STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable Marvin H. Dukes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES AUSTIN EDWARD TOWNSEND,

APPELLANT

APPELLATE CASE NO. 2025-000414

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to instruct the jury on criminal sexual conduct with a minor, third degree, as a lesser-included offense when evidence existed there was touching but not actual penetration?

STATEMENT OF THE CASE

On June 22, 2023, the Colleton County grand jury indicted Appellant for criminal sexual conduct with a minor, first degree. The case proceeded to trial before the Honorable Marvin H. Dukes, III, and a jury. Appointed counsel David Mathews represented Appellant. Julie Kate Keeney prosecuted the case. Tr. 1. Appellant was convicted as indicted and sentenced to a thirty-year prison term. Tr. 267.

This appeal follows.

STANDARD OF REVIEW

"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). "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense." *State v. Sams*, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014); *see also, State v. Drafts,* 288 S.C. 30, 340 S.E.2d 784 (1986); *State v. Gourdine,* 322 S.C. 396, 472 S.E.2d 241 (1996).

ARGUMENT

The trial court erred in refusing to charge the jury on criminal sexual conduct with a minor, third degree, when there was evidence by which the jury could have concluded that touching, but no actual penetration, occurred.

Relevant Facts

The state alleged at trial that in March of 2023, Appellant digitally penetrated Minor, who was six years old at the time. Tr. 143-46. Appellant and Minor were neighbors. Tr. 137, ll. 2-3. Minor testified at trial that she and Appellant were playing hide and seek near their respective houses, and while doing so, Appellant used his hand to touch under her clothes on the "outside of where" she "pee[s]." Tr. 146, ll. 8-16. This was different than what she had testified to in her forensic interview where she stated that Appellant had penetrated her multiple times. Tr. 153; State's Exhibit 1 ([Minor] Forensic Interview) (on file with this Court). Appellant gave a statement to law enforcement, which was admitted over his objection, wherein he stated that he "tried to penetrate her vagina with two fingers." Tr. 179; State's Exhibit 3 (Disk interview by Lt. Ballard) (on file with this Court). A SANE Exam was never performed because Minor's mother, after "doing [her] own research online," decided it would not be helpful. Tr. 139, l. 19.

After the presentation of evidence, Appellant requested a jury charge on criminal sexual conduct with a minor, first degree (CSCM First). Tr. 203-04, ll. 3-6. He argued that there was evidence by which the jury could conclude that there was no penetration, and thus, no sexual battery. Tr. 204, ll. 4-12. The state responded that it would "love" to have CSC with Minor 3rd submitted to the jury but that criminal sexual conduct with a minor, third degree (CSCM Third) was not a lesser-included offense of CSCM First. Tr. 205-07. Ultimately, the trial court declined

to charge any lesser-included offenses. *See generally*, Tr. 248-49 (jury charge for CSCM First). The jury ultimately convicted Appellant as charged. Tr. 257.

Discussion

The trial court erred in refusing to charge the lesser-included offense of CSCM Third. First, CSCM Third is a lesser-included offense of CSCM First. The *Blockburger*[1] test does not preclude the consideration of CSCM Third as a lesser-included offense of CSCM First, and in any event, common law offenses preceding CSCM Third were historically lesser-included offenses of common law offenses preceding CSCM First. Second, there was evidence presented to the jury by which they could have found that Appellant was guilty of CSCM Third rather than CSCM First. For these reasons, this Court should reverse Appellant's conviction and sentence and remand for a new trial.

Whether one crime is a lesser-included offense of another depends on whether the greater of the two offenses includes all the elements of the lesser offense. *State v. Northcutt*, 372 S.C. 207, 215, 641 S.E.2d 873, 877 (2007). "A lesser included offense is included in the greater only if each of its elements is *always* a necessary element of the greater offense." *Id.* (citing *Knox v. State*, 340 S.C. 81, 530 S.E.2d 887 (2000) (emphasis in original)). However, even if two crimes fail the elements test, the lesser offense will be considered a lesser-included offense if it has traditionally been considered as such. *State v. Burton*, 356 S.C. 259, 264, 589 S.E.2d 6, 8 (2003). This additional distinction is important, because some offenses—especially common law offenses—that have historically been considered lesser-included offenses would not pass the modern elements test. *See, e.g., State v. Elliot*, 346 S.C. 603, 610, 552 S.E.2d 727, 731 (2001)[2] (Pleicones, J., dissenting) (stating that murder cannot be said to contain all the elements of

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1 *Blockburger v. United States*, 284 U.S. 299 (1932).

2 *Overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

voluntary manslaughter, despite the latter being considered a lesser-included offense of the former).

As relevant here, the elements of CSCM First are: (1) sexual battery; (2) with a victim who is younger than eleven. S.C. Code Ann. § 16-3-655(A)(1); *State v. Green*, 343 S.C. 207, 209, 539 S.E.2d 419, 420 (Ct. App. 2000). A "sexual battery" is "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." *Id.* § 651(h). The elements of CSCM Third are: (1) willfully and lewdly; (2) commits or attempts to commit a lewd or lascivious act; (3) upon or with the body; (4) of a child under the age of sixteen; (5) with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child. *Id.* § 655(C).

Prior to 2012, the crime of CSCM Third did not exist; rather, a there was a very similar offense known as lewd act upon a minor. *State v. Brock*, 335 S.C. 267, 271, 516 S.E.2d 212, 214 (Ct. App. 1999) (citing S.C. Code Ann. § 16-15-140 (Supp. 1995)). The elements of CSCM3 are identical to the former lewd act. *Compare State v. Norton*, 286 S.C. 95, 97, 332 S.E.2d 531, 532 (1985) (defining lewd act), *with* S.C. Code Ann. § 16-3-655(C). The present statutory scheme includes three "degrees" of criminal sexual conduct with minors: first, second, and third. *Id.* § 655. All three are within the same code section. *See id.*[3]

[3] The fact that all three offenses are included in the same section should be indicative of legislative intent that they be treated as lesser-included offenses of one another. *Cf., e.g.,* S.C. Code Ann. § 16-3-600 (creating degrees of assault and battery crimes and providing that each is a lesser-included offense of the one preceding it).

In *Norton*, our Supreme Court considered the question of whether lewd act was a lesser-included offense of CSCM First. The Supreme Court answered that question in the negative. 286 S.C. at 96, 332 S.E.2d at 532. It found that lewd act was not a lesser-included offense of CSCM1 because both offenses had elements that the other lacked: CSCM First required a sexual battery; lewd act required "the intent of appealing to the lust or passions of himself or the child." *Id.* at 97, 332 S.E.2d at 533.

Norton is not dispositive to this case; it determined whether lewd act was a lesser-included offense of CSCM First, it did not pass on whether CSCM Third was. *See generally, id.* Whether CSCM Third is a lesser-included offense of CSCM First is a different question, because CSCM Third is a newly created criminal offense, separate from lewd act. *See* S.C. Acts 255, § 1 (2012) ("Criminal sexual conduct in the third degree, *new crime designated*, penalty" (emphasis added)).[4]

It is true that CSCM Third requires a defendant to act with "the intent of appealing to the lust or passions of himself or the child." S.C. Code Ann. § 16-3-655(C). However, this intent requirement is not exclusive to CSCM Third, it is within CSCM First as well.[5]

CSCM First requires a sexual battery, which is an "intrusion" into another person's body. *Id.* § 651(h). The use of the word "intrusion," rather than "touching" or "insertion" means that the General Assembly intentionally created an intent requirement. *State v. Adams*, 430 S.C. 420,

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[4] To the extent that *Norton*'s reasoning must apply to this case, Appellant recognizes that this Court is bound by the Supreme Court's decision. For the reasons that follow, however, Appellant respectfully asserts that *Norton* was wrongly decided. Appellant understands that this Court lacks the authority to overrule *Norton* if it concludes that *Norton* is binding precedent.

[5] The state may argue that CSCM First is a strict liability crime. It is not. *See Adams, infra*, 430 S.C. at 429-30, 845 S.E.2d at 222 (differentiating between a strict liability crime, which does not require criminal intent, and every other type of crime, and holding that CSCM First requires an act *and* wrongful intent).

430, 845 S.E.2d 217, 222 (Ct. App. 2020). "An intrusion, in its popular and accepted sense, is not just any act, but an act committed with wrongful intent." *Id.* That wrongful intent will always or almost always be identical to CSCM Third. A "sexual battery," after all, is by nature "lewd and lascivious." And an accidental touching which would typically constitute CSCM First is not CSCM First because of its accidental nature. *Id.* (citing *Carter v. United States*, 530 U.S. 255, 269 (2000), itself quoting *United States v. X-Citement Video*, 513 U.S. 64, 72 (1994) (a statute must be read to "read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct'")). Reading CSCM First to require a lesser mental state than the far less serious CSCM Third would be an "absurd" reading of the statute. *See Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342-43, 713 S.E.2d 278, 283 (2011) ("Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention"). The fact that the intent requirement of CSCM Third is specifically listed as "appealing to the lust or passions of himself or the child," *see Norton*, 286 S.C. at 97, 332 S.E.2d at 533, does not mean that CSCM Third requires a greater or different *mens rea* than CSCM First. Because CSCM Third can be accomplished by a wider range of conduct, the intent requirement is specifically sexual in nature to differentiate between wholly innocent conduct and conduct that is "lewd and lascivious." *Cf., Carter*, 530 U.S. at 269 (a statute must be read to "read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct'").

Therefore, when the same intent requirement is read into CSCM First, the elements of CSCM First are: (1) intentional; (2) sexual battery; (3) with a person under the age of eleven. The elements of CSCM Third are: (1) intentional; (2) lewd or lascivious conduct on or about the body; (3) with a person under the age of sixteen. Therefore, the elements of CSCM Third are

wholly subsumed by CSCM First. *See Knox*, 340 S.C. 81, 530 S.E.2d 887. CSCM Third is a lesser-included offense of CSCM First.

Even if the elements of CSCM Third are not wholly subsumed by CSCM First, criminal acts similar to CSCM Third have been traditionally considered as lesser-included offenses of criminal acts similar to CSCM First. *Burton*, 356 S.C. at 264, 589 S.E.2d at 8.

At common law, there was no distinction between rape and statutory rape. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 124 (1769) (Lonang Inst. 2005). Rape of an adult woman was defined as "carnal knowledge of a woman forcibly and against her will." *Id.* at 123. However, rape was also committed by "carnally knowing" a woman under the age of ten, since "by reason of her tender years she is incapable of judgment and discretion." *Id.* at 124. South Carolina's common law split the crime of rape into two categories: what is commonly referred to as rape, and what is commonly referred to as statutory rape. *See generally, e.g., State v. Whitener*, 228 S.C. 244, 89 S.E.2d 701 (1955). Common law rape in South Carolina was defined as "ravish[ing] a woman...when she did not consent." *Id.* at 270, 89 S.E.2d at 714. "Statutory rape," or "carnal knowledge" at that time prohibited "carnally know[ing] and abus[ing] any woman child under the age of sixteen years." *Id.* Carnal knowledge was a lesser-included offense of rape. *See id.* at 273 (acknowledging that rape contains all elements of carnal knowledge but with one additional element, force). Both were capital offenses, but if the jury recommended mercy, rape was punishable by imprisonment for five-to-forty years, while carnal knowledge was punishable only by imprisonment of up to fourteen years; and if the victim was older than fourteen, imprisonment up to five years. *Id.* at 270-71, 89 S.E.2d at 714.

Essentially, crimes similar to CSCM Third or "lewd act" have consistently been recognized to be lesser-included offenses of the common law adjacent crime of "carnal knowledge." *See, e.g., Allison v. United States*, 409 F.2d 445, 451 (D.C. Cir. 1969). "An assault with intent to commit carnal knowledge on a child is most certainly the taking of indecent liberties with a child[6], but with the intent of going far beyond the liberties referred to in [the indecent liberties statute]." *Id.* Since CSCM First requires "sexual battery" while CSCM Third requires only "lewd and lascivious conduct," the intent required to commit CSCM First "is to take indecent liberties plus an intent much more vicious, violent or aggravated." *Id.*

Logically, a crime constituting mere touching or other conduct of a sexual nature is a lesser-included offense of a crime constituting sexual battery. That logic tracks the common law understanding of the precursor crimes to CSCM First and CSCM Third, rape and carnal knowledge. For these reasons, CSCM Third and similar crimes are properly understood as crimes which have traditionally been considered as lesser-included offenses of CSCM First.

For these reasons, CSCM Third is a lesser-included offense of CSCM First. Further, because Minor testified at trial that she had not been penetrated, Tr. 145-46, the trial court should have charged it. *State v. Gosnell*, 341 S.C. 627, 635, 535 S.E.2d 453, 458 (Ct. App. 2000) ("A trial judge must charge a lesser included offense if there is any evidence from which it can be inferred that the defendant committed the lesser rather than the greater offense"). Therefore, the trial court erred by not charging CSCM Third. Appellant's conviction should be reversed.

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6 "Indecent liberties with a child" as referred to here is essentially identical to lewd act or CSCM First. *See id.* ("The elements of the offense are (1) taking immoral, improper, or indecent liberties with (2) a child under the age of 16, (3) with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the child or of the accused").

CONCLUSION

For the foregoing reasons, Appellant's conviction should be reversed, and this case should be remanded for a new trial.

W. Chandler Norville
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of October, 2025.