STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

QUASHON G. MIDDLETON,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge's requirement that the evidence must show an unlawful touching or injury in order to instruct the jury on the lesser-included offense of assault and battery in the first degree was error in light of the clear statutory language defining the offense and the Legislature's intent.

STATEMENT OF THE CASE

A Colleton County Grand Jury indicted Appellant for the attempted murder of Ryan Stephens pursuant to indictment 2010-GS-15-960, the attempted murder of Stephanie Mack pursuant to indictment 2010-GS-15-962, and possession of a weapon during a violent crime pursuant to indictment 2010-GS-15-961. R. 179, Indictments. The state, represented by Amanda Haselden, called the cases for trial on July 25, 2011. R. 2 lines 7-12. David Mathews represented Appellant. The jury returned its verdict finding Appellant guilty of attempted murder of Mack and Stephens and possession of a weapon during the commission of a violent crime. R. 176 line 15 – R. 177 line 7. Judge Buckner sentenced Appellant to imprisonment for thirty years on each count of attempted murder and five years for possession of a weapon during the commission of a violent crime. R. 178 lines 2-17.

Appellant filed a timely notice of appeal.

ARGUMENT

The trial judge's requirement that the evidence must show an unlawful touching or injury in order to instruct the jury on the lesser-included offense of assault and battery in the first degree was error in light of the clear statutory language defining the offense and the Legislature's intent.

Relevant Facts

Around three o'clock in the afternoon of September 28, 2010, Stephanie Mack was driving down Brittlebank Road in Colleton County with Ryan Stephens as her passenger. R. 43 lines 13-23; R. 61 lines 11-20. They came to a stop as a school bus in the on-coming lane stopped to drop off a child. R. 44 lines 2-4; R. 62 lines 10-12. Appellant, riding on a moped, drove up behind Mack and Stephens and brandished a gun. R. 44 lines 7-22; R. 62 lines 12-14. Appellant then began shooting in the direction of Mack's car. R. 44 lines 4-9; R. 62 lines 16-17. Mack then switched seats with Stephens. R. 47 lines 9-15; R. 55 line 23 – R. 56 line 10; R. 62 lines 19-20; R. 70 lines 20-21; R. 76 lines 12-14. While Appellant continued to shoot, Stephens sped off hitting Appellant's leg. R. 47 lines 16-22; R. 62 lines 22-24. Mack and Stephens then drove to Stephens' home. R. 48 lines 11-12; R. 64 lines 2-4.

The paramedic who arrived at the scene reported that Appellant stated he had been run over and the people in the car had been shooting at him. R. 38 lines 2-6. Appellant was in significant pain according to the paramedic. R. 34 lines 6-10. He had a deformity to his right leg indicating a possible fracture. R. 36 lines 22 – R. 37 line 1. Appellant was transported to the emergency room. R. 38 lines 19-21; R. 41 lines 3-4.

When law enforcement arrived at Stephens' home, Mack and Stephens provided statements explaining what happened. R. 49 lines 7-9; R. 63 lines 22-24. Although Mack knew Appellant was the person on the moped, she did not tell the police initially. R. 49 lines 10-11. Mack testified that neither she nor anyone in her car shot at Appellant. R. 50 lines 5-6. Stephens testified that he did not have a gun in the car and did not shoot at Appellant. R. 77 lines 16-19.

The South Carolina Law Enforcement Division (SLED) tested the gunshot residue (GSR) kits collected by local law enforcement. According to Kathleen Woodward with SLED, "[t]he quantities of metals found in [Appellant's] kit d[id] not indicate the presence of gunshot residue." R. 104 lines 18-21. However, the GSR kit from Mack's right and left palms provided "quantities of metals that may be associated with gunshot residue." R. 104 line 23-25; R. 105 lines 2-3. Similarly, "the quantities of metals found on the right palm of [Stephens'] hand may be associated with gunshot residue." R. 105 lines 7-9. Likewise, the metals found on Stephens' left palm and back of his left hand "may be associated with gunshot residue." R. 105 lines 11-14.

The prosecutor asked Mack "Were you hurt in any way?" R. 48 line 17. Mack responded "No, ma'am." R. 48 line 18. The prosecutor followed up with "any glass hit you?" and Mack responded "I had a couple of cuts from the glass." R. 48 lines 19-20.

At the conclusion of the evidence, the trial judge placed on the record that he had met with the attorneys concerning the changes in the law by virtue of the statute passed in June 2010. R. 116 lines 6-9. The judge explained that it was his belief that he should charge the lesser-included offenses of assault and battery of a high and aggravated nature and assault and battery in the first degree as to Mack. R. 116 line 21 – R. 117 line 1.

Judge Buckner went on to state that there was "no battery involved" with Stephens. R. 117 lines 2-3. He recalled that defense counsel asked Stephens if he had been injured and Stephens responded negatively. R. 117 lines 3-7.[1] Judge Buckner explained his reasoning as follows:

> The statute defines assault and battery in the first degree if the person unlawfully injures another person, and then other things. Although [defense counsel] does point out that there is an offering, or attempting to injure another person, the first part of the statute for assault and battery in the first degree says in A – the person commits this if the person unlawfully, A, injures another person and the act either applies to one or two. And then it says B, offers or attempts to injure another person with the present ability to do so.

R. 117 lines 12-21. The judge concluded that he would not charge the jury as to assault and battery in the first degree as to Stephens because there was no touching. R. 117 lines 22-24. Later, when discussing the jury instructions again, the trial judge explained that defense counsel requested the charges on the lesser-included offenses as to Stephens, but the judge "declined to do so because of the evidence at the trial in which he said he had no injury." R. 120 lines 21-25. Judge Buckner explained he would charge the jury as to assault and battery in the first degree concerning Mack because she testified "she had cuts and bruises." R. 118 lines 2-12.

After the judge charged the jury, defense counsel renewed his request for the court to instruct the jury on assault and battery in the first degree as to Stephens. R. 173 line 24 – R. 174 line 4. Judge Buckner again declined to charge assault and battery

[1] The trial judge stated that "both attorneys agreed that that evidence came out during the trial of the case." R. 117 lines 6-7. Respectfully, a review of the record revealed no such testimony by Stephens. Regardless, whether Stephens testified he suffered an injury is inconsequential because the statute for assault and battery in the first degree does not require an unlawful touching. See S.C. Code Ann. § 16-3-600(C)(1)(b).

concerning Stephens because there was no evidence "of any touching for battery." R. 174 lines 17-24.

Law and Analysis

There is no question that assault and battery in the first degree is a lesser-included offense of attempted murder. S.C. Code Ann. § 16-3-600(C)(3). A jury charge to a lesser-included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law mandates a jury instruction on a lesser-included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), "[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts."

The trial judge refused to instruct the jury as to assault and battery in the first degree concerning Stephens because there was no touching or injury. This reasoning is erroneous. South Carolina defines assault and battery in the first degree as

> offer[ing] or attempt[ing] 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 Ann. § 16-3-600(C)(1)(b). The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (citations omitted). Where the statute's language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. Id. (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

Prior to June of 2010, assault and battery was a common law offense. In the 1800s, South Carolina defined assault and battery as "any touching of the person of an individual in a rude or angry manner, without justification." State v. Hill, 29 S.C.L. (2 Speers) 150 (S.C. App. L. 1843); State v. Mims, 286 S.C. 553, 554, 335 S.E.2d 237, 237 (1985). Assault was defined "as 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." In re McGee, 278 S.C. 506, 299 S.E.2d 334 (1983); State v. Jones, 133 S.C. 167, 130 S.E. 747 (1925) overruled on other grounds by State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). The South Carolina Supreme Court explained that common law

assault differed from common law assault and battery in that "there is no touching of the victim." Mims, 286 S.C. at 554, 335 S.E.2d at 237. In the 1900s the definition of common law assault and battery evolved somewhat. In Jones, 133 S.C. at __, 130 S.E. at 751, the Supreme Court explained that "simple assault and battery" was "an unlawful act of violent injury to the person of another, unaccompanied by any circumstances of aggravation." See also State v. Germany, 211 S.C. 297, 300, 44 S.E.2d 840, 841 (1947). Obviously, Appellant concedes that at common law battery required an unlawful touching. However, the new statutory scheme, under which Appellant was indicted, eliminates the requirement of a touching for some categories of assault and battery.

The statutory definition of assault and battery in the first degree does not require an injury or an unlawful touching. The plain language of the statute requires only an offer to injure or an attempt to injure with the present ability to do so and the offer or attempt is accomplished by means likely to produce death or great bodily injury. The statute simply does not require an unlawful touching or an injury to the victim. Comparing § 16-3-600(C)(1)(b) of the South Carolina Code with the other parts of the statute make clear that the Legislature intended to eliminate the requirement of an unlawful touching as to certain categories of assault and battery. Lawmakers required an injury in order to establish assault and battery in the first degree under the first subsection. S.C. Code Ann. § 16-3-600(C)(1)(a). Had the Legislature intended to require a touching or injury for all categories of assault and battery, it easily could have done so. The wording of assault and battery in the third degree demonstrates most clearly that lawmakers intended to eliminate the necessity of a touching from the statutory scheme encompassing assault and battery. By defining third degree assault and battery as

"unlawfully injur[ing] another person, or offer[ing] or attempt[ing] to injure another person with the present ability to do so," S.C. Code Ann. § 16-3-600(E)(1), lawmakers codified common law assault. Reviewing the statutory scheme as a whole, it is clear the Legislature intended to subsume all categories of common law assault and common law assault and battery.

In addition to the plain and ordinary meaning of the statute, the Legislature made clear in the Omnibus Crime Reduction and Sentencing Reform Act that it was aware of the common law offenses and specifically sought to abolish them:

> The common law offenses of assault and battery with intent to kill, assault with intent to kill, assault and battery of a high and aggravated nature, simple assault and battery, assault of a high and aggravated nature, aggravated assault, and simple assault are abolished for offenses occurring on or after the effect date of this act.

2010 S.C. Act No. 273, § 7.B. The intent of the General Assembly in passing the legislation was to "provide consistency in sentencing classifications, provide proportional punishments for the offenses committed, and reduce the risk of recidivism." 2010 Act No. 273 § 2. Rather than creating separate offenses of assault and assault and battery, the Legislature created multiple degrees of assault and battery encompassing conduct that would have been considered assault under the common law.

Appellant, while riding a moped, fired shots into the vehicle in which Stephens was a passenger. His conduct fits squarely within the lesser-included offense of assault and battery in the first degree. The first element - an attempt to injure another person - is satisfied by Appellant shooting a gun into an occupied vehicle. The second element that the actor has the present ability to cause injury is satisfied by Appellant's use of a gun. Appellant satisfied the final element because he used a deadly weapon to fire shots into

the car where Stephens was a passenger, which is means likely to produce death or great bodily injury.

The trial judge confused the elements of common law assault and battery with the elements of statutory assault and battery in the first degree when he required the showing of an unlawful touching or injury in order to instruct the jury concerning the lesser-included offense.

Although the trial judge instructed the jury on the lesser-included offense of assault and battery in the first degree as to Mack, this Court should reverse Appellant's conviction of attempted murder of Mack as well as his conviction of attempted murder of Stephens due to the prejudice Appellant suffered based upon the judge's erroneous ruling. The evidence presented as to Mack and Stephens was exactly the same. Based on the choices presented to the jury, there is simply no way the jury could find Appellant guilty of assault and battery in the first degree concerning Mack, but find him guilty of attempted murder concerning Stephens. By eliminating the lesser-included offenses concerning Stephens, the trial judge forced the jury to return a verdict of attempted murder as to Mack. The record contained no evidence to suggest that the jury should treat the victims differently as the evidence was the exact same concerning both victims. The trial court's instructions amounted to a comment on the evidence. In State v. Roof, 298 S.C. 351, 380 S.E.2d 828, (1989), the Supreme Court reversed the defendant's conviction for murder where the trial judge instructed the jury it may convict the defendant's co-defendant, who had been charged with murder, on the lesser-included offense of accessory after the fact, but did not give the jury that option for the defendant and the evidence presented against the two was the same. The defendant and co-

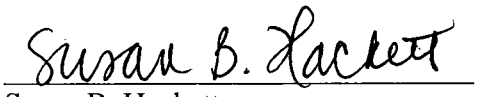
defendant gave identical statements to law enforcement implicating the other in the murder, but inculpating the writer as an accessory. Id. at 352-353, 380 S.E.2d at 829. The co-defendant testified at trial consistent with his written statement. Id. at 353, 380 S.E.2d at 829. At the conclusion of the trial, the judge instructed the jury on murder and accessory as to the co-defendant, but refused to charge accessory as to the defendant. Id. The Supreme Court held that "by giving the accessory charge as to [co-defendant], the court improperly implied that the court itself gave greater weight to [co-defendant]'s credibility." Id. The jury instruction option "was tantamount to a comment by the court on the dispositive factual issue here – witness credibility." Id. at 353-354, 380 S.E.2d at 829.

The evidence presented against Appellant concerning Stephens and Mack was identical. The trial judge's erroneous ruling to charge assault and battery in the first degree concerning Mack, but not Stephens amounted to a comment by the trial judge that Appellant was guilty of attempted murder.

CONCLUSION

Appellant requests this Court reverse his convictions and remand this matter for a new trial based upon the trial judge's failure to charge the jury with the lesser-included offense of assault and battery in the first degree.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of May, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

May 1st, 2012

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 1st day of May, 2012.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of May, 2012.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013 .