STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JABARRIE BROWN,

APPELLANT

APPELLATE CASE NO. 2012-210387

BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court committed reversible error by refusing to charge the jury on criminal domestic violence as a lesser included offense of criminal domestic violence of a high and aggravated nature.

STATEMENT OF THE CASE

On March 25, 2010, the Lancaster County Grand Jury indicted Appellant Jabarrie Brown on counts of criminal domestic violence of a high and aggravated nature and possession or display of a firearm or knife during commission of a violent crime. R. 155—R. 156; R. 158—R. 159. On March 31, 2010 the case proceeded to a trial in Appellant's absence before The Honorable Jeffrey Young and a jury. Mark Grier represented Appellant and Curtisha Mingo represented the State. R. 1. On April 1, 2010, the jury found Appellant guilty as charged, and the court entered a sealed sentence. R. 125, lines 19-25; R. 130, lines 20-22.

On December 12, 2011, Appellant appeared at a hearing before The Honorable J. Ernest Kinard, Jr. Mark Grier and Curtisha Mingo again represented the parties. The court further delayed sentencing.[1] R. 136-140. On March 16, 2012, Appellant appeared before The Honorable Brooks P. Goldsmith. Mark Grier and Curtisha Mingo continued to represent the parties. R. 142. The court sentenced Appellant to concurrent five-year terms of incarceration for the CDVHAN and possession charges.[2] R. 153, lines 1-3; R. 157; R. 160.

[1] The court concluded that the sealed sentence was invalid on its face and adjourned until a proper sentence could be determined.

[2] The court concluded that the original sentence was valid, interpreting it to impose the concurrent five-year terms of incarceration.

ARGUMENT

THE TRIAL COURT REVERSIBLY ERRED BY FAILING TO CHARGE CRIMINAL DOMESTIC VIOLENCE AS A LESSER-INCLUDED OFFENSE OF CRIMINAL DOMESTIVE VIOLENCE OF A HIGH AND AGGRAVATED NATURE BECAUSE MACKEY TESTIFIED APPELLANT DID NOT TOUCH HER AFTER HE PULLED OUT THE HANDGUN AND BECAUSE SHE KNEW HER BOYFRIEND WOULD NOT HARM HER.

FACTS

Cortney Mackey has known Appellant since 2003. On the afternoon of October 20, 2007, Appellant returned to Mackey's apartment after buying lunch for her and their young son. The two were dating and raising the child together. R. 53, line 20—R. 55, line 14. Appellant and Mackey were spending time together every day, either at his residence or hers. R. 67, line 19-24. Appellant and Mackey began to argue about not Mackey not coming to see him the night before. R. 54, line 11—R. 55, line 14. Appellant pushed Mackey on the couch, and she pushed him back before going upstairs to her bedroom. She called Appellant's father to come get him "because he was just starting to get on my nerves." R. 56, lines 1-18; R. 58, lines 14-23; R. 74, lines 19-23.

Appellant followed Mackey to the bedroom where they continued arguing, and Appellant pushed Mackey on the bed. She got up and punched Appellant in the head and went into her bathroom. R. 56, line 25—R. 57, line 13. Appellant followed her to the bathroom, pulled a small handgun from his pocket, and pointed it at her. R. 57, line 16—R 58, line 4. Appellant's dad arrived soon thereafter, and Appellant voluntarily got in the car and went home. R. 61, lines 13-16.

Mackey admitted that as he left, she was still angry and stuck her middle finger up at him. She was not worried about provoking him. R. 70, lines 4-21. Later that night, Mackey, still upset, went to a hospital, where she called the police. She gave a written

statement about the argument. R. 86, lines 23—R. 87, line 22. Police then went to Appellant's home and arrested him. R. 88, lines 10-16; R. 93, lines 11-15. Nevertheless, Mackey and Appellant spoke the next day. Ap. 64, lines 16-20. They continued their relationship and are together today with a second child. R. 53, lines 20-24; R. 65, line 3—R. 66, line 7.

At trial, Mackey testified that she never took Appellant's actions with the gun seriously:

> It was like up near my head area but it wasn't touching, and he was just like I'll kill you B [sic], but I was like you ain't going to do nothing, you ain't going to do nothing, and I wasn't even worried about it, ... So then he put the gun away and we just walked downstairs, but I had called his daddy to come get him.

R. 58, lines 7-13. Mackey later reiterated that when Appellant pointed the gun, she "was like, you ain't going to do s-h-i-t, and he put the gun back in his pocket and [they] went downstairs." R. 59, lines 10-14. She further testified that she "wasn't scared period. I didn't even call [the police]. . . . I didn't even write in my statement that I was scared." Mackey knew Appellant was "all mouth." R. 63, lines 18-25; R 75, lines 5-16. Appellant's father also testified that "she didn't sound like she was upset or anything" when she called. R. 76, lines 14-16.

At the close of evidence Appellant requested a jury charge on criminal domestic violence ("CDV") as a lesser-included offense of criminal domestic violence of a high and aggravated nature ("CDVHAN"), which the court denied. The court concluded that the evidence indisputably established that a gun was involved, and therefore if the offense occurred, it was necessarily of a high and aggravated nature under the statute. R. 103, lines 1-16.

DISCUSSION

The trial court reversibly erred by failing to charge CDV because Mackay testified Appellant did not touch her after he pulled out the gun and because she knew her boyfriend would not harm her. The law to be charged is determined from the evidence presented at trial. *State v Knoten,* 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "[T]he task of the trial court in deciding whether to charge [a lesser-included offense], and of this court reviewing that decision on appeal, is to examine the record to determine if there is evidence upon which the jury could find the defendant was guilty of the lesser offense, but not guilty of the greater offense." *State v Golston*, 399 S.C. 393, 398, 732 S.E.2d 175, 178 (2012). In determining whether the evidence supports a lesser-included charge, a court must view the facts in the light most favorable to the defendant. *See, e g , State v. Coleman*, 342 S.C.172, 179-80, 536 S.E.2d 387, 391 (Ct. R. 2000) (citing *State v Byrd*, 323 S.C. 319, 474 S.E.2d 430 (1996)). The trial court commits reversible error by failing to give a requested charge on an issue raised by the evidence. *State v Hill,* 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993).

South Carolina Code section 16-25-20(A) defines the offense of criminal domestic violence ("CDV") as (1) causing to a person's household member physical injury or (2) offering or attempting to cause such injury with the present ability under circumstances reasonably creating fear of imminent peril. Section 16-20-65(A) defines the offense of CDVHAN as committing CDV "when . . . [t]he person commits" either of the following:

> (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.

Thus, Appellant was entitled to a CDV charge if the evidence viewed in the light most favorable to him could support a finding that he committed neither (1) nor (2) above.

A. The evidence supported the finding that Appellant did not commit a battery using a deadly weapon because Mackey testified he did not touch her after he pulled out the handgun.

The evidence supported the finding that Appellant did not commit a battery using a deadly weapon because Mackey testified he did not touch her after he pulled out the handgun. As an initial matter, construing subsections (1) and (2) harmoniously means that subsection (1) requires the defendant to make contact with the household member during the assault and battery. The cardinal rule of statutory construction is to give effect to the intent of the Legislature. *S C Coastal Conservation League v S C Dep't of Health and Envtl Control*, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010); *Hodges v Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing *Charleston County Sch District v State Budget and Control Bd*, 313 S.C. 1, 437 S.E.2d 6 (1993)). Legislative intent is first and foremost determined by the language of the statute. *State v Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) (citing *Whitner v State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997)). "[A] statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." *S C State Ports Auth v Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). "When interpreting a statute, courts must presume the legislature did not intend to do a futile act." *State v Sweat*, 386 S.C. 339, 377, 688 S.E.2d 569, 651 (2010). Thus, a "'statute should be so construed that no word, clause, sentence, provision or part shall

be rendered surplusage, or superfluous.'" *Id* at 351, 688 S.E.2d at 575 (quoting *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)). *See also Davenport v City of Rock Hill*, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993) ("It is never to be supposed that a single word was inserted in the law of this state without the intention of thereby conveying some meaning."). "[A] penal statute is construed strictly against the State and in favor of the defendant." *State v Cutler*, 274 S.C. 376, 378, 264 S.E.2d 420, 420-21 (1980).

The South Carolina Code does not define assault and battery under 16-20-65(A). The offense has its origin in common law. *State v Hill*, 254 S.C. 321, 329, 175 S.E.2d 227, 231 (1970). At common law, an assault was "an unlawful attempt or offer to commit a violent injury upon the person of another, coupled with a present ability to complete the attempt or offer by a battery. . . . [a]nd differ[ed] from assault and battery in that there [was] no touching of the victim . . . ." *In the Interest of Doe*, 318 S.C. 527, 533, 458 S.E.2d 556, 560 (Ct. R. 1995) (citations omitted). Courts harbor a strong presumption that the Legislature does not intend to modify the common law. *Wimberly v Barr*, 359 S.C. 414, 422, 597 S.E.2d 853, 857 (Ct. R. 2004).

Nevertheless, the legislature may be regarded as modifying the common law when its language is clear and unambiguous. *Nuckolls v Great Atlantic & Pacific Tea Co*, 192 S.C. 156, 5 S.E.2d 862 (1939). Thus, in the recent past, the legislature has explicitly defined assault and battery by statute. *See, e g*, *State v Fennell*, 340 S.C. 266, 274, 531 S.E.2d 512, 516 (2000) (assaying offenses of simple assault and battery as defined by statute, assault and battery of a high and aggravated nature under common law, and assault and battery intent to kill as defined by statute). Under the current

statutory system, a person can be guilty of assault and battery in the second and third degrees even though the victim is neither injured nor physically contacted. S.C. Code § 16-3-600(E)(1).

For the present purposes, physical contact is implicitly required under subsection (1) because subsection 16-20-65(A)(2) specifies an offender must commit an "an assault, with or without an accompanying battery . . . ." To interpret otherwise would mean that the phrase "with our without accompanying battery" would be superfluous. Further, this interpretation comports with the principle that the legislature does not intend to modify the common law without expressly indicating it has done so.

At trial, the parties presented evidence supporting the finding Appellant did not commit a battery using the handgun as required under subsection 16-20-65(A)(1). CDV and assault and battery are offenses against the person. *See* S.C. Code Ann. Title 16, Ch. 3 (titled "Offenses against the Person" and including assault and battery offenses and offense of spousal sexual battery); *State v Prince*, 335 S.C. 466, 475, 517 S.E.2d 229, 234 (Ct. R. 1999) (discussing "fear inducing" offenses of stalking, assault and battery, criminal sexual conduct, and CDV). With offenses against the person, the corpus delicti is consummated as soon as the victim suffers the harm that is sought to be avoided. *See, e g , State v Jones*, 344 S.C. 48, 54-55, 543 S.E.2d 541, 543-44 (2001) (holding defendant who simultaneously robbed three victims at gunpoint committed "a separate offense as to each person who was threatened with bodily harm by a deadly weapon" and could be charged with three separate counts). For the common law offense of assault and battery, the harm sought to be avoided is harmful or offensive contact and fear from the reasonable apprehension thereof. *See, e g , State v Davis*, 19 S.C.L. (1 Hill) 46 (Ct. R. L.

& Eq. 1833) (defining assault as "any attempt to do violence to the person of another, in a rude, angry, or resentful manner . . . and raising a stick or fist, within striking distance, pointing a gun within the distance it will carry . . . are the instances, usually put by way of illustration"); *Smith v Smith*, 194 S.C. 247, 9 S.E.2d 584 (1940) ("[A] *battery* is the unlawful touching or striking of another . . . sometimes defined as any injury done . . . in a rude, insolent, or revengeful way . . ." (citations omitted)).

In this case, Mackey testified that Appellant did not touch her with the handgun or with anything else after he pulled the gun out. Instead, she specifically testified that he never touched her with the gun. In this situation, the only alleged harm sought to be avoided was fear from the reasonable apprehension that Appellant would use the gun to harm Mackey. Physical injury or offensive contact from his actual contacting her with the gun is simply not an issue in this case. While testimony showed Appellant did push Mackey downstairs and in her bedroom prior to pulling out the gun, any assault and battery he committed thereby was predicated on a harm independent of the handgun and was consummated before Appellant pulled out the gun. Thus, the evidence could not have supported a finding that Appellant committed a battery involving a deadly weapon as required under subsection 16-3-65(A)(1).

B. Evidence that Appellant and Mackey were dating and raising a child together and Mackey's testimony that she never feared Appellant hurting her with the gun supported a finding that Appellant did not reasonably cause Mackey to fear being shot or injured with the gun.

Evidence that Appellant and Mackey were dating and raising a child together and Mackey's testimony that she never feared Appellant hurting her with the gun supported a finding that Appellant did not reasonably cause Mackey to fear being shot or injured with

the gun. Whether Appellant's use of the handgun would reasonably cause a person to fear imminent serious bodily injury or death is an objective determination based on the totality of the circumstances. *Cf State v Navy*, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010) ("Whether a suspect is in custody [for purposes of Miranda warnings] is determined by an examination of the totality of the circumstances . . . . It is an objective determination, that is, would a reasonable person have believed he was in custody.").

Based on the totality of the circumstances presented by the evidence, a jury could have found Appellant would not have reasonably caused a person in Mackey's position to fear being injured by the gun. Mackey and Appellant had known each other for around four years. Mackey was his girlfriend, whom he saw every day, and the mother of Appellant's young son, whom the two were actively raising together. The two had a not uncommon argument over the mundane topic of not seeing each other the night before. Both exhibited a predilection for expressing anger through coarse language and mild physical aggression, but no evidence existed in the record that Appellant had a violent reputation or previously engaged in violent behavior towards Mackey or anyone else. Neither did the evidence show Mackey suffered any physical injury.

Mackey did not call the police at the time of the argument, nor did she exhibit any other indubitable sign that she feared for her safety at all. She testified she merely left Appellant downstairs and called his dad to come get him because he was getting "on her nerves." At the end of the fight, Appellant voluntarily got in his father's car and went home. Mackey testified she was fearless in insulting him as he left by sticking her middle finger up at him. She did call the police well after the argument, but admitted that when she did so, she was still angry at Appellant.

Finally, the only circumstances to be gleaned regarding the use of the handgun itself were that it was small and Appellant was already carrying it on his person. He did not actively retrieve it from elsewhere, and no evidence was presented that it was even loaded. The dispute between longtime boyfriend and girlfriend reasonably appeared to be fueled by raw emotions from uncool heads, but fear from being shot or beaten with a handgun was not necessarily one of those. Mackey's own testimony only supported this theory of the case. She stated she "wasn't scared period" and was entirely unimpressed with Appellant's show of force—so much so that she egged him on, saying, "You ain't going to do nothing." Based on the evidence and circumstances presented, the jury was entitled to determine that a reasonable person in Mackey's position would not have reasonably feared Appellant's use of the gun to cause injury.

CONCLUSION

For the foregoing reasons, the evidence could support findings that Appellant neither committed an assault and battery with a deadly weapon nor reasonably caused Mackey to fear imminent serious bodily injury or death. Accordingly, Appellant respectfully requests reversal of his convictions for CDVHAN and possession of a deadly weapon during the commission of a violent crime and remand for a new trial.

Respectfully submitted,

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of June, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
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THE STATE,

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V.

JABARRIE BROWN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of June, 2014.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of June, 2014.

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