STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Thomas W. Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DONALD EUGENE PETERS,

APPELLANT

APPELLATE CASE NO. 2013-000492

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in finding that assault and battery in the second degree is not a lesser included offense of assault and battery in the first degree and refusing to instruct the jury on the lesser included offense of assault and battery in the second degree?

STATEMENT OF THE CASE

In July of 2011, the Beaufort County Grand Jury indicted Appellant Peters for burglary first degree, armed robbery, assault and battery first degree and safecracking, indictments #2011-GS-07-1456, 1457, 1458, 1459. On February 25, 2013, Peters proceeded to jury trial before the Honorable G. Thomas Cooper. Attorney Ehrick K. Haight represented Peters at trial. Attorney Meredith Bannon prosecuted the case on behalf of the State. At the close of the State's case the judge directed a verdict of acquittal on the safecracking charge. The jury returned verdicts of guilty on the other charges. Judge Cooper sentenced Peters to twenty three (23) years for burglary first degree, a concurrent twenty three (23) years for armed robbery and a concurrent ten (10) years for assault and battery first degree. A timely notice of intent to appeal was served on March 4, 2013. This appeal follows.

STATEMENT OF FACTS

Ron Lanier was an ex-marine who operated Ron's Barber Shop right around the corner from his house in the Bon Aire subdivision in Beaufort County. (Tr. p. 73, lines 6-21; p. 84, lines 6-10). Lanier would pay Lauren Baughman and Ashley Pierce to do odd jobs around the house and to have sex with him. (Tr. p. 73, line 22 – p. 74, lines 1-14). Lauren's parents lived across the street from Lanier. (Tr. p. 192, lines 6-16). Lauren was addicted to prescription pills and had a $300 dollar a day pill habit, taking 29 – 30 pills a day. (Tr. p. 193, lines 3-13). Lauren would clean house and have sex with Lanier in order to get money to support her pill habit. (Tr. p. 192, line 17 – p. 193, lines 1-21).

In June of 2011, Lauren was living with her boyfriend Kurtis Edwards. (Tr. p. 194, lines 1-8). During this time Lauren was also in a sexual relationship with the appellant, Donald "Doobie" Peters. (Tr. p. 195, lines 2-25). The boyfriend, Edwards, was unaware that Lauren was sleeping with Lanier and Peters. (Tr. p. 196, lines 5-8). Peters and Lanier both knew that Lauren was sleeping with Edwards. (Tr. p. 196, lines 1-4; 9-12). Edwards testified that he met Lanier on two occasions through Lauren. Lanier testified that he knew "Doobie" from the neighborhood. (Tr. p. 87, lines 8-20).

On June 28, 2011, Lauren woke up with no pills, no money and a $2,000.00 fine to pay. (Tr. p. 197, lines 7-24). Lauren went to Lanier's house in the hopes of getting money, as she had done in the past. (Tr. p. 216, lines 12-24). Ashley Pierce testified that Lauren called her and asked her to come to Lanier's house. (Tr. p. 169, lines 20-22). Ashley testified, "He [Lanier] liked girls to mess with each other in front of him, and he had money." (Tr. p. 169, lines 22-23). This time, however, Lauren was unsuccessful in obtaining money from Lanier. (Tr. p. 170, lines 4 – p. 171, lines 1-8; p. 200, line 17 – p.

201, lines 1-16). Before leaving Lanier's house, Lauren testified that she unlocked the front door. (Tr. p. 200, lines 17-25). According to Lauren, she left Lanier's house, met Edwards and Peters and discussed robbing Lanier. (Tr. p. 201, lines 12-16).

Lanier testified that after Lauren and Ashley left his house two men burst in demanding his keys, money and beating him. (Tr. pp 75 – 80). Lanier testified that Lauren knew that he kept cash in a locked safe in the closet. (Tr. p. 81, lines 5-18). Lanier was unable to identify the men who entered his house. (Tr. p. 87, lines 18-23). Lanier claimed that the men took about nine thousand five hundred ($9,500.00) dollars. Lanier admitted drinking whisky that night. (Tr. p. 75, lines 5-8). After the robbery Lanier went to his neighbor, Eugene Smith's house and Smith called 911. Smith is Lauren's step dad. (Tr. pp. 35-37). Smith testified that Lanier smelled of alcohol. (Tr. p. 37, lines 6-9). Lanier was not cooperative with law enforcement, emergency medical technicians who responded or with hospital staff. (Tr. pp. 83-85). Lanier was eventually handcuffed, placed in an ambulance and transported to the hospital where he refused treatment. (Tr. p. 84, line 17- p. 85, lines 1-8).

At trial Lauren admitted that she planned the robbery of Lanier and claimed that she asked Edwards and Appellant Peters to help her. (Tr. p. 217, lines 2-25). Lauren testified that prior to the break in at Lanier's house, Edwards broke into Lanier's barber shop in search of money. (Tr. p. 225, lines 20-24). At trial Edwards admitted breaking into the barber shop. (Tr. p. 279, lines 20-21). Edwards testified that while he was breaking into the barber shop, Lauren drove Appellant Peters to Whitmore Plumbing where he took some scrap metal. (Tr. p. 279, lines 12-25). According to Edwards, he and Peters broke into Lanier's house about two hours after the break in at the barber shop. (Tr. p. 291, lines 4-24).

Edwards testified that Lauren drove them to Lanier's house where he and Peters went in the front door Lauren unlocked earlier. (Tr. pp. 269-272). Lauren told Edwards Lanier kept money in a safe in the closet and he kept the keys to the closet around his neck. (Tr. p. 268, line 20 – p. 269, lines 1-13). According to Edwards, Peters took Edwards' police baton inside with him to protect against Lanier's dog. (Tr. p. 270, line 21 – p. 271, lines 1-20). The baton was later recovered from Edwards' closet. (Tr. p. 124, line 25 – p. 125, lines 1-5). Lanier's blood was found on the baton. (Tr. p. 303, lines 19-20). Edwards claimed that once inside Peters punched Lanier above the left eye. (Tr. p. 273, line 18 – p. 274, lines 1-5). Edwards testified that he took the keys out of Lanier's pocket and opened the safe but found no money in the safe. (Tr. p. 275, lines 3-17). Edwards eventually found Lanier's wallet and removed approximately three thousand ($3,000.00) dollars. (Tr. pp. 276- 278).

According to Edwards, he and Peters left Lanier's house and Lauren picked them up. (Tr. p. 277, lines 18-24). The three bought some pills and then drove to Hardeeville where they spent the night in one hotel room. (Tr. pp. 282-284). The next day Peters sold the scrap metal he had taken from Whitmore Plumbing to M&J Metal Recycling in Hardeeville for two hundred twelve dollars and sixty seven cents ($212.67). (Tr. pp. 178-181).

During trial the State presented a power point presentation summarizing text messages between Lauren, Edwards and Peters. The State also added audio to the text messages. (Tr. p. 158, lines 1-22). During pre-trial and again at trial Appellant objected to the admission of the power point presentation as hearsay. (Pre-trial Tr. p. 96, lines 3-12; Tr. pp. 96-97). The judge overruled the objection both pre-trial and again at trial. (Pre-trial Tr. pp 96-101; Tr. pp. 96-100). As to the added audio portion, trial counsel stated, "And, your

Honor, I'm a little old fashioned. I don't know that I'm used to computers reading off testimony which is what I'm told is going to happen. They say that it's non-emotional, but also these are text messages where, you know, many of us don't even understand what some of these things are supposed to be that are being said." (Tr. p. 98, lines 4-10). Trial counsel also stated, "I'm not quite sure how that's going to sound and whether I object to it or not." (Tr. p. 98, lines 12-13).[1]

After interviewing Lanier and learning that Lauren and Ashley had been at his house prior to the robbery, Investigator Andrew Rice with the Beaufort County Sheriff's Department interviewed Lauren. (Tr. p. 118, lines 1-21). As a result of the interview Lauren was arrested, Edwards was interviewed and arrested and Peters was interviewed and arrested. (Tr. pp. 118 – 123). According to Investigator Rice, Peters denied going inside Lanier's house and denied involvement with taking money or beating Lanier but stated that he merely served as a lookout in the front yard. (Tr. p. 123, lines 18-21). The statement was not audio or video taped and was not reduced to writing.

[1] Trial counsel's failure to object to the State's interpretation of the text messages through the summary and added audio may be an issue to be explored in post conviction relief.

ARGUMENT

The trial judge erred in finding that assault and battery in the second degree is not a lesser included offense of assault and battery in the first degree and refusing to instruct the jury on the lesser included offense of assault and battery in the second degree.

The jury found Appellant guilty of burglary first degree, armed robbery and assault and battery first degree. During the charge conference counsel for Appellant requested a charge on the lesser included offence of assault and battery second degree. (Tr. p. 329, lines 23-24). Counsel stated, "But certainly on the assault and battery charge, we would request a lesser included if at all possible." (Tr. p. 330, lines 5-6). The State objected arguing that assault and battery second degree was not a lesser included offense of assault and battery first degree. The prosecutor stated, "I object to the inclusion of assault and battery second. I don't believe it's actually a lesser included of it because it contains the separate elements that the State has to prove. And I think if you look at legislative intent, this is a higher degree of assault because you did it while committing this other crime." (Tr. p. 332, lines 3-9).

The judge agreed with the prosecutor and stated, "That's right. And that's true. The question is whether or not the greater includes all of the elements of the lesser. And it seems to me that the lesser includes additional elements that is not in the greater. And that is the distinction between the degree of injury. I'll look that up further, but I will – if I change my mind I'll charge the lesser and if I don't I'll let you know before we go to the jury." (Tr. p. 332, lines 10-18). Prior to the charge the judge stated, "On reconsideration, I've decided not to charge the lesser included of assault and battery second degree." (Tr. p. 334, lines 7-9). At the close of the jury charge the judge asked for any exceptions or additions to the charge stating, "Thank you. Mr. Haight [trial counsel for Appellant Peters], other than

previously noted are there any additional requests or exceptions from the defense?" (Tr. p. 392, line 25 – p. 393, lines 1-2). Trial counsel answered, "Nothing additional, Your Honor." (Tr. p. 393, line 3).

During post trial motions counsel moved for a new trial based on the failure to charge the lesser included offense of assault and battery second degree. (Tr. pp. 423-425). Counsel argued, "The other ground, Your Honor, that we would have is with regard to the assault and battery where the Court charged first but refused to charge second. (Tr. p. 425, lines 2-4). The State again argued that assault and battery second is not a lesser included under the subsection of assault and battery first which was charged in the indictment. (Tr.p. 426, lines 7-12). The judge denied the motion for a new trial stating, "As to the failure to include the lesser included – excuse me, the lesser charge of assault and battery second, I simply reaffirm my earlier rulings that I don't think that it is a lesser included of assault and battery. It contains elements that are not contained in the larger charge which seem to me to be – it is a Blockburger test, quite frankly, for determining whether or not something is a lesser included. So I would simply renew my earlier rulings in that regard and deny the motion for new trial on that basis as to that charge." (Tr. p. 428, lines 7-14). The trial judge erred in finding that assault and battery second degree is not a lesser included offense of assault and battery first degree.

The indictment alleges, "That in Beaufort County, South Carolina, on or about June 29, 2011, the Defendant, Donald Eugene Peters, did commit and assault and battery constituting an unlawful act of violent injury to the victim, Ronald Lanier, accompanied by circumstances of aggravation, to wit: did cause injury to the victim during a robbery; all in violation of the Common law of South Carolina and Section 17-25-30(C/L) of the code of

Laws of South Carolina (1976, as amended)." (R. p. **). The other side of the indictment references assault and battery 1st degree and lists S.C. Code §16-3-600(C)(1). (R. p. **).

S.C. Code §16-3-600(C)(1) defines assault and battery **first** degree and provides:

> 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; or
>
> (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or
>
> (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 §16-3-600(D)(1) defines assault and battery **second** degree and provides:

> 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 §16-3-600(D)(3) specifically states that assault and battery in the second degree is a lesser included offense of assault and battery in the first degree providing:

> Assault and battery in the second degree is a lesser-included offense of assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29.

The judge erred in finding that assault and battery in the second degree is not a lesser included offense of assault and battery in the first degree when the statute specifically states that assault and battery in the second degree is a lesser included offense of assault and battery in the first degree. The judge erred in refusing to charge the jury with the lesser included offense of assault and battery in the second degree.

The law to be charged is determined by the evidence presented at trial. State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986). 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. Brightman v. State, 336 S.C. 348, 350-351, 520 S.E.2d 614, 615 (1999). 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. State v. Funchess, 267 S.C. 427, 429, 229 S.E.2d 331, 332 (1976).

There is evidence in the record from which the jury could infer that Appellant committed assault and battery in the second degree. The judge correctly instructed the jury that they could believe a small portion of the testimony of a single witness and disbelieve the larger portion of the testimony. (Tr. p. 373, lines 21-25). Investigator Rice testified that while Appellant denied going inside Lanier's house, he also denied being involved with any burglary, robbery/larceny. (Tr. p. 123, lines 18-21). Edwards testified that Appellant punched Lanier above the left eye. (Tr. p. 273, line 18 – p. 274, lines 1-5). The jury could believe Appellant's statement that he was not involved with any burglary,

robbery/larceny but disbelieve his denial of going into the house, believing Edwards' testimony that Appellant punched Lanier. The jury could have found that a punch, not thrown during the commission of a robbery, burglary, kidnapping, or theft could, constituted assault and battery in the second degree.

CONCLUSION

Based on the above argument, the conviction for assault and battery in the first degree should be reversed and the case remanded.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of March, 2014.