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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2013-002655

THE STATE,

Respondent,

vs.

CHARLES BRANDENBURG, JR.

Appellant.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Assistant Attorney General
S.C. Bar No. 100108

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit
Post Office Box 516
Greenwood, South Carolina 29648
(864) 942-8800

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in charging first-degree harassment as a lesser included offense of stalking.

STATEMENT OF THE CASE

Appellant was indicted during the December 2013 term of the Abbeville Grand Jury for stalking. He was represented by Eighth Circuit Public Defender Janna A. Nelson and Assistant Public Defender Patricia A. Bolen. The State was represented by Assistant Solicitors Elizabeth P. White and C. Yates Brown, Jr.

Appellant proceeded to trial on December 4-5, 2013, before the Honorable Thomas J. Hughston and a jury. Over Appellant's objection, the trial court instructed the jury on first degree and second-degree harassment as lesser included offenses. The jury convicted Appellant of harassment in the first degree. The trial court sentenced Appellant to three years imprisonment, suspended upon the service of sixteen months imprisonment followed by five years of probation.

Appellant filed a timely notice of appeal and a brief pursuant to Anders v. California, 386 U.S. 738 (1967), was submitted on his behalf. By Order dated March 17, 2015, this Court denied counsel's motion to be relieved and directed the parties to file merits briefs. On March 31, 2015, Appellant filed his Brief of Appellant. This brief follows.

STATEMENT OF FACTS

Appellant and Angela Bradenburg[1] were married and living in Berkeley County, South Carolina, with their two small children. (R. pp. 90, 96). On June 28, 2012, Angela left Appellant and moved in with her parents in Abbeville, South Carolina. (R. pp. 89-90, 96). Angela started a job at Self Regional Hospital and enrolled the children in a local elementary school. (R. pp. 98, 106).

Throughout the summer, Appellant occasionally called Angela, sometimes asking to speak to the children, but did not make any attempts to see them or Angela. In September 2012, Appellant began asking if he could come see the children. (R. pp. 96-97). Angela suggested that they meet in Columbia at his mother's house. (R. pp. 96-97).

On the evening of September 18, 2012, Appellant showed up at Angela's parent's house where she and the children were living. (R. pp. 97-98). Angela's father went outside and told Appellant he was not welcome and needed to leave; Appellant complied. (R. pp. 97-98). The next morning, Appellant was waiting outside the children's school. (R. pp. 98-99). Appellant spoke with Angela and the children briefly before Angela brought the children inside. (R. p. 98-99). After she came back outside, Angela spoke with Appellant again and agreed to let him see the children after school. (R. pp. 99-100). During the afterschool visit, Appellant urged Angela to spend the night in a motel with him and the children. (R. pp. 99-100). Angela refused and reaffirmed her plans to bring the children to see him that Saturday in Columbia. (R. p. 100).

On September 20, 2012, Angela received two text messages from Appellant, including one that read, "I'm going to follow those pretty blue eyes." (R. p. 104). The

[1] Because Appellant, Charles Brandenburg, and his wife, Angela Brandenburg, share a last name, Angela will be referred to by her first name throughout this brief.

next day, Angela received more text messages from Appellant, along with a phone call telling her he was in Greenwood at a motel and wanted to see her and the children. (R. p. 105). Angela responded that they already had plans to meet in Columbia on Saturday and go to the zoo. (R. p. 105).

Angela had contact again with Appellant on October 5, 2012, when he called and texted her indicating he was in the area. (R. p. 105). When Angela left work early the next morning, she found a note from Appellant on her truck and Appellant waiting in the parking lot. (R. pp. 105-07). Appellant then called her later that evening and early the following morning asking to meet. (R. p. 107). When Angela left work that morning, Appellant was again waiting in the parking lot of Self Regional Hospital. (R. p. 107). Appellant approached Angela and told her he did not want a divorce and was going to pick up the children. (R. p.p 107-08). Angela told Appellant that he could not show up unannounced demanding to see the children and needed to call her first to make a plan. (R. p. 108). Angela left and drove to her parent's house with Appellant following her. (R. p. 108). When they arrived, her father, Robert Faggart, came outside and told him he needed to leave. (R. pp. 108-09). Appellant said he was here to see the children and refused to leave. (R. pp. 108-09). Angela's mother called 911 and the Sheriff's Department arrived. (R. p. 109). Deputies spoke with Appellant and explained it would be best for him contact Angela beforehand to set up a time to see the children, but stated that he could not be detained for trespassing because he had a right to see his children. (R. p. 109). After an hour, Appellant left. (R. p. 109).

The next time Angela had contact from Appellant was the morning of November 18, 2012. (R. pp. 109-10). Angela was leaving work at 5 a.m. when she noticed Appellant

was following her. (R. pp. 109-10). Angela and the children had moved out of her parent's house and she was concerned that Appellant would follow her to her new home. (R. p. 110). She drove around until she finally lost Appellant. (R. p. 110).

Appellant next contacted Angela on November 26, 2012. (R. p. 11). Angela received a text message from Appellant's mother that he was on his way to see her and the kids. (R. p. 111). Angela picked up the children from school early and took them to a relative's home where Appellant did not know the location. (R. p. 111). Appellant then texted Angela, upset that she had taken the children out of school early. (R. p. 111). Later than evening, she saw Appellant waiting in the parking lot near Self Regional Hospital as she arrived for work. (R. pp. 111-12). Appellant was outside leaning against his car. (R. p. 112). Later, Angela received a call from the school that Appellant was there demanding to see the children. (R. p. 112). The principal of the school, Charles Costner, refused to allow Appellant to see the children until he confirmed that he was their father. (R. pp. 176-77). Appellant explained that he and Angela were separated and he wanted to see his children. (R. p. 177). Costner asked Appellant to fill out an emergency card with his information so he could confirm his identity and Appellant complied. (R. pp. 176-77).

Appellant came to the school again on November 27, 2012, demanding to see his children. Angela had kept her children out of school that day due to concerns about Appellant's behavior. (R. p. 112). Principal Costner again told Appellant he could not see his children, causing Appellant to become very agitated and boisterous. (R. pp. 178-79). Due to Appellant's behavior, Principal Costner called law enforcement for assistance. (R. p. 179). Three officers arrived and escorted Appellant off school grounds. (R. p. 179-80). Later that morning, Angela saw Appellant's car parked near the children's school. (R. pp.

112-13). She went to the Sheriff's Department and asked if she could file a report, but was told it was a family court issue and they could not get involved. (R. p. 113). Angela next saw Appellant at a family court hearing in Berkeley County on December 3, 2012. (R. p. 114).

On December 12, 2012, Angela was Christmas shopping in Greenwood when she saw Appellant in the parking lot. (R. p. 114). Appellant indicated for Angela to pull over and she complied. (R. pp. 114-15). The two spoke regarding their marital status and Appellant's desire to work things out. (R. pp. 115). Angela told Appellant she did not want to work things out. (R. p. 115). Later that afternoon, Appellant was across the street from the children's school, pacing back and forth and yelling to get the children's attention. (R. pp. 115-16, 181-82). Angela agreed to meet Appellant at McDonald's so he could see the children. (R. p. 116).

The next morning, December 13, 2012, Angela saw Appellant after dropping the children off at school and he flagged her down. (R. pp. 117-18, 120). Angela stopped and spoke to Appellant. (R. p. 118). She told Appellant that he needed to return to Charleston and leave her and the children alone. (R. pp. 118, 120). On December 14, 2012, Appellant received a text message from Appellant congratulating her on the family court decision awarding her sole custody of the children.[2] (R. pp. 120, 134).

Angela next saw Appellant when he showed up at her house in Abbeville. (R. p. 135). Appellant asked to see the children, but Angela refused and told him he needed to

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[2] During this time, Appellant and Angela were both parties to family court action regarding custody of their children, which was still pending at the time of trial. Angela was represented by counsel, while Appellant was representing himself. On December 14, 2012, the family court advised Angela's counsel and Appellant by email of his ruling and requested a proposed Order granting Angela sole custody of the children and mutually restraining each from contacting the other. (R. pp. 134-35). This Order was not signed until December 28, 2012, and was not filed until January 3, 2013. (R. pp. 143-35; Supp. R. pp. 13-15).

leave or she would call law enforcement. (R. pp. 164-65). Angie Priest from the Abbeville Police Department responded and Appellant was apprehended on active warrants regarding his repeated contact of Angela. (R. pp. 192-94, 196-97).

On February 8, 2013, Angela saw Appellant at the children's school and in the town square. (R. pp. 139-40, 165). Appellant next contacted Angela on February 24, 2013, by text message and phone call, indicating he wanted to see the children. (R. pp. 140, 167). Two days later, on February 26, 2013, Appellant drove by Angela's home several times throughout the afternoon and left a bag of toys in her backyard for the children. (R. pp. 140, 167). She called law enforcement and reported the incident out of fear for the safety of herself and the children. (R. pp. 140-41).

Appellant was indicted by the Abbeville County Grand Jury for stalking pursuant to S.C. Code Ann. §§ 16-3-1700 & -1730. Appellant's counsel filed written motions to sever and quash, and both were argued prior to Appellant's trial. (R. pp. 23-36; Supp. R. 1-12). As to the motion to sever, Appellant argued that he was arrested twice: first pursuant to a warrant for stalking issued by the Abbeville Sheriff's Department and second pursuant to a warrant for harassment issued by the Abbeville Police Department. (R. pp. 23-36; Supp. R. 7-12). Appellant asserted that the State should not be permitted to try both charges together under a recently-obtained indictment for stalking covering conduct from both warrants and demanded that the charges be tried separately. (R. pp. 23-36; Supp. R. 7-12). The State responded that it indicted Appellant for stalking to encompass all conduct out of judicial economy, as both warrants involved the same pattern of behavior with the same victim. (R. pp. 23-36; Supp. R. 7-12). The trial court denied Appellant's motion and proceeded with his trial for stalking. (R. p. 36).

During its case, the State presented testimony from Angela, Principal Costner, Faggart, and Officer Priest. At the conclusion of the presentation of evidence, the State requested a jury instruction on first degree and second-degree harassment as lesser included offenses of stalking. (R. pp. 207-216). Appellant objected and argued that first degree and second-degree harassment were not lesser included offenses of stalking and should not be charged. (R. pp. 207-216). Specifically, Appellant argued that first-degree and second-degree harassment contain additional elements not included in stalking, such as "mental or emotional distress" and "unreasonable intrusion into the private life," and therefore, did not meet the elements test to be lesser-included offenses of stalking. (R. pp. 214-16). After hearing argument from both sides, the trial court decided to charge both first degree and second-degree harassment as lesser included offenses. (R. pp. 207-216). The jury convicted Appellant of first-degree harassment. (R. p. 293).

ARGUMENT

I. The trial court did not err in charging first-degree harassment as a lesser included offense of stalking.

Appellant contends that the trial court erred in charging the jury on first-degree harassment as a lesser-included offense. In support of that contention, Appellant maintains that first degree harassment includes an "unreasonable intrusion into the private life of a targeted person" and "emotional distress" that are not included in stalking, and therefore, harassment is not a lesser included offense of stalking. Contrary to Appellant's contentions, first-degree harassment is a lesser included offense of stalking. The trial court properly instructed the jury on first-degree harassment in Appellant's case. Appellant's conviction should be affirmed.

"In criminal cases, the appellate court sits to review errors of law only." State v. Green, 406 S.C. 589, 592, 753 S.E.2d 259, 260 (Ct. App. 2014) (citing State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (internal citations omitted). "This Court is bound by the trial court's factual findings unless they are clearly erroneous." Id. (citing State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)).

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). No instruction should be given by the trial judge that tenders an issue which is not presented or supported by the evidence. State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). The trial court only commits reversible

error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 838, 849 (1993).

In instructing the jury on the law, "[a] trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Green, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012). Generally, pursuant to the elements test, an offense is a lesser-included offense of a greater offense if the greater offense includes all of the elements of the lesser-included offense. State v. Primus, 349 S.C. 576, 579-580, 564 S.E.2d 103, 105 (2002), overruled on other grounds by State v. Gentry, 563 S.C. 93, 610 S.E.2d 494 (2005). However, "[i]f the lesser offense includes an element which is not included in the greater offense, then the lesser offense is not included in the greater offense." Id. at 580, 564 S.E.2d at 105. In determining whether an offense is a lesser-included offense of another, courts in South Carolina typically apply the elements test to make that determination with few exceptions. See id. ("While the Court recognizes the existence of a few anomalies, it generally adheres to the use of the traditional elements test.").

In the case at bar, the trial court committed no error in instructing the jury on the offense of first-degree harassment because that crime is a lesser included offense of stalking.

The elements of stalking are as follows:

> [A] pattern of words, whether verbal, written, or electronic, or a pattern of conduct that serves no legitimate purpose and is intended to cause and does cause a targeted person and would cause a reasonable person in the targeted person's position to fear: (1) death of the person or a member of his family; (2) assault upon the person or a member of his family; (3) bodily injury to the person or a member of his family; (4) criminal sexual contact on the

> person or a member of his family; (5) kidnapping of the person or a member of his family; or (6) damage to the property of the person or a member of his family.

S.C. Code Ann. § 16-3-1700(C). The elements of first-degree harassment are as follows:

> [A] pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose and causes the person and would cause a reasonable person in his position to suffer mental or emotional distress. Harassment in the first degree may include, but is not limited to: (1) following the targeted person as he moves from location to location; (2) visual or physical contact that is initiated, maintained, or repeated after a person has been provided oral or written notice that the contact is unwanted or after the victim has filed an incident report with a law enforcement agency; (3) surveillance of or the maintenance of a presence near the targeted person's: (a) residence; (b) place of work; (c) school; or (d) another place regularly occupied or visited by the targeted person; and (4) vandalism and property damage.

S.C. Code Ann. § 16-3-1700(A).

At first blush, Appellant's assertions that first-degree harassment contains elements not included in stalking appear to have some merit, as the exact working for the elements differ. However, upon closer inspection of the statutory requirements for each crime, it is clear that the elements of first-degree harassment are all contained within stalking. Under any reasonable interpretation, a pattern of words, whether verbal, written, or electronic, or a pattern of conduct that serves no legitimate purpose and is intended to cause and does cause a targeted person and would cause a reasonable person in the targeted person's position to fear death of, physical or sexual assault upon, injury to, or kidnapping of the person/member of the person's family or damage to the property of the person/member of the person's family would have to include a pattern of intentional, substantial, and unreasonable intrusion into the private life of the targeted person that

serves no legitimate purpose and causes the person and would cause a reasonable person in his position to suffer mental or emotional distress (i.e., to at least a layperson, fear is a type of mental/emotional distress). More specifically, the "unreasonable intrusion into the private life of a targeted person" in first-degree harassment is the same element as the six enumerated acts explicitly listed within stalking and fear is a type of mental or emotional distress. Thus, all of the elements of first-degree harassment are contained within stalking.

Criminal statutes must be strictly construed against the state and in favor of the defendant. Williams v. State, 306 S.C. 89, 91, 410 S.E.2d 563, 564 (1991). The elementary and cardinal rule of statutory construction is that the court must ascertain and effectuate the intent of the legislature. Mid–State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Therefore, in interpreting a statute, the words must be given their plain and ordinary meaning without resorting to subtle or forced construction that limit or expand the statute's operation. Rowe v. Hyatt, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996). Statutes, as a whole, must receive "practical, reasonable and fair interpretation consonant with the purpose, design and policy of lawmakers." Whiteside v. Cherokee County Sch. Dist. No. 1, 311 S.C. 335, 340, 428 S.E.2d 886, 888 (1993).

Furthermore, the court should not consider the particular clause being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law. South Carolina Coastal Council v. South Carolina State Ethics Comm'n, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991). Statutory provisions should be given a reasonable construction consistent with the purpose of the statute. Jackson v.

Charleston County Sch. Dist., 316 S.C. 177, 181, 447 S.E.2d 859, 861 (1994). Statutes that are part of the same act must be read together. Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). Statutes must be read as a whole and sections that are part of the same general statutory scheme must be construed together and each given effect, if reasonable. Higgins v. State, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992).

Under such rules of statutory construction, it is clear that all elements of first-degree harassment are included within stalking and that first-degree harassment is intended to be a lesser included offense of stalking. Despite the plain and ordinary interpretation of the elements from both offenses meaning the same thing, Appellant is attempting to construe the statutory language in an extremely narrow fashion for his own benefit while ignoring the clear intent of the legislature that first-degree harassment is a lesser included offense of stalking. It is clear that the legislature intended for the crimes enumerated in S.C. Code Ann. § 16-3-1700 to be interpreted together and act as lesser included offenses, both when enacted in 1995 and in all amendments since. See State v. Prince, 335 S.C. 466, 472, 517 S.E.2d 229, 232 (Ct. App. 1999) (noting that S.C. Code Ann. § 16-3-1700 delineates a three-tiered approach to stalking crimes with progressively egregious conduct and harsher penalties as the tiers increase), see also Act No. 94, § 1, 1995 S.C. Acts & Joint Resolutions; Act No. 81, § 4, 2001 S.C. Acts & Joint Resolutions; Act No. 106, § 7, 2005 S.C. Acts & Joint Resolution; Act No. 99, § 1, 2013 S.C. Acts & Joint Resolutions. The interpretation of first-degree and second-degree harassment as lesser included offenses of stalking also effectuates the legislature's policy intentions of curbing the perpetrator's behavior before it reaches the level of stalking.

The trial court did not err in charging the jury on first-degree harassment as a lesser included offense of stalking. Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Assistant Attorney General
S.C. Bar No. 100108

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit
Post Office Box 516
Greenwood, South Carolina 29648
(864) 942-8800

BY:
Megan Harrigan Jameson

Office of the Attorney General
Post Office Box 11549
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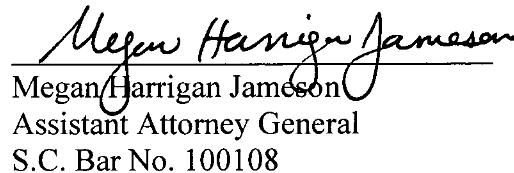
PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Brief of Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Pachak, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 27th day of July, 2015.



Megan Harrigan Jameson
Assistant Attorney General
S.C. Bar No. 100108

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727