STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRELL FLOREZ,

APPELLANT

APPELLATE CASE NO. 2012-213369

ANDERS BRIEF OF APPELLANT

LARA M. CAUDY
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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in refusing to charge the jury on the lesser included charge of criminal domestic violence (CDV) when there was evidence of CDV since it was a question of fact whether the complainant's injuries constituted "serious bodily injury," whether the act involved a "deadly weapon," and whether Appellant acted in self-defense?

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant at the October 3, 2011 term of General Sessions for criminal domestic violence of a high and aggravated nature (CDVHAN). R. * His case was called to trial on October 25, 2012 before the Honorable Kristi L. Harrington, and a jury. Tr. 1. Martha Runey and Cantrell Frayer represented Appellant. Jessica Baldwin and Timothy Finch were the Assistant Solicitors. Tr. 2.

At the conclusion of the trial on October 26, 2012, the jury found Appellant guilty as indicted. Tr. 298, ll. 17-23. Judge Harrington sentenced Appellant to eight years. Tr. 308, l. 24 – 309, l. 3.

This appeal follows.

ARGUMENT

The trial court erred in refusing to charge the jury on the lesser included charge of CDV when there was evidence of CDV since it was a question of fact whether the complainant's injuries constituted "serious bodily injury," whether the act involved a "deadly weapon," and whether Appellant acted in self-defense.

Relevant Facts

Appellant, forty-one, and Roseanne Eaton, fifty, dated for a few months before Appellant moved into Eaton's mobile home. Tr. 62, ll. 15-19; Tr. 204, ll. 14-17. Their relationship started off "great," but after about eight months of living together, Eaton asked Appellant to move out of her home. She was no longer happy in the relationship and gave Appellant two weeks, until June 1, 2011, to find a new place to live. Tr. 62, ll. 20-23; Tr. 64, ll. 4-20.

On May 31, 2011, the day before Appellant was supposed to move out, Eaton testified she went to work as usual and, on her way home, she picked up Appellant from McDonald's. She suspected Appellant had been drinking because she "could smell it on him." Tr. 64, l. 21 – 65, l. 8. The two went home and watched television. Tr. 65, ll. 9-11.

Eaton decided she was tired and went to the bedroom to lie down around nine o'clock. She testified Appellant came into the bedroom around ten o'clock and attempted to push his way into bed with her. She refused to allow him to lay with her and told him to "leave me alone." Tr. 65, l. 24 – 66, l. 4. Eaton explained that she finally "just got aggravated with it" and grabbed her pillow and blanket and went to go lie down in the living room. Tr. 66, ll. 5-8. This "sparked" an argument.

Eaton testified she and Appellant began to argue back and forth. Tr. 66, l. 19-24. Appellant was standing behind her in the living room and was "twisting the body pillow." Tr. 67, ll. 1-12. Eaton alleged as she was making a bed on the floor, Appellant hit her from behind with the body pillow causing her to fall and hit her head on the floor. That's when she "knew that this was way out of control" and that "I had to get out of there." Tr. 67, l. 25 – 68, l. 5.

Eaton explained she then ran to her bedroom, grabbed her purse, and then walked to the kitchen to get her keys that were hanging on a shelf. Her daughter lived about ten minutes away and she planned to drive there to get help. Tr. 69, ll. 1-12.

As she was standing in the kitchen, she saw Appellant "get up off the sofa." He was holding an ottoman in his lap. Tr. 69, ll. 14-17. Eaton testified that before she knew it, Appellant had "come at me and held the ottoman up chest high and he had just totally rammed it into my face." Tr. 69, l. 23 – 70, l. 2. Eaton testified she fell to the ground and "almost felt myself go unconscious." Appellant then got on top of her and put one knee on her chest and one knee on her leg.

After she eventually "wrestled" her way out from under Appellant, Eaton explained she ran to the bedroom to look at her face in the mirror. Tr. 70, ll. 3-25. After looking in the mirror and noticing blood dripping from her mouth, Eaton determined she needed to go to the emergency room. Tr. 71, ll. 2-21. Appellant eventually responded that if Eaton was going to the emergency room then he was going with her. Tr. 72, ll. 6-18. When Appellant went to the bedroom to get dressed, Eaton left the home through the front door, started her vehicle, and drove to her daughter's home. Tr. 72, l. 19 – 73, l. 16.

When she got to her daughter's home, her daughter called 911 and she was eventually taken to the hospital by EMS where she received treatment for her injury. Tr. 83, l. 23 – 85, l. 14; Tr. 86, l. 1 – 87, l. 15. The doctors at the emergency room removed her front eight teeth—the top four and the bottom four—and put stitches on the roof of her mouth. Tr. 88, l. 18 – 89, l. 1. At the time of trial she had temporary dentures. Tr. 89, ll. 2-10. Eaton also claimed she had bruising on her chest and thigh where Appellant had placed his knees on top of her. Tr. 100, l. 21 – 101, l. 2.

Appellant's account of the events disputed much of what Eaton alleged. Appellant agreed that their relationship started off "fine," but that Eaton became controlling and suspected him of having a relationship with someone else. Tr. 204, l. 18 – 205, l. 10. They had an argument and Eaton asked him to move out. She gave him a couple of weeks until the end of the month to find a new place to live. Tr. 206, ll. 6-12. The night before he was supposed to move out is when this incident occurred.

Appellant testified the two were watching television in the front room when Eaton went to the bedroom to go lie down. After a while, Appellant also went to the bedroom to lie down. Tr. 206, ll. 18-25. As he was getting into bed, "she basically told me to get the fuck off me." Tr. 207, ll. 2-4. As a result, Appellant went back into the front room and laid on the couch where he had previously been watching television. Eaton eventually came back into the front room as well because that is where the window air conditioning unit is located and she began to put pillows on the floor. Tr. 207, ll. 5-11.

Appellant testified Eaton was upset about a "sexual episode" the two had had the day before or two days before. She was upset about "the way it went down." Tr. 207, ll. 11-22. "[S]he kept arguing to me about the sexual thing and I got tired of her and I hit her

with the pillow, the body pillow, from the couch. I just hit her in the head." Tr. 208, ll. 15-18. Appellant denied Eaton fell to the ground. Tr. 208, ll. 19-20. Eaton then returned to the bedroom.

Appellant explained that while Eaton was in the bedroom he heard a loud bump "like a stick was hitting the mattress" and he laid there "wondering what it was." Tr. 209, ll. 1-9. He was lying on the couch with his back to the bedroom when he heard Eaton walking back into the front room. He sat up and turned in her direction and saw Eaton coming towards him with a bat in her hand. Tr. 209, ll. 11-18. She was walking with "a purpose" and was "two steps" away from him. Tr. 232, l. 11 – 233, l. 9. He had seconds to react. Appellant testified he did not believe it was possible for him to duck out of the way of the bat. Tr. 240, ll. 17-23. He grabbed the ottoman and "threw it at her to knock this bat out of her hand." Before he "noticed that her lip was busted," he pushed her to ground. Appellant denied getting on top of Eaton. Tr. 209, ll. 19-25.

After he noticed Eaton was bleeding, Appellant helped her up and told her to go to the bathroom and put a towel on it. Tr. 210, ll. 6-9. While Eaton was in the bathroom, Appellant grabbed the bat and hid it behind the washer. Tr. 236, ll. 3-12. Eaton then said she was going to the emergency room and, after Appellant looked at her injury, he told her he would go with her. Tr. 211, ll. 7-20. While Appellant was getting dressed, Eaton took off without him. Tr. 211, ll. 21-24.

After Eaton left, Appellant decided to leave. He packed a bag, but before he could leave the police arrived at the home. Appellant refused to come out of the residence because he "knew they was going to arrest me." The SWAT team, a division of the

Charleston County Sheriff's Office, eventually entered the home several hours later and found Appellant hiding in the bedroom closet. Tr. 212, ll. 9-24.

Appellant testified that he was "very sorry that that happened. I had no intentions of hurting her to that degree. I just wanted to knock that bat out of her hands." Tr. 210, ll. 10-13. He further testified that "it's very much possible you can die from" being hit in the head with a bat. Tr. 241, ll. 14-25.

Kelly Lybrand, the oral surgeon who treated Eaton in the hospital, testified Eaton had swelling of the lips, tearing of the gum tissue, and mobility of her four upper and four lower front teeth. Those eight teeth were noted as "non-salvageable," meaning the teeth were too mobile to be saved with any form of treatment, and, as a result, Lybrand removed them. Tr. 127, l. 17 – 129, l. 23. There were no facial lacerations or facial fractures. Tr. 130, ll. 11-19. Lybrand testified that she would expect this type of injury to be caused by "some form of blunt force trauma" in a "straight forward" direction. Tr. 129, ll. 11-15. However, she acknowledged she had no way of knowing what type of object caused the injury. Tr. 130, ll. 20-25.

Thomas Kays, a general dentist, testified he treated Eaton approximately two weeks after the incident on June 13, 2011. Tr. 194, ll. 17-19. After assessing the injury, he made Eaton "interim removable partial dentures" to allow her to go back to work and be seen in public. Tr. 195, ll. 11-24. Those dentures, however, were not permanent. Kays concluded that this was a "serious" and "traumatic' injury. Tr. 199, ll. 8-22.

The Charleston County Sheriff's Office did little to investigate the case. A search warrant for the residence was never obtained nor were any items taken into evidence, including the ottoman, a key piece of evidence in the case. It is unknown whether a bat

or any other weapons were located inside the home at the time of the incident. No photographs of the scene were taken, except for a handful of pictures taken by the SWAT team to document the damage the agency did to the residence. Tr. 160, l. 19 – 164, l. 5. The crime scene investigation division of the sheriff's office was never called out to process the scene. Tr. 160, ll. 1-18. The investigation consisted solely of an interview of Eaton, photographs of her injuries taken at the hospital, followed by the arrest of Appellant. Tr. 150, l. 9 – 153, l. 20. Appellant never gave a statement to the police. Tr. 245, ll. 8-11.

Jury Charge Conference

After the conclusion of the testimony, defense counsel requested the judge charge self-defense based on Appellant's testimony. Defense counsel argued that Appellant was lying on the sofa when Eaton came towards him "wielding a bat" and that Appellant feared Eaton would hit him in the head and severely injure him. It was only then that Appellant picked up the ottoman and threw it in an attempt to get Eaton to drop the bat. Defense counsel further argued that Appellant testified that Eaton was "very close to him" and that he believed "he would not be able to move from that area." Tr. 254, l. 16 - 256, l. 7.

Defense counsel also requested a jury charge on the lesser included offense of CDV. Defense counsel argued "the reason that I'm asking for the CDV charge is not based on the throwing of the ottoman. It is based on the act that [Appellant] did testify and admit that he hit her with the body pillow." Tr. 258, ll. 22-25.

The state objected to charging the lesser included offense of CDV under State v. Golston, 399 S.C. 393, 732 S.E.2d 175 (Ct. App. 2012). In that case, "there really was

just a question of either he caused the injury or he didn't cause the injury. And I think that situation is here in this case, Your Honor. Either he caused serious bodily injury, in that he knocked out her front eight teeth, or he didn't. So we would ask that you deny it." Tr. 258, ll. 9-20.

The court ruled that it would charge the jury on self-defense, but refused to charge the lesser included offense of CDV under Golston. "I will just have the complete defense of self-defense but there will be no lesser includeds." Tr. 259, ll. 14-22.

Discussion

The court erred in refusing to charge the jury on the lesser included offense of CDV as there was evidence of CDV since it was a question of fact whether Eaton's injuries constituted "serious bodily injury," whether the ottoman was a "deadly weapon," and whether Appellant acted in self-defense when throwing the ottoman in Eaton's direction, but not when hitting her with the body pillow.

"The law to be charged to the jury is determined by the evidence presented at trial." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000) (citing State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989)). "A trial judge must charge a lesser included offense if there is ***any*** evidence from which the jury could infer the defendant committed the lesser rather than the greater offense." State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004) (citing Brightman v. State, 336 S.C. 348, 350-351, 520 S.E.2d 614, 615 (1999) (emphasis added). "Conversely, a trial judge does not err by refusing to charge a lesser included offense where there is ***no*** evidence tending to show the defendant was guilty only of the lesser offense." Id. (citing State v. Funchess, 267 S.C. 427, 429, 229 S.E.2d 331, 332 (1976) (emphasis added). "The test for determining if a crime is a lesser included offense of another crime is whether

the greater of the two offenses includes all the elements of the lesser offense." State v. LaCoste, 347 S.C. 153, 165, 553 S.E.2d 464, 471 (Ct. App. 2001) (citing State v. McFadden, 342 S.C. 629, 632, 539 S.E.2d 387, 389 (2000)).

CDV was clearly a lesser included offense of CDVHAN because the statute for CDVHAN, Section 16-25-65 references the statute for CDV, Section 16-25-20. Section 16-25-65 provides:

> (A) A person who violates 16-25-20(A) is guilty of the offense of criminal domestic violence of a high and aggravated nature when one of the following occurs. The person commits: (1) an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim; or (2) an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death.

The phrase "serious bodily injury" is not defined in the statute, indicating the Legislature's intent that the question be decided by a jury. Whether Eaton's injuries were "serious" under subsection 16-25-65(A)(1) is a question of fact, and if the jury found the injuries were not "serious," Appellant could have been found guilty only of CDV. There is a reasonable probability that the jury may have determined that her injuries did not constitute "serious bodily injury" because Eaton suffered no facial lacerations and no facial fractures. It is also likely that the jury may have concluded the ottoman was not a "deadly weapon," thereby failing to satisfy the other aggravating circumstance.

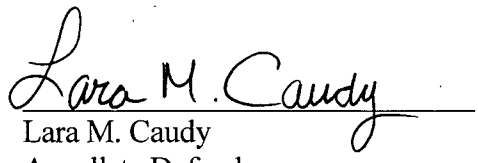
Additionally, if the jury found Appellant acted in self-defense when throwing the ottoman then it may have determined that Appellant's admission that he hit Eaton in the head with the body pillow constituted CDV rather than CDVHAN for there was no testimony that Eaton suffered ***any*** injury from that event nor could a reasonable jury have

found that the pillow constituted a "deadly weapon" when used as Appellant used it. Therefore, the trial judge erred by not charging the jury on the lesser included offense of CDV.

CONCLUSION

By reason of the foregoing argument, Appellant's conviction should be reversed and this case remanded to the Charleston County Court of General Sessions for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of September, 2013.

STATE OF SOUTH CAROLINA

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Darrell Florez states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial before Judge Kristi Lea Harrington, which was held on October 26, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Darrell Florez.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of September, 2013.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment;
(2) Entire Trial transcript (October 25 - 26, 2012).

I certify that this designation contains no matter which is irrelevant to this appeal.

September 10th, 2013

Lara M. Caudy

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 10, 2013

Lara M. Caudy

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Darrell Florez, #352962 at Trenton Correctional Institution, this 10th day of September, 2013.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of September, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.