STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NATHANIEL WITHERSPOON,

APPELLANT

APPELLATE CASE NO. 2013-001440

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by instructing the jury that the alleged victim's testimony did not have to be corroborated since this was an impermissible charge on the facts and prejudicial?

2.

Whether the court erred by refusing to instruct the jury on assault and battery in the first degree pursuant to South Carolina Code Section 16-3-600 (C)(1) as a lesser–included or lesser offense of criminal sexual conduct in the first degree since the facts of this case justified charging this statutory subsection in the same manner as ABHAN?

STATEMENT OF THE CASE

Appellant was indicted by the Charleston County Grand Jury for the offenses of criminal sexual conduct in the first degree and burglary in the first degree. R. p. 347-352. His case was called to trial on June 19, 2013 before the Honorable Deadra L. Jefferson, and a jury. Andrew Grimes and Christina Parnell represented appellant. Timothy Finch and Elizabeth Riddle were the assistant solicitors. R. p. 1 - 2.

On June 21, 2013 the jury found appellant guilty on both counts. R. p. 334, ll. 9-25. Judge Jefferson sentenced appellant to eighteen years imprisonment, concurrent, on the two counts. R. p. 345, l. 22 – 346, l. 3.

This appeal follows.

ARGUMENT

1.

The court erred by instructing the jury that the alleged victim's testimony did not have to be corroborated since this was an impermissible charge on the facts and prejudicial.

Relevant Facts

The alleged victim, Sharon R., was sixty-four years old at the time of the incident on October 24, 2011. R. p. 26, ll. 9-12. She lived in an apartment in North Charleston. R. p. 27, ll. 7-9. She was legally blind because of cataracts. R. p. 28, ll. 1-9.

Ms. R. admitted that she regularly used crack cocaine. One of the men who often came by her apartment to do crack cocaine was nicknamed "New York". R. p. 29, l. 11 – 30, l. 13. Ms. R. remembered that New York had come by the night before or the night of the incident. R. p. 29, ll. 8 -16.

She testified that she was laying down watching television because she could not sleep. She thought she heard her cat scratching at the door to be let into the apartment. She went to the door and there was a man standing there. He was "very soft-spoken." R. p. 30, l. 17 – 33, l. 6.

The man asked to use the phone claiming his car had "broken down." She agreed to let him use the phone. While she walked to get the phone "he grabbed me around the throat and started dragging me to the bedroom .... I was doing everything I could to get help, to get away from him. And he grabbed me by my hair, pulled me down, and he started beating me in the face. And I kept hollering, you know, for somebody to help me. And finally he looked at me very soft-spoken, and he says, I have a knife. *I don't remember anything after that. Except looking around and looking for something to put on.*" She stated she then went

to her neighbor's house across the street and the neighbor called 911. I told her I'd been attacked and raped. I mean, I was raped." R. p. 30, l. 17 – 33, l. 6. (emphasis added).

Ms. R. admitted she had no idea who the person was that assaulted her. She told a detective she thought it could either be a dark-skinned white guy or a black man. R. p. 45, l. 15 – 46, l. 9. She also said it could have been "maybe an Italian guy." R. p. 46, ll. 21-22.

She admitted she had friends who came over to her apartment to "get me high" on crack cocaine. R. p. 52, ll. 15-20. She named "Cooper, a guy named New York, and ...a friend of mine named Pam" as recent partakers. R. p. 52, ll. 15-20.

Jill Farman was an investigator with the North Charleston Police Department. R. p. 86, l. 21- 87, l. 14. She remembered that Sharon R. had been in the emergency room and had dried blood on her and she had other injuries as well. R. p. 88, l. 17 – 89, l. 2. The included a scratch around her neck, and "some redness there." R. p. 89, ll. 8-14. Farman described her as "exhausted."

Farman also related that Sharon R. she thought a dark-skinned white male or an Italian or maybe light-skinned black male may have been her attacker. R. p. 90, l. 3 – 92, l.1. Ms. R. also told Farman that "New York" had been there the night before and they were smoking crack. R. p. 92, l. 13 – 93, l. 24.

Farman admitted that appellant having a consensual sexual relationship with the alleged victim would be "an option to explain why his [appellant's DNA] was there, yes." R. p. 104, l. 20 – 105, l. 16. However, Farman refused to admit that that a consensual sexual relationship would have changed her evaluation of this case – evidentially that she thought appellant was guilty. R. p. 111, l. 23 - 112, l. 2. Farman admitted that she understood appellant was very cooperative with the police. R. p. 126, ll. 2-5.

Janet Ward was a sexual assault nurse at MUSC. R. p. 129, ll. 11-19. She remembered that Sharon R. reported to the emergency room with injuries. R. p. 138, l. 25 – 140, l. 2. Ward acknowledged that she was told by Ms. R. that she had not done drugs or drank alcohol within the last seventy-two hours. That obviously was not true. R. p. 145, l. 23 – 146, l. 1.

Catherine Leisy of SLED testified that appellant had a DNA match on the external genital swabs of Sharon R. On another swab appellant could not be excluded as a possible "contributor." R. p. 153, ll. 16-24; 160, l. 3 – 161, l. 17.

Officer Matt Lawless of the North Charleston Police Department was responding to a "shots fired" call unrelated to this case when he found a cell phone with the name "N. Witherspoon on the screen. The phone no longer had service." Lawless estimated this was "about a mile away" from the alleged victim's apartment. R. p. 77, l. 10 – 80, l. 21. The import of this was the phone Lawless found that it was the alleged victim's phone stolen by her attacker. R. p. 34, l. 23 – 35, l. 1; R. p. 79, ll. 20-25.

During the defense case, Tammy Stiles testified that she had often seen appellant, whom she had known for over twenty years, at the alleged victim's apartment. She said he was there "just about every time I went there." Stiles testified that appellant and Ms. R. were doing sexual favors "for one another." She said the alleged victim readily admitted her sexual relationship with appellant. R. p. 215, l. 6 – 219, l. 7.

Derrick Felder also testified that he knew that appellant and the alleged victim did drugs together at her apartment, and that they were having an ongoing sexual relationship. R. p. 228, ll. 7-25.

Charge Conference

Defense counsel Grimes objected to the judge's intention to instruct the jury that "the victim's testimony does not need to be corroborated; [it] is a comment on the facts." The judge said the Legislature had decided "in its province that a CSC victim's testimony does not have to be corroborated. And that is the law..." R. p. 251, ll. 10-20.

Grimes said that if the judge was going to charge it he was preserving the issue for appeal. The judge responded: "Knock yourself out." R. p. 251, l. 13 – 252, l. 5. Defense counsel cited the dissent in State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006), for his contention that this jury instruction was not proper, and was a charge on the facts. R. p. 251, l. 14 – 254, l. 12; R. p. 275, l. 2 – 276, l. 11. Over objection the judge charged that pursuant to the statute "the testimony of the victim need not be corroborated." R. p. 326, ll. 9-14.

Discussion

As seen, the alleged victim in this case could not identify her attacker. The state's case against the appellant was circumstantial. Appellant presented evidence that he had an ongoing sexual relationship with the alleged victim. The defense strongly contended therefore that his DNA was found on the alleged victim was essentially meaningless. "And how do we know the DNA did not come from the assailant," Defense counsel asked the jury, "The assailant didn't ejaculate in her . . . Just brushed up against and it might be touch be touch DNA that's left there. That might be why it's weaker than Mr. Witherspoon's. R. p. 291, l. 8 – 294, l. 14. The other circumstantial evidence involved the alleged victim's cell phone.

It is apparent that the alleged victim lied at the emergency about her crack cocaine use. It is clear that the use of crack cocaine can strongly alter a person's perceptions and their ability to reason.

The jury instruction that the alleged victim's testimony did not need to be corroborated was especially prejudicial in this case given the alleged description of her attacker as being an Italian man, "a dark-skinned white guy or a black man." Appellant was a black man. "Doesn't that rule out Nathaniel by itself?," defense counsel asked.

The jury instruction in this case on the alleged victim's testimony does not need to be corroborated gives special status to an alleged victim of a criminal sexual assault that the victim of no other crime receives. Defense counsel correctly argued this jury instruction was an impermissible charge on the facts.

In State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006), the Supreme Court held that a judge could, but was not required to, charge South Carolina Code Section 16-3-657 that the alleged victim's testimony need not be corroborated. In Rayfield the defendant argued the jury instruction was a charge on the facts and it carried the strong possibility of unfairly biasing the jury against the defendant. It further improperly, and obviously, emphasized the testimony of one witness, the alleged victim, against others. See State v. Hill, 394 S.C. 280, 298, 715 S.E.2d 368, 378 (Ct. App. 2011).

The dissenters in State v. Rayfield noted this jury instruction did not assist the jury in fulfilling its function of deciding whether the state had proven the charges beyond a reasonable doubt. It created more problems than it solved, and the jury instruction was confusing as a whole.

As stated above, appellant is not aware of any other jury instruction that favors the testimony of a single witness over all others. Defense counsel correctly argued the instruction was a charge on the facts. See State v. Bagwell, 201 S.C. 387, 392, 23 S.E.2d 244, 249 (1942) (similar instruction on "uncorroborated" statements of accomplices should be received with caution and scrutinized by the jury with great caution was a charge on the facts which violated the State Constitution).

The purpose of the statute is to change the law that a rape charge need to be corroborated **when the trial judge** is determining whether to grant a directed verdict. It is **not a jury charge.**

The alleged victim in this case, as stated above, did not recognize her attacker, and her drug use, and her failure to be honest about her drug use at times, made her testimony very suspect. Appellant presented evidence that he was often at the appellant's apartment, where they did drugs together, and that were having an ongoing consensual sexual relationship. The state's case against appellant was circumstantial; the defense provided an appellant explained the DNA evidence. The jury instruction that the shaky testimony of the alleged victim did not need to be corroborated was highly prejudicial in this case, and it constituted reversible error.

2.

The court erred by refusing to instruct the jury on assault and battery in the first degree pursuant to South Carolina Code Section 16-3-600 (C)(1) as a lesser–included or lesser offense of criminal sexual conduct in the first degree since the facts of this case justified charging this statutory subsection in the same manner as ABHAN.

Relevant Facts

Defense counsel asked that the judge to charge the "new statute" on assault and battery in the first degree as a lesser-included offense of criminal sexual conduct in the first degree. He argued while technically it might not meet the elements test of being a lesser-included offense of CSC in the first degree that the judge should consider it as being similar to ABHAN, being a lesser-included offense of sexual crimes. R. p. 254, l. 13 – 256, l. 12.

The solicitor argued he did not think it was a lesser-included offense. The judge then went through the elements of South Carolina Code Section 16-3-600 (C)(1) which were that the person who committed that offense unlawfully injured another person during an act involving non-consensual touching of their private parts, either under or above their clothing. The perpetrator did so with lewd and lascivious intent, and he committed the offense during the commission of another crime, including, as here, burglary. R. p. 259, l. 25 – 261, l. 7.

Defense counsel Grimes argued that the facts of this case almost mirrored the elements of the assault and battery in the first-degree offense. The judge ultimately refused to charge assault and battery in the first degree. R. p. 262, l. 19 – 270, l. 12; R. p. 275, ll. 3-9.

Discussion

South Carolina Code Section 16-3-600 (C)(1) provides:

> A person commits the offense of sexual and battery in the first degree if the person unlawfully:
>
> (a) injures another person, and the act:
>
> (i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or
>
> (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.

Defense counsel correctly argued that the lesser offense should have been charged in this case. There was evidence alleged victim was injured, and she maintained that she had been sexually molested or raped. She did not remember what happened after he attacker grabbed her, and the solicitor admitted she not identify him. The state also charged appellant with burglary in the first degree, coupled with the CSC in the first-degree offense.

No forensic evidence demonstrated penetration to the exclusion of any other factual scenario. Defense counsel correctly argued that even if the assault and battery in the first-degree offense was not a lesser-included offense under the elements test, it still should have been instructed consistent with the Supreme Court's framework of ABHAN being a lesser-included offense criminal sexual conduct cases.

In State v. Elliott, 346 S.C. 603, 607, 552 S.E.2d 727, 729 (2001), the Supreme Court held that charging ABHAN as a lesser-included offense of criminal sexual conduct was proper. The Court noted that the Legislature in enacting new legislation was presumed to know the common law and that common law did not "always fit into neat categories we

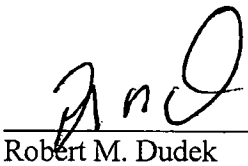
might prefer." The Court found "compelling reasons not to abandon its long-standing inclusion of ABHAN of a lesser-included offense of attempted battery crimes." Id. 552 S.E.2d at 729.

The same is true here as defense counsel argued. The present offense of assault and battery in the first degree is a result of "new" legislation first enacted in 2010. South Carolina Code Section 16-3-600 (C)(1), mirrors one consistent version of the offense and evidence in this case. Defense counsel correctly analogized it to ABHAN in arguing why it should have been instructed in this case. The trial court erred by refusing to charge this lesser or lesser-included offense given the facts of this case.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Charleston County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of February, 2015.

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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 11, 2015

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NATHANIEL WITHERSPOON,

APPELLANT

APPELLATE CASE NO. 2013-001440

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 Mark R. Farthing, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 11th day of February, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of February, 2015.

Rhonda Dennise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.

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February 11, 2015

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Re: The State v. Nathaniel Witherspoon

Dear Salley:

Enclosed are two copies of the Final Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/rdf

Enclosure

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2013-001440

THE STATE,

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vs.

NATHANIEL WITHERSPOON,

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STATEMENT OF ISSUES ON APPEAL

I.

The trial judge committed no reversible error in instructing the jury on S.C. Code Ann. § 16-3-657, which states the testimony of the victim does not need to be corroborated, because that statutory language constituted a correct statement of law in South Carolina, that language was not unduly emphasized during the trial judge's jury instructions, and those jury instructions as a whole correctly conveyed the relevant and applicable law to the jury.

II.

The trial judge properly declined to instruct the jury on the statutory offense of first-degree assault and battery because that offense is not a lesser-included offense of first-degree criminal sexual conduct and, even if it somehow was, was not supported by the facts and evidence presented during trial.

STATEMENT OF THE CASE

In March of 2012, Appellant Nathaniel Witherspoon was arrested following an investigation into a violent home invasion and sexual assault that occurred on October 24, 2011. In June of 2012, Appellant was indicted by the Charleston County Grand Jury for one count of first-degree criminal sexual conduct and one count of first-degree burglary. On June 19, 2013, a jury trial was commenced in the Charleston County Court of General Sessions with the Honorable Deadra L. Jefferson, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of eighteen years for each of the convictions. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

In the early morning hours of October 24, 2011, Sharon Rosenbaum ("Victim"), a sixty-four-year-old woman who lived alone in North Charleston, South Carolina, began resting on her couch and watching television after "New York," a friend she had been smoking crack cocaine with earlier, left her apartment. (R. p. 26; pp. 29-30). A little while later, Victim heard what she believed to be the sounds of her pet cat at the door to the apartment, and she went to the door to let the cat inside. (R. pp. 31-32). Upon opening the door, Victim was unexpectedly greeted by an unfamiliar man, who informed her his car had broken down and asked to use her phone. (R. p. 32). In response, Victim told the man she would get him her phone, turned around, and started to retrieve her phone from inside her residence. (R. p. 32; pp. 35-36). At that point, the man suddenly rushed into Victim's apartment, grabbed Victim around the throat, and began to drag her towards her bedroom. (R. p. 32). Alarmed, Victim began struggling to break free from the man, and he responded by pulling her to the floor by her hair, repeatedly striking her in the face, and threatening her with a knife. (R. pp. 32-33). He then proceeded to rape her.[1] (R. pp. 32-33).

After the rape, the man left Victim's home, and Victim unsuccessfully tried to find her phone to call for help. (R. p. 34). When she could not do so, Victim put on some pants, ran to the home of one of her neighbors, and advised her neighbor she had just been assaulted and raped in her apartment. (R. pp. 32-34; pp. 56-57; pp. 60-61). In response, Victim's neighbor immediately called the police, and officers with the North Charleston Police Department quickly responded to their location. (R. p. 33; pp. 56-59). Upon arriving, they spoke with Victim about the incident, and she told them what had

[1] After the man finished raping Victim, he informed her "that's all [he] wanted." (R. p. 34).

occurred. (R. pp. 35-36). However, she was only able to provide a vague description of her assailant as she did not know him, did not see his face, and was not wearing her glasses at the time of the assault. (R. p. 35; p. 39; pp. 44-46). Victim was then taken to the hospital to receive treatment for her injuries. (R. p. 36; p. 38).

At the hospital, Victim was examined by Janet Ward, a sexual assault nurse examiner. (R. p. 38; p. 129). During the examination, Ward observed Victim had scratches and bruising on her neck, bruising on her forehead, scratches and bruising on her face and cheeks, redness and bruising on her chest, bruising on the bridge of her nose, darkening of her eyes, carpet burns to her back, and injuries to her arm and shoulder. (R. pp. 140-141). However, Ward did not see any injuries to Victim's vaginal area.[2] (R. p. 146). Ward then collected evidence from Victim's body, including external swabs from Victim's genital area and internal swabs from Victim's vagina, and sealed that evidence so it could subsequently be analyzed. (R. pp. 142-143; pp. 150-151).

A few days later, an officer with the North Charleston Police Department responded to a report of shots fired at a location not far from Victim's residence and located a phone on the ground while searching for evidence of the shooting. (R. pp. 77-79). Upon making that discovery, the officer collected the phone as evidence and observed Appellant Nathaniel Witherspoon's name displayed on the phone's screen. (R. pp. 78-79). Subsequently, the officer learned the phone, which actually belonged to Victim, was connected to the investigation into the sexual assault of Victim, and he turned it over to Investigator Jill Farman, a detective with the North Charleston Police Department involved in that investigation. (R. p. 80; pp. 86-87; pp. 97-98). Thereafter,

[2] During trial, Ward explained a sexual assault does not always result in injuries to the vaginal area of a victim while noting hormones related to child-birth cause elasticity in a vagina. (R. p. 149). Notably, Victim had previously given birth to three children prior to the incident. (R. pp. 26-27).

Investigator Farman examined the phone and discovered numerous calls had been made to and received from numbers Victim was not familiar with shortly after the sexual assault had occurred. (R. pp. 98-99). In response, Investigator Farman obtained records for one of the numbers frequently called from Victim's phone after the incident, spoke with the person associated with the number, and learned Appellant was involved with the calls from Victim's phone. (R. pp. 99-100).

Subsequently, Investigator Farman provided Appellant's name to S.L.E.D. as a possible suspect in the sexual assault of Victim, and an analyst with S.L.E.D. determined Appellant's D.N.A. profile, which was maintained in South Carolina's D.N.A. database, matched the D.N.A. profile developed from the evidence collected during the sexual assault examination of Victim. (R. pp. 100-102). As a result, Appellant was arrested, and his D.N.A. was submitted to S.L.E.D. for further analysis. (R. pp. 102-103; p. 109). Upon analysis, a S.L.E.D. analyst confirmed the semen recovered from Victim's body following the sexual assault was Appellant's. (R. pp. 103-104; State's Ex. # 19 – D.N.A. Report). Appellant was then indicted for first-degree criminal sexual conduct and first-degree burglary, and he proceeded to trial. (R. p. 2; pp. 347-348; pp. 350-351).

During trial, Victim testified about the home invasion and sexual assault and indicated she could not remember the specific details of what occurred after her assailant threatened her with the knife.[3] (R. p. 32). However, she specifically testified she was raped by her assailant during the incident. (R. p. 33). Furthermore, Victim's neighbor confirmed Victim reported she had been raped after the incident, the officers involved in

[3] Prior to the beginning of the evidentiary phase of trial, the trial judge presented preliminary instructions to the jury. (R. pp. 5-14). Through those instructions, the trial judge explained to the jurors the State had the burden of proving Appellant's guilt beyond a reasonable doubt and instructed the jurors they were the sole judges of the facts and should disregard any remarks she made that could be construed as comments on the facts of the case. (R. p. 7).

the investigation into the incident testified about the results of their investigation, and Ward testified about Victim's injuries and condition following the crimes, which Ward characterized as "consistent" with what Victim reported had transpired. (R. pp. 56-59; pp. 63-67; pp. 78-80; pp. 86-104; pp. 133-144).

Following that testimony, Catherine Leisy, a forensic analyst with S.L.E.D. and an expert in the field of D.N.A. analysis, testified about her analysis of the evidence collected during the investigation. (R. p. 153; pp. 155-157; pp. 159-161). Specifically, Leisy confirmed she compared a D.N.A. profile developed from Appellant's D.N.A. to the D.N.A. profiles developed from the swabs collected during the sexual assault examination of Victim. (R. pp. 159-161). Based on that comparison, Leisy testified Appellant's D.N.A. profile conclusively matched the D.N.A. profile developed from the sperm found on the external genital swabs taken from Victim and the D.N.A. profiles developed from the sperm and semen found on the internal vaginal swab taken from Victim. (R. p. 160; pp. 192-193). However, Leisy indicated she also found a small amount of D.N.A. on one of the swabs collected during the sexual assault examination that could not have come from Appellant or Victim, but she noted the non-matching D.N.A. could have resulted from a "technical artifact" or "stutter" that occurred during the analysis. (R. pp. 160-161; pp. 164-166).

Subsequently, the State rested its case, and Appellant elected not to testify in his own defense. (R. p. 195; p. 197). However, several witnesses offered testimony on Appellant's behalf. (R. p. 200; p. 215; p. 225; p. 232). Initially, Clary Samuels, Appellant's brother-in-law, testified he had never seen Appellant use drugs, did not know Victim, and never saw Appellant in Victim's company. (R. pp. 203-205). Samuels further opined Appellant was not a violent person and indicated Appellant had only

committed "small" crimes in the past.[4] (R. pp. 206-208). Next, Tammy Stiles, who was incarcerated for trespassing at the time of Appellant's trial, testified she had been to Victim's apartment regularly in the past, almost always saw Appellant there, and believed Appellant and Victim were involved in a sexual relationship because Victim told her she was having sexual intercourse with Appellant. (R. pp. 215-219). However, Stiles acknowledged she had not been to Victim's apartment in roughly three years. (R. p. 221). Similarly, Derrick Felder, who was incarcerated for burglary at the time of Appellant's trial and who had previously been convicted of providing false information to the police, testified he knew Appellant and Victim and had seen Appellant at Victim's apartment a few times in the past. (R. pp. 225-229). Finally, Joseph Mazyck testified he was a long-time friend of Appellant's, had been to Victim's apartment before to have his palms read, saw Appellant there once or twice, and believed Appellant was an acquaintance of Victim's.[5] (R. pp. 232-234).

Thereafter, at the close of the evidentiary phase of trial, the trial judge conducted a charge conference with the solicitor and defense counsel. (R. p. 241). During the charge conference, defense counsel asked the trial judge not to instruct the jury on the statutory language indicating a victim's testimony need not be corroborated because he alleged it would constitute an improper comment on the facts. (R. p. 251). However, the trial judge indicated she intended to present the non-corroboration charge to the jury because it constituted a proper statement of law in South Carolina. (R. pp. 251-254). As the charge conference continued, defense counsel asked the trial judge to instruct the jury

[4] During the sentencing proceedings at the end of Appellant's trial, the trial judge noted Appellant had previously been convicted of criminal offenses over forty times, including for criminal domestic violence, possession of crack cocaine, pointing and presenting a firearm, and grand larceny. (R. p. 336).

[5] During his cross-examination of Victim, defense counsel asked her if she knew Stiles, Felder, and Mazyck, and she denied that she did. (R. p. 49).

on first-degree assault and battery as a lesser-included offense of first-degree criminal sexual conduct while expressly conceding it would not be a proper lesser-included offense of the indicted offense if the elements of the offenses were compared to one another. (R. pp. 254-257). Once again, the trial judge declined Appellant's request after determining first-degree assault and battery was not a lesser-included offense of first-degree criminal sexual conduct based on its elements and was not factually supported as a lesser-included offense in Appellant's case based on the evidence presented during trial. (R. pp. 272-273; p. 275).

Following the charge conference, the solicitor and defense counsel presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (R. pp. 277-331). During the jury charge, the trial judge instructed the jurors:

> In every case tried in this Court before a jury, the jury becomes the sole and exclusive judges of the facts in a case. You, the jury, are the judges of the facts in this case. This Court is the judge of the law. The constitution of our state has declared that a trial judge shall not intimate, state, comment upon, or make any statement to a trial jury about the facts in a case. Since you, the jury, are the sole judges of the facts in this case, you are not to infer anything that I've said during the progress of this trial, in ruling upon the admissibility of evidence or otherwise, or anything that I now state to you during the course of this instruction, that I have any opinion about the facts in this case. The law does not allow me to have an opinion about the facts in this case. This is a matter solely for you, the jury, to determine.

(R. p. 317). Additionally, the trial judge explained to the jurors the State had the burden of proving Appellant's guilt beyond a reasonable doubt, thoroughly defined reasonable doubt for the jurors, instructed the jurors on evaluating the credibility of the witnesses, and advised the jurors they could accept the testimony of a single witness over several

witnesses or the testimony of several witnesses over a single witness.[6] (R. pp. 317-318; pp. 321-324). Furthermore, the trial judge explained the elements of the indicted offenses to the jurors and instructed "code section . . . 16-3-657 . . . provides that the testimony of the victim need not be corroborated." (R. pp. 325-328).

Subsequently, at the conclusion of trial, the jury convicted Appellant as indicted. (R. p. 334). Following the verdict, the trial judge sentenced Appellant to concurrent eighteen-year terms of imprisonment for the first-degree burglary and first-degree criminal sexual conduct convictions. (R. pp. 345-346).

[6] Specifically, regarding witness credibility, the trial judge instructed the jury: "Necessarily, you must assess the credibility of witnesses who have testified. Credibility is simply a legalistic term meaning believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine that evidence which convinces you of its truth. Some of the things you may consider as you decide whether or not to believe a witness' testimony about a particular matter include: what was the manner and appearance of the witness who testified; was he or [she] straightforward or hesitant in answering; was the testimony of the witness consistent or inconsistent; how did the witness come to know the facts that he or she testified to or what was her or his ability to know these facts; is there some reason a witness would want to give testimony which would help or hurt one side [or] the other, in other words, was the witness biased or prejudiced; and was the testimony of a witness strengthened or weakened by other testimony or evidence. Also, in evaluating the testimony of the witnesses, you may believe one witness as against several witnesses or several witnesses as against one witness. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. If you have a good and sound reason, you may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety. You may consider the demeanor of a witness from the witness stand. You can believe as much or as little of each witness' testimony as you think proper. Throughout this process, ladies and gentlemen, you have but one objective: to seek the truth, regardless of its source." (R. pp. 317-318).

ARGUMENT

I.

The trial judge committed no reversible error in instructing the jury on S.C. Code Ann. § 16-3-657, which states the testimony of the victim does not need to be corroborated, because that statutory language constituted a correct statement of law in South Carolina, that language was not unduly emphasized during the trial judge's jury instructions, and those jury instructions as a whole correctly conveyed the relevant and applicable law to the jury.

Appellant contends the trial judge committed reversible error by instructing the jury on the statutory non-corroboration language of S.C. Code Ann. § 16-3-657. In support of that contention, Appellant maintains the giving of an instruction based on Section 16-3-657 constitutes an impermissible comment on the facts. To the contrary, the trial judge's presentation of the statutory non-corroboration language, which was only referenced a single time during the jury instructions, did not constitute a comment on the facts and, instead, was a proper statement of the applicable South Carolina law relevant to Appellant's case. Furthermore, the trial judge properly and completely instructed the jurors on the State's burden of proof, their duties in evaluating the credibility of the witnesses, and their duties to act as the sole judges of the facts while specifically cautioning the jurors they should not interpret any of her remarks as a comment on the facts of the case. Under those circumstances, the trial judge's decision to instruct the jury on Section 16-3-657, which provides the testimony of the victim does not need to be corroborated, was not improper and did not constitute reversible error in Appellant's case. Appellant's convictions should be affirmed.

The purpose of a trial judge's jury instructions is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). When instructing a jury on the law, a trial judge is required to charge only

the current and correct law of South Carolina. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003). In doing so, a trial judge is only required to instruct the jury on the substance of the law and does not have to use any particular verbiage. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). A trial judge's jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.").

In reviewing a trial judge's jury instructions for error, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); see Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation in analyzing whether the defendant's due process rights have been violated."). When reviewing the trial judge's jury instructions, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal."); see also State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied.").

One particular provision of law enacted by the legislature in South Carolina is Section 16-3-657, which states "[t]he testimony of the victim need not be corroborated in

prosecutions under [Sections] 16-3-652 through 16-3-658." S.C. Code Ann. § 16-3-657. In enacting that provision, the legislature recognized "crimes involving criminal sexual conduct fall within a unique category of offenses against the person" in which the only evidence that can frequently be presented due to the lack of eyewitnesses or other evidence is the uncorroborated testimony of the victim or the assailant. State v. Rayfield, 369 S.C. 106, 117, 631 S.E.2d 244, 250 (2006). For that reason, the legislature "decided it is reasonable and appropriate in criminal sexual conduct cases to make abundantly clear – not only to the judge **but also to the jury** – that a defendant may be convicted solely on the basis of a victim's testimony." Id. (emphasis added).

In the case sub judice, the trial judge committed no error in instructing the jury on the non-corroboration language from Section 16-3-657, which unquestionably constituted a correct statement of the law in South Carolina, because that instruction was not unduly emphasized during the trial judge's jury charge and the jury charge as a whole correctly relayed the relevant and applicable law to the jury. See id. at 117-118, 631 S.E.2d at 250 ("A trial judge is not required to charge § 16-3-657, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law."); see also Sheppard, 357 S.C. at 665, 594 S.E.2d at 472-473 ("A jury charge is correct if it contains the correct definition of the law when read as a whole."). Critically, in instructing the jury on the law in Appellant's case, the trial judge only instructed the jury on the statutory non-corroboration language a single time during the course of the entire jury charge. See State v. Orozco, 392 S.C. 212, 224, 708 S.E.2d 227, 233 (Ct. App. 2011) ("[T]he *only* charge given by the trial court in regard to the corroboration of the victims' testimony was that 'in South Carolina the testimony of a victim need not be corroborated

for prosecution in a criminal sexual conduct case.' Thus, this single instruction was not unduly emphasized." (italics in original)). Furthermore, the trial judge correctly explained the State's burden of proof to the jurors, thoroughly identified the factors relevant to the assessment of a witness' credibility to the jurors, specifically informed the jurors they could accept a single witness' testimony over the testimony of multiple witnesses or the testimony of multiple witnesses over a single witness' testimony, and directly cautioned the jurors she had no opinion on the facts of the case and they should not consider anything she said as a comment on the facts. Cf. State v. Schumpert, 312 S.C. 502, 509, 435 S.E.2d 859, 863 (1993) (finding the trial judge committed no reversible error in instructing the jury on the non-corroboration language when "[t]he trial judge properly charged the jury it could believe any single witness over several, it was the sole judge of the facts, he had no opinion about those facts, and the State had the burden of proving the offense charged beyond a reasonable doubt"). Under those circumstances, the trial judge's jury instructions provided the jury with the correct legal basis upon which to render a decision in Appellant's case and did not constitute reversible error. See Burkhart, 350 S.C. at 263, 565 S.E.2d at 304 (instructing there is no reversible error when the jury instructions given "afford the proper test for determining the issues")

In arguing the trial judge's jury instructions warrant the reversal of his convictions, Appellant contends the trial judge's presentation of the non-corroboration language to the jury constituted an impermissible comment on the facts of his case and improperly "favor[ed] the testimony of a single witness over all others."[7] (App. Br. pp.

[7] In seeking a reversal of his conviction on appeal, Appellant also contends: "The purpose of the [non-corroboration] statute is to change the law that a rape charge need to be corroborated **when the trial judge** is determining whether to grant a directed verdict. It is **not a jury charge**." (App. Br. p. 10) (emphasis in

9-10). However, in instructing the jury on the non-corroboration language, the trial judge prefaced her remarks by specifically stating the non-corroboration language was derived from Section 16-3-657, which clearly conveyed to the jury the non-corroboration language was a legal principle taken from a statute and was not a personal statement of the trial judge's views on the facts or the weight of the evidence. See generally State v. Bell, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991) ("The test to determine the propriety of the trial judge's charge is what a reasonable juror would have understood the charge to mean."). Thus, contrary to Appellant's contentions, the trial judge did not impermissibly comment on the facts by instructing the jury on Section 16-3-657, which correctly states the testimony of the victim does not need to be corroborated. However, even assuming that instruction could have somehow been misconstrued as a statement of the trial judge's beliefs on the facts of Appellant's case, the trial judge's instructions both at the beginning of trial and during the jury charge clearly dispelled any such misconception because the trial judge specifically explained to the jurors she had no opinion on the facts and any statement she made that could be construed as a comment on the facts had to be disregarded. See Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) ("A jury is presumed to follow instructions."); State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them.");

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original). However, as our Supreme Court has previously explained, the legislature intended for the non-corroboration language of Section 16-3-657 to do "much more" than prevent trial courts or appellate courts from finding the testimony of a sexual assault victim to be insufficient to support a conviction simply because the testimony was not corroborated. See Rayfield, 369 S.C. at 117, 631 S.E.2d at 250 ("Section 16-3-657 prevents trial or appellate courts from finding a lack of sufficient evidence to support a conviction simply because the alleged victim's testimony is not corroborated. However, § 16-3-657 **does much more**. In enacting this statute, the Legislature recognized that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical or forensic evidence identifying a particular perpetrator. The Legislature has decided it is reasonable and appropriate in criminal sexual conduct cases to make abundantly clear – not only to the judge but also to the jury – that a defendant may be convicted solely on the basis of a victim's testimony." (emphasis added))

State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) ("It is the duty of jurors to take the law from the court in the particular case on trial. It must be presumed that they do so."). Because the trial judge's jury instructions constituted a correct and complete statement of the law in South Carolina without impermissibly commenting on the facts of Appellant's case or unduly emphasizing the statutory non-corroboration language, the trial judge committed no reversible error in instructing the jury on the law. Cf. State v. Hill, 394 S.C. 280, 299, 715 S.E.2d 368, 379 (Ct. App. 2011) ("[T]he single instruction on 'no corroboration,' was not unduly emphasized, and the charge as a whole comported with the law, such that there was no reversible error in the 'no corroboration' charge."); Orozco, 392 S.C. at 224, 708 S.E.2d at 233 (holding the trial judge committed no reversible error in instructing the jury on the non-corroboration language where that language was not unduly emphasized and the trial judge's jury charge as a whole properly instructed the jury on the law). Accordingly, Appellant's convictions should be affirmed.

II.

The trial judge properly declined to instruct the jury on the statutory offense of first-degree assault and battery because that offense is not a lesser-included offense of first-degree criminal sexual conduct and, even if it somehow was, was not supported by the facts and evidence presented during trial.

Appellant contends the trial judge erred in declining to instruct the jury on the statutory offense of first-degree assault and battery. In support of that contention, Appellant maintains first-degree assault and battery should be considered to be a lesser-included offense of first-degree criminal sexual conduct in light of the fact the common law offense of assault and battery of a high and aggravated nature has previously been found to be a lesser-included offense of first-degree criminal sexual conduct. Furthermore, Appellant maintains the facts of his case justified a charge on first-degree assault and battery as a lesser-included offense. Contrary to Appellant's contentions, first-degree assault and battery is not a lesser-included offense in light of the fact first-degree criminal sexual conduct does **not** include all of the elements of first-degree assault and battery. Moreover, first-degree assault and battery is not a lesser-included offense of first-degree criminal sexual conduct in light of the fact the legislature elected not to recognize it as such. Therefore, the trial judge properly declined to instruct the jury on first-degree assault and battery in Appellant's case. However, even assuming first-degree assault and battery was a lesser-included offense of first-degree criminal sexual conduct, the trial judge still nonetheless properly declined to instruct the jury on first-degree assault and battery because the testimony and evidence presented during trial did not support such a charge. Appellant's convictions should be affirmed.

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, at the request of the appellant, which 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 (emphasis added). 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.").

Importantly though, even if an offense is a lesser-included offense of another offense, the trial judge is only required to instruct the jury on the lesser-included offense

when the evidence could support an inference the defendant is guilty of **only** the lesser-included offense and not the greater offense. State v. Lambright, 279 S.C. 535, 537, 309 S.E.2d 7, 8 (1983). "It is well settled that a jury instruction on a lesser included offense is required only when the evidence warrants such an instruction." State v. Coleman, 342 S.C. 172, 175, 536 S.E.2d 387, 389 (Ct. App. 2000). "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 tend to show the defendant was guilty only of the lesser offense." State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006).

In the case at bar, the trial judge committed no error in declining to instruct the jury on the offense of first-degree assault and battery because that crime was not a lesser-included offense of first-degree criminal sexual conduct. Furthermore, even if first-degree assault and battery somehow was a lesser-included offense of first-degree criminal sexual conduct, the trial judge still committed no error in declining to instruct the jury on that offense because the evidence presented during trial would not have supported a conclusion Appellant was guilty of only the lesser-included offense and not the greater offense.

Initially, looking to the elements of the offenses, first-degree criminal sexual conduct does **not** include all of the elements of first-degree assault and battery. Compare S.C. Code Ann. § 16-3-652(1) (defining first-degree criminal sexual conduct, which requires proof the actor committed a sexual battery along with proof of one or more of the following circumstances: (1) the actor used aggravated force; (2) the victim submitted to the sexual battery under circumstances where the victim is also the victim of forcible confinement, kidnapping, trafficking in persons, robbery, extortion, burglary, housebreaking, or any other similar offense or act; or (3) the actor caused the victim to

become mentally incapacitated or physically helpless through the use of a controlled substance, controlled substance analogue, or intoxicating substance); with S.C. Code Ann. § 16-3-600(C)(1) (defining first-degree assault and battery, which requires proof: (1) the actor injured another through nonconsensual touching of the private parts with lewd and lascivious intent or during the course of a robbery, burglary, kidnapping, or theft; or (2) the actor offered or attempted to injure another person with the present ability to do so by a means likely to produce death or great bodily injury or during the commission of a robbery, burglary, kidnapping, or theft). As a result, first-degree assault and battery is not a lesser-included offense of first-degree criminal sexual conduct under the elements test. See Knox v. State, 340 S.C. 81, 85, 530 S.E.2d 887, 889 (2000) ("A lesser offense is included in the greater only if each of its elements is *always* a necessary element of the greater offense." (italics in original)), overruled on other grounds by State v. Gentry, 563 S.C. 93, 610 S.E.2d 494 (2005).

Recognizing that fact, defense counsel conceded during trial first-degree assault and battery was not a lesser-included offense pursuant to the elements test while arguing it should nonetheless be considered as one due to the fact it was similar to the common law offense of assault and battery of a high and aggravated nature, which – prior to its abolition though the passage of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 – had traditionally been considered to be a lesser-included offense of first-degree criminal sexual conduct. See Primus, 349 S.C. at 581, 564 S.E.2d at 106 ("[E]mploying the traditional elements test, ABHAN is not a lesser-included offense of first degree CSC. Nevertheless, the Court most recently determined that because it had consistently held ABHAN is a lesser included offense of assault with intent to commit CSC, it would continue this ruling even though the two offenses failed the traditional

elements test. In order to have a uniform approach to CSC and ABHAN offenses, we likewise hold ABHAN is a lesser included offense of first degree CSC." (citations omitted)); see also State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) ("Though the passage of the Act, the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses."). However, in abolishing the common law assault and battery offenses, the legislature in South Carolina specifically identified the different offenses to which the new statutory assault and battery offenses could be considered lesser-included offenses. See State v. Elliott, 346 S.C. 603, 607, n. 2, 552 S.E.2d 727, 729 (2001) ("[T]he legislature, in enacting the CSC statutes, is presumed to know the common law **and could have provided that ABHAN not be treated as a lesser offense** of ACSC, as it was of AIR." (emphasis added)), overruled on other grounds by State v. Gentry, 563 S.C. 93, 610 S.E.2d 494 (2005). Tellingly, the legislature elected **not** to recognize first-degree assault and battery – or any of the other new statutory assault and battery offenses – as a lesser-included offense of first-degree criminal sexual conduct. See S.C. Code Ann. § 16-3-600(C)(2) ("Assault and battery in the first degree is a lesser-included offense of assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29."). Because the legislature specifically chose to identify first-degree assault and battery as a lesser-included offense of certain specified offenses while choosing not to identify it as a lesser-included offense of first-degree criminal sexual conduct, the statutory offense of first-degree assault and battery is **not** a lesser-included offense of first-degree criminal sexual conduct, and the trial judge properly declined to instruct the jury on first-degree assault and battery in Appellant's case. See Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction

'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' "); see also State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. **We cannot under our power of construction supply an omission in the statute**." (emphasis added)); cf. Nelson v. Ozmint, 390 S.C. 432, 436, 702 S.E.2d 369, 371 (2010) (finding the legislature's inclusion of language allowing for early release in one statute but omitting it in another evidenced the legislature intent for a defendant convicted of the offense delineated in the statute not containing the early release language to be ineligible for early release).

However, even assuming first-degree assault and battery was somehow a lesser-included offense of first-degree criminal sexual conduct, the trial judge's decision not to charge the jury on first-degree assault and battery was proper and justified in Appellant's case because the evidence presented during trial did not support an instruction on that particular offense. Critically, looking to the evidence presented, there was no testimony or evidence establishing Appellant was guilty of first-degree assault and battery **instead of** first-degree criminal sexual conduct. See State v. Murphy, 322 S.C. 321, 325, 471 S.E.2d 739, 741 (Ct. App. 1996) ("[A] lesser included offense instruction is required only when the evidence warrants such an instruction, and it is not error to refuse to charge the lesser included offense unless there is evidence tending to show that the defendant was guilty **only of the lesser offense**." (emphasis added)). Specifically, during trial, Victim testified a stranger entered her residence without permission, grabbed her, and dragged her towards her bedroom before beating **and** raping her. Furthermore, in addition to Victim's testimony in regard to the beating and rape, several other witnesses confirmed

Appellant reported she was raped, a sexual assault nurse examiner testified about Victim's injuries while noting they were consistent with what Victim had reported, and a D.N.A. analyst confirmed Appellant's sperm and semen were discovered **inside** of Victim's vagina after the sexual assault. Under those circumstances, the evidence and testimony supported a conclusion Appellant was either guilty of first-degree criminal sexual conduct or not guilty of any offense. See State v. Gilmore, 396 S.C. 72, 77, 719 S.E.2d 688, 691 (Ct. App. 2011) ("The mere existence of evidence of ABHAN . . . is not sufficient to require the jury charge. Rather, there must be evidence the defendant committed ABHAN *instead of* CSC." (italics in original)); see also Magazine v. State, 361 S.C. 610, 619-620, 606 S.E.2d 761, 766 (2004) (reversing a grant of post-conviction relief after determining Magazine was not entitled to a charge on the lesser-included offense of assault and battery of a high and aggravated nature during his criminal sexual conduct trial where the evidence presented did not suggest anything other than a rape occurred and where Magazine contended he was not present at the time of the crimes instead of contending he simply assaulted the victim without raping her); State v. Forbes, 296 S.C. 344, 345, 372 S.E.2d 591, 592 (1988) ("Here the evidence shows appellant committed a sexual battery as defined by § 16-3-651(h) or no battery at all. He was therefore not entitled to a charge of ABHAN."); State v. Fields, 356 S.C. 517, 523-524, 589 S.E.2d 792, 795 (Ct. App. 2003) ("Field's mere assertion that the jury might have disbelieved the State's evidence that the sex was not consensual and on the remaining evidence found him guilty of ABHAN does not entitle him to have the lesser offense submitted to the jury."). As a result, notwithstanding the fact first-degree assault and battery is not a lesser-included offense of criminal sexual conduct, the trial judge properly declined to instruct the jury on first-degree assault and battery in Appellant's case in light

of the fact the offense was not supported by the evidence presented during trial. See Dempsey v. State, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005) ("[W]here there is no evidence from which it could be inferred than ABHAN **rather than CSC** was committed, an ABHAN charge is not warranted."). Appellant's convictions 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,

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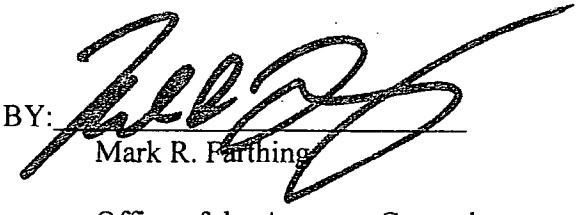
BY: 
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January 26, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2013-001440

THE STATE,

Respondent,

vs.

NATHANIEL WITHERSPOON,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 26th day of January, 2015.

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