault with intent to commit CSC with a minor, the trial judge would have properly refused the request because there was no evidence that Petitioner only committed an assault. Trial counsel was ineffective for failing to timely object to the jury instruction on assault with intent to commit CSC with a minor.

Petitioner was prejudiced by the deficient performance. Petitioner was indicted for lewd act on a minor and CSC second degree with a minor. The jury found Petitioner not guilty of lewd act but guilty of assault with intent to commit sexual conduct with a minor, a charge unsupported by the evidence presented at trial. If the jury had been properly instructed only on CSC second degree with a minor, the charge supported by the evidence presented at trial, there is a reasonable probability that the jury would have accepted the mistake defense presented and found Petitioner not guilty. "[D]ue process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." Hopper v. Evans, 456 U.S. 605, 611, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982). Petitioner proved prejudice resulting from the failure to object to a jury charge on an offense not supported by the evidence.

CONCLUSION

Based on the above argument, this Court should reverse the conviction.

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This 1st day of May, 2024.