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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSEPH WILLIAMS DINKINS,

APPELLANT

APPELLATE CASE NO. 2014-001593

ANDERS BRIEF OF APPELLANT

JOHN H. STROM
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

The trial judge erred in failing to instruct the jury on the lesser-included offense of criminal domestic violence where the evidence before the jury supported a conviction on the lesser offense in light of the complainant's injuries and the State's inability to produce evidence that the gasoline-water mixture poured on complainant was flammable.

STATEMENT OF THE CASE

On October 8, 2012, the Orangeburg County Grand Jury indicted Appellant Joseph Dinkins for one count of Criminal Domestic Violence of a High and Aggravated Nature (CDVHAN). R. * (Indictment).

On November 6, 2012, Appellant proceeded to trial *in absentia* before the Honorable Edgar W. Dickson and a jury. Mark Wise and John Stroud represented Appellant, and Assistant Solicitors Sarah A. Ford and Robert N. Clariday represented the State.

The jury found Appellant guilty as charged. R. 228, ll. 1-23. On July 15, 2013, the trial court sentenced Appellant to ten years imprisonment. R. 242, ll. 24 – R. 243, ll. 9.

ARGUMENT

The trial judge erred in failing to instruct the jury on the lesser-included offense of criminal domestic violence where the evidence before the jury supported a conviction on the lesser offense in light of the complainant's injuries and the State's inability to produce evidence that the gasoline-water mixture poured on complainant was flammable.

Relevant Facts

Procedural History

Appellant and Crystal Allen were in a long-term relationship and had two children together. R. 69, ll. 8 – R. 70, ll. 19. On May 30, 2012, Appellant and Allen had an argument about the future of their relationship that ended with Appellant walking out of their shared residence in Orangeburg County. *Id.*

In the early morning hours of May 31, 2012, Appellant returned to the residence to again talk to Allen about salvaging their relationship. R. 70, ll. 20 – R. 72, ll. 16. Allen's friend Kara Dowling and a male-friend of Dowling, "Cliff", were at the residence with Allen when Appellant returned. R. 99, ll. 4 – R. 101, ll. 6

At some point the discussion became confrontational. Appellant allegedly took a family picture and smashed it on the ground outside of the residence. R. 71, ll. 1-24. Shortly thereafter, Appellant returned to the house with a "jug" containing what the State would allege was gasoline. R. 72, ll. 10-22..

Appellant walked over to where Allen was seated in the living room and poured the liquid contents of the container on to Allen. R. 72, ll. 8 – R. 73, ll. 18. While restraining Allen with his knee, Appellant produced a lighter. Appellant allegedly threatened that "if I [Appellant] can't have you [Allen], no one can." *Id.*

Dowling and "Cliff" pulled Allen free of Appellant. *Id.* Appellant left the residence in Allen's car. R. 73, ll. 19-24. Allen called the police, who issued an alert for Appellant. R. 81, ll.

14-21. Appellant was located by Deputy Michael Faseco. R. 159, ll. 4-25. Appellant initially denied having any confrontation with Allen. R. 162, ll. 22-25. While being transported to the county jail and after having been read his *Miranda* rights, Appellant stated that he did not assault Allen, but that Allen had kicked the jug causing it to spill on both of them. R. 163, ll. 14-25.

Trial

Appellant was not present for trial. The trial court denied defense counsel's motion for a continuance. R. 6, ll. 18 – R. 8, ll. 23. The trial court also ruled that Appellant's statement to Deputy Fraseco, made while he was being transported to the county jail, was admissible. R. 54, ll. 16 – R. 55, ll. 2.

Trial Testimony of Crystal Allen

During Allen's testimony, the State introduced a letter that Appellant wrote to Allen while incarcerated. R. 78, ll. 2 –R. 80, ll. 25; *see also* R.* (State's Exhibit 1). In the letter, Appellant expressed deep remorse for his actions and assured Allen that he never would actually "set her on fire." *Id.* The letter also states that the "jug" contained more water than gasoline and ended with Appellant affirming his commitment to their relationship and to their children. *Id.*

Allen claimed that the substance Appellant poured on her smelled like gasoline. R. 81, ll. 1-7. On cross-examination, Allen admitted that, while Appellant held her down, he never hit or punched her. R. 92, ll. 14-21. Allen stated that she did not know where the "jug" used by Appellant currently was. R. 92, ll. 22 – R. 93, ll. 4. Allen also acknowledged that Appellant brought the jug in from outside the residence and that it had been exposed to the elements for an indeterminate amount of time. R. 83, ll. 3-24; R. 86, ll. 9 – R. 93, ll. 14.

Trial Testimony of Desi McQueen

Desi McQueen, an Orangeburg Sheriff Department Deputy who responded to Allen's 911 call, testified that when she entered the residence she immediately notice the smell of gasoline. R. 116, ll. 6 – R. 117, ll. 9. McQueen testified that Allen was hysterical, but had no visible injuries. R. 120, ll. 16 – R. 121, ll. 10.

McQueen admitted on cross-examination that she saw the "jug" Allen claimed Appellant used, but that she did not take it into evidence and had no idea where it currently was. *Id.* McQueen stated that she took Allen's shirt as evidence for testing by SLED, but did not hand over the shirt to her superior for several days. R. 121, ll. 17 – R. 122, ll. 5. McQueen acknowledged that she did not preserve any of the carpeting or furniture fabric that Allen indicated had the gasoline-water mixture spilled on it. *Id.*

Trial Testimony of Judy Walton

Lieutenant Judy Walton collected Allen's shirt from McQueen for testing. R. 132, ll. 8 – R. 133, ll. 14. Walton stated that she took possession of the shirt, which was in a Ziploc bag, from McQueen and placed it in her patrol car's trunk. *Id.* Walton did not turn the shirt over to the department's evidence custodian until four months after the incident occurred. *Id.* She testified that she turned the shirt into the evidence technician in the same Ziploc bag that she received it in. *Id.*

Trial Testimony of Michael Moskal

Moskal, a forensic technician with SLED's trace evidence department, stated that he received Allen's shirt in a canister, instead of the plastic bag that McQueen placed it in. R. 148, ll. 12 –R. 158, ll. 6. He did not know who moved the shirt from the plastic bag into the canister. R. 145, ll. 24 – R. 146, ll. 2; R. 148, ll. 10 – R. 151, ll. 24. Moskal tested the shirt for the

presence of gasoline, but did not find "any ignitable liquids of evidentiary value." R. 154, ll. 7 – R. R. 155, ll. 20.

Moskal then posited that, because of evaporation, he would not expect to find any gasoline on the shirt four months after the incident. *Id.* On cross-examination, Moskal conceded that another explanation for the lack of gasoline could be that it was never on the shirt. R. 156, ll. 6-25.

Denial of Lesser-included Charge: Criminal Domestic Violence

Defense counsel requested that the trial court charge the jury with the lesser-included offense of criminal domestic violence. R. 184, ll. 1 – R. 189, ll. 11. The defense argued that Appellant's letter to Allen, which the State entered as an exhibit, was evidence that the gasoline-water was not combustible and that the State had produced no evidence demonstrating that the substance was flammable. *Id.*

The defense further noted that the quantity of gasoline spilled was unknown. *Id.* Finally, the defense stated that there was no evidence that Appellant attempted to ignite the gasoline. *Id.* Since Appellant's case was concerning potential injuries, the State had to prove that the potential injuries could have been serious or life-threatening. *Id.* Given the lack of evidence that the gasoline was flammable, the defense contended Appellant was entitled to a charge on the lesser-included offense of CDV. *Id.*

The State countered that Allen reasonably feared that Appellant was going to light her on fire, causing her to sustain great bodily injury or death. R. 190, ll. 1-18. Citing *State v. Golston*[1], the trial court ruled that Appellant was not entitled to a jury instruction on the lesser-included instruction of CDV. R. 191, ll. 16 – R. 192, ll. 5. The court concluded that "the mere existence

[1] 399 S.C. 393, 732 S.E.2d 175 (Ct. App. 2012)

of evidence that defendant committed these acts, in addition to other acts which would constitute CDVHAN, does not warrant a jury charge on CDV." *Id.*

Discussion

The trial judge erred reversibly in failing to instruct the jury on the lesser-included offense of criminal domestic violence when the evidence before the jury supported a conviction on the lesser offense in light of the complainant's minor physical injuries and the State's inability to present evidence that the gasoline-water mixture poured on complainant was flammable. R. 184, ll. 1 – R. 189, ll. 11; *Golston*, 399 S.C. 393, 732 S.E.2d 175; *see also State v. Geiger,* 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006).

A jury charge to a lesser-included offense is required when the evidence warrants such an instruction. *Geiger*, 370 S.C. at 606, 635 S.E.2d at 673. South Carolina law mandates a jury instruction on a lesser-included offense when there is any whatsoever 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); *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 296 (2001).

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."

A person is guilty of CDV when he or she causes physical harm or injury to a household member or attempts to cause physical harm or injury to a household member "with apparent

present ability under circumstances reasonably creating fear of imminent peril." S.C. Code Ann. § 16–25–20(A) (Supp.2011). A person is guilty of CDVHAN when, in addition to committing CDV, one of the aggravating circumstances in § 16–25–65(A) are present. § 16–25–65(A)(1)-(2) (Supp.2011).

Appellant was charged with CDVHAN. The State alleged that Appellant assaulted Allen, with or without a battery, in a manner which would reasonably cause a person to fear imminent serious bodily injury or death. § 16-25-65(A)(2); R. 64, ll. 2 –R. 66, ll. 16. The trial court refused to charge the jury concerning CDV. R. 191, ll. 16 – R. 192, ll. 5. This was in error. Appellant was entitled to a jury instruction on CDV because evidence was presented at trial tending to show that Appellant was only guilty of CDV. *State v. Gourdine*, 322 S.C. at 398, 472 S.E.2d at 241.

The State's theory of the case was centered on proving that Appellant had the ability to ignite the gasoline-water mixture that he poured onto Allen. R. 191, ll. 16 – R. 192, ll. 5. However, the State failed to present any evidence that the gasoline-water mixture was flammable. Tests conducted by SLED of Allen's clothes returned negative for any ignitable liquids. R. 191, ll. 16 – R. 192, ll. 5. Law enforcement did not preserve the "jug" that the gasoline-water mixture was stored in. R. 120, ll. 16 – R. 121, ll. 10.

Nor did the investigators test or otherwise preserve carpeting or other pieces of furniture that the State alleged Appellant poured gasoline-water mixture on. *Id.* The State also failed to produce the lighter Appellant supposedly threatened Allen with. *Id.* Moreover, none of the witnesses called by the State were able to testify with any specificity on the amount of the gasoline-water mixture was spilled. R. 186, ll. 19 – R. 187, ll. 15.

In contrast, the State introduced a letter written by Appellant to Allen stating that the gasoline-water mixture was mostly water and that it was not flammable. R. 78, ll. 2 –R. 80, ll. 25; *see also* R.* (State's Exhibit 1). Further, the only evidence presented by the State that Appellant battered Allen was that he pinned her to the floor with his knee and that earlier in the night he had pushed her out of the master bedroom. R. 73, ll. 6-8.

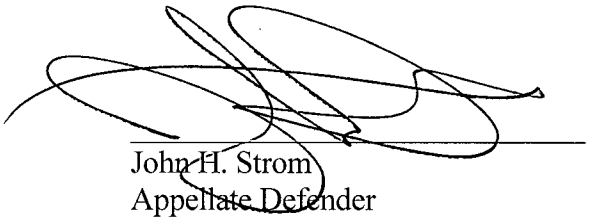
This battery does not rise to the level of CDVHAN. The lack of evidence proving that the gasoline-water mixture was flammable should have sustained a jury instruction on the lesser-included offense of CDV. *State v. Drayton,* 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987) (court must charge a lesser-included offense if there is evidence inferring the lesser, rather than the greater, offense was committed). In Appellant's case, the evidence was equivocal as to whether he had the apparent present ability to carry out an assault that would have reasonably caused a person to fear imminent serious bodily injury or death. *Patterson*, 337 S.C. at 233, 522 S.E.2d at 854; § 16-25-20(A)(1)-(2); § 16–25–65(A)(2).

Accordingly, the trial court erred reversibly in refusing to charge the jury with the lesser-included offense of criminal domestic violence. *Watson*, 349 S.C. at 375, 563 S.E.2d at 337.

CONCLUSION

Based on the foregoing reason, Appellant Joseph Dinkins respectfully requests this Court reverse his convictions and remand this case to the Orangeburg County Court of General Sessions for a new trial

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of August, 2015.

STATE OF SOUTH CAROLINA
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Appeal from Orangeburg County
Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSEPH WILLIAMS DINKINS,

APPELLANT

APPELLATE CASE NO. 2014-001593

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joseph Williams Dinkins states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Edgar W. Dickson, which was held on July 15, 2014, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Joseph Williams Dinkins.

Respectfully submitted,

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of August, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County
Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

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APPELLANT

APPELLATE CASE NO. 2014-001593

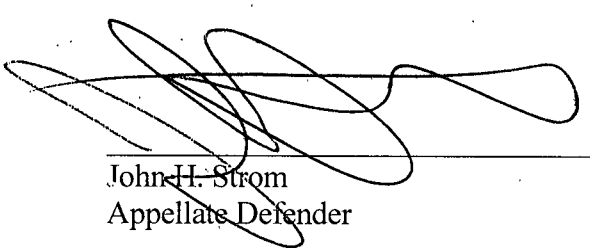
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment;
(2) Entire trial transcript (November 6, 2012); and
(3) State's Exhibit Number 1

I certify that this designation contains no matter which is irrelevant to this appeal.

August 5th, 2015



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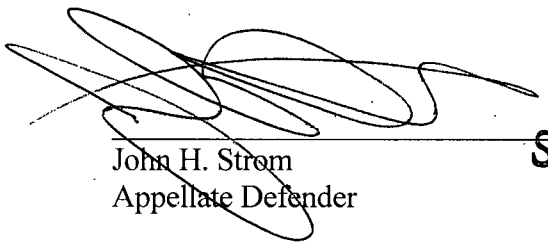
Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 5, 2015



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APPELLATE CASE NO. 2014-001593

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Joseph Williams Dinkins, #331909 at Livesay Pre-Release Center, this 5th day of August, 2015.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of August, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.