STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County
William Jeffrey Young, Circuit Court Judge

THE STATE,

Respondent,

vs.

JABARRIE BROWN,

Appellant.

Appellate Case No. 2012-210387

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court did not err in declining to charge criminal domestic violence as a lesser included offense of criminal domestic violence of a high and aggravated nature where the evidence is uncontroverted that Appellant pointed a gun at his girlfriend's head and announced he would kill her.

STATEMENT OF THE CASE

Appellant Brown was indicted by the Lancaster County Grand Jury for criminal domestic violence of a high and aggravated nature and possession or display of a firearm or knife during the commission of a violent crime. He was tried by jury for these charges on March 31, 2010, and found guilty as charged on both counts at the conclusion of the trial on April 1, 2010. The jury took twenty minutes to deliberate. R. pp. 124-125. Brown did not attend his own trial, so the sentence was sealed. Ultimately, Brown was sentenced to concurrent terms of five years imprisonment for each charge.

STATEMENT OF FACTS

Appellant Brown pointed a pistol at his girlfriend and said "I'll kill you B." R. p. 58. His girlfriend (Victim) lived at her aunt's house with her child. Brown is the father. Brown took Victim and their child to McDonalds for something to eat. An argument started there over the fact that Victim did not come over to Brown's house the night before. The argument continued at the aunt's house, with Brown pushing Victim and Victim falling on the couch. She stood back up and pushed Brown. She then went upstairs with her child to her bedroom and closed the door. Brown followed behind and pushed her on the bed. She then punched him in the head and walked into the bathroom. Brown took a gun out of his pocket. R. pp. 52-57. It was a little grey gun. R. p. 58.

Victim testified as follows:

> And then he like pointed it at me. It was like up near my head area but it wasn't touching, and he was just like I'll kill you B, 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. p. 58, lines 7-13.

Brown walked outside towards his father and Victim, still angry, stuck up her middle finger at Brown. This prompted Brown to kick in the storm door. The storm door fell off its hinges and fell into the house. Victim testified that the father, Stanley Brown (Stanley), never came in the house. R. pp. 59-60; p. 62; p. 70.

Victim testified that when she called Stanley, she told him, "Stanley, this is [Victim], you need to come get [Brown], because he's starting to get angry is what I told him." R. p.

63, lines 6-8. Victim denied she was scared. R. p. 63.

In contrast, Investigator Mike Adams testified that he went to the hospital and took an incident report from Victim.[1] She appeared to be distressed and upset. She said she was fearful. R. pp. 87-88. Investigator Adams testified: "We went looking for [Brown] because the victim was so concerned about him coming for her." R. p. 88, lines 6-9.

Victim testified that her and Brown were back together soon afterwards. Victim testified that "[w]e communicated daily. I would say – I don't see him that much, but we communicate daily." R. p. 65, lines 10-11. They are still in a relationship. R. p. 66, lines 4-7. She testified that she works all the time, except when she is attending school (USC – Lancaster). Brown spends time with the kids, but Victim's aunt keeps them most of the time. R. p. 66.[2] Despite the fact that he pointed a gun at her head while her son was in the house, she still thought he was a good father who would do nothing to endanger the kids. R. p. 67, lines 6-8. She has forgiven Brown for pointing a gun at her head. R. p. 70.

Stanley verified that he received a call from Victim to pick up Brown. He reached the residence and honked the horn. He looked up to see Brown standing by the front door. As for the door, it was laying down in the doorway. On cross-examination, he contradicted himself and said that Brown was already standing outside when he arrived. Stanley offered to fix the door that his son knocked off its hinges. R. pp. 76-79; p. 85. No evidence in the record indicates Brown offered to fix the door he broke in his violent rampage.

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1 A pre-trial hearing was held, during which Victim testified that the door fell on the child This probably explains the hospital visit, although the jury never heard this testimony R pp 34-35 Victim testified that she never called law enforcement R p 65

2 So the aunt is raising the children with Victim Brown is mistaken when he claims that Victim and Brown are raising children together

When they got home Brown told Stanley he found this gun and Stanley took the gun from him. Stanley lectured his son about the dangers of having a gun. Stanley hid the gun in the shrubs. But Stanley did the right thing and showed law enforcement where this gun was located when they arrived. Stanley described his actions as being "a good Samaritan." R. pp. 80-83.

Investigator Adams testified that he went to Brown's house later that evening. Investigator Adams saw Brown looking out the garage window. Stanley was outside when they arrived and they spoke with him. Stanley went inside the house to find Brown, but Brown fled into the woods. Stanley had to talk his son into coming out of the woods. Stanley showed law enforcement where the gun was buried, under a pile of mulch by the azaleas. R. pp. 88-91. When Brown spoke with law enforcement, he claimed he did not have a gun. R. p. 93.

ARGUMENT

The trial court did not err in declining to charge criminal domestic violence as a lesser included offense of criminal domestic violence of a high and aggravated nature where the evidence is uncontroverted that Appellant pointed a gun at his girlfriend's head and announced he would kill her.

Brown complains the trial court erred in denying his request to charge criminal domestic violence (CDV) as a lesser included offence of criminal domestic violence of a high and aggravated nature (CDVHAN). However, no evidence supports the lesser included offense. Brown pointed a gun at Victim's head and threatened to kill her. This conduct cannot be anything but CDVHAN.

A lesser included offense should be charged only where evidence warrants the instruction. State v. Coleman, 342 S.C. 172, 536 S.E.2d 387 (Ct. App. 2000). "It is not error to refuse to charge the lesser included offense unless there is evidence tending to show the defendant was guilty *only* of the lesser offense." Id. at 175, 536 S.E.2d at 389 (emphasis in the original). "The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tends to show the defendant was guilty of only the lesser offense." State v. Franks, 376 S.C. 621, 624, 658 S.E.2d 104, 106 (Ct. App. 2008) (citations and internal quotation marks omitted).

Brown's argument is that because Victim testified she was not in fear of imminent serious bodily injury or death, a jury issue was created as to whether the CDV was of a high and aggravated nature. However, the CDVHAN statute defines an objective test, not a subjective one.

Criminal domestic violence is prohibited by S.C. Code §16-25-20(A) (Supp. 2007),[3] which makes it unlawful to "(1) cause physical harm or injury to a person's own household member; or (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril."

Criminal domestic violence of a high and aggravated nature occurs when the aggressor 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." S.C. Code §16-25-60(A) (Supp. 2007) (emphasis added). An assault is "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." State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000). Note that paragraph (1) of §16-25-60 refers to injury inflicted on "the victim," while paragraph (2), implicated in this case, refers to an assault causing "a person" to be put in fear of serious bodily injury or death.

Use of "a person" instead of a "victim" indicates an objective test that is not dependent on a victim's subjective state of mind. See Seckinger v. The Vessel, Excalibur, 326 S.C. 382, 483 S.E.2d 775 (Ct. App. 1997) (statutory language should be given its plain and ordinary meaning unless something else in the statue requires an alternative meaning). The statute requires the "victim" be injured for paragraph (1) to apply, but does not require the State to prove the victim was in fear for paragraph (2) to become effective. See Home

3 The aggravated assault occurred on October 20, 2007 R. p 159.

Building & Loan Ass'n v. City of Spartanburg, 185 S.C. 313, 194 S.E. 139, 142 (1937) (finding no requirement to publish proposed penalty ordinance where first part of the applicable statute permitted council to impose tax by ordinance after ten day publication period, and a later portion of the statute granted power to impose penalty without referencing a publication period); see generally Taylor v. Michigan Public Utilities Commission, 186 N.W. 485, 487 (Mich. 1922) ("The law designates the actors and when a law designates the actors none others can come upon the stage.").

In the instant case, the only evidence is that Brown pointed the gun at Victim and said "I'll kill you B." R. p. 58. This action undoubtedly would reasonably cause a person to fear imminent serious injury or death. "An assault with a pistol is one of an aggravated nature." State v. Wharton, 263 S.C. 437, 211 S.E.2d 237 (1975) *overruled on other grounds by* State v. Evans, 307 S.C. 477, 415 S.E.2d 816 (1992). Victim's testimony that she was not in fear, if believed, is not reasonable; her foolish subjective belief is irrelevant.

In State v. Golston, 399 S.C. 393, 732 S.E.2d 175 (Ct. App. 2013), this Court noted:

> In most prosecutions for CDVHAN, there will be evidence the defendant committed acts which constitute only CDV in addition to acts which constitute CDVHAN. In this case, for example, Golston's statement to the victim "you ain't going nowhere" and his admitted "slap[ping] her face" could be found by a jury to amount only to CDV and not CDVHAN. However, the mere existence of evidence that Golston committed these acts in addition to other acts which could constitute CDVHAN, such as beating the victim with his fists so severely that her own son could not recognize her and she could not open one of her eyes for ten days, does not warrant a jury charge on simple CDV. Rather, to warrant a jury charge on the lesser offense, the evidence viewed as a whole must be such that the jury could conclude the defendant is guilty of the lesser offense *instead of* the indicted offense.

Id. at 397-98, 732 S.E.2d at 178 (citation omitted, emphasis in the original).

In the present case, the evidence indicates that Brown pointed a gun at Victim's head and threatened to kill her. Fortunately, this is not a homicide case. However, the compulsion to point a pistol at a person's head should be dealt with firmly, and the acceptance of such extreme conduct as a mere simple assault would signal casual tolerance for the violent use of guns that our society must deplore. Whether or not Victim was in actual fear for her life is immaterial. Accordingly, no evidence supports that Brown was guilty of only the lesser rather than the greater offense, and the trial court did not err in declining to charge criminal domestic violence to the jury. The conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

August 28, 2014

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Honorable William Jeffrey Young, Circuit Court Judge

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Benjamin J. Tripp, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, PO Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served

This 28th day of August, 2014.

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