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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions

Eugene C. Griffith, Jr., Circuit Judge

Appellate Case No. 2015-002254
General Sessions Case No. 2013-CR-30-0256 & 0257

STATE OF SOUTH CAROLINA

Respondent,

v.

BRAD BERNARD DAWKINS

Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT 1

The trial judge erred in refusing to charge the lesser offense of ABHAN

The Appellant reasserts and realleges herein all that he has argued in the original Brief of Appellant regarding this issue.

Appellant would first note that the Respondent does not argue that *State v. Primus*, 564 S.E.2d 103, 105 (S.C. 2002), *rev'd on other grounds by, State v. Gentry*, 610 S.E.2d 494 (S.C. 2005), should be overruled. Respondent's Brief pp. 7-11. Further, the rule of *Primus* has been reaffirmed in recent cases of this Court. *State v. Geiger*, 635 S.E.2d 600, 606 (S.C. Ct. App. 2006) and *State v. Gilmore*, 719 S.E.2d 688, 691 (S.C. 2011).

The mere existence of evidence of ABHAN, however, is not sufficient to require the jury charge. Rather, there must be evidence the defendant committed ABHAN *instead of* CSC. *Dempsey*, 363 S.C. at 371, 610 S.E.2d at 815. Our courts have identified three types of cases in which the evidence can support an inference that the defendant is guilty of ABHAN instead of CSC: (1) there is evidence the defendant committed ABHAN by an unlawful sexual touching in the course of attempting CSC, and there is conflicting evidence as to whether the defendant accomplished sexual battery; *see, e.g., State v. Pressley*, 292 S.C. 9, 9-10, 354 S.E.2d 777, 777 (1987); *State v. Mathis*, 287 S.C. 589, 594, 340 S.E.2d 538, 541 (1986); **(2) there is evidence the defendant committed a nonsexual ABHAN, such as in a fight, and in addition to evidence to support CSC, there is evidence the two never had sex**; *see, e.g., State v. Lambright*, 279 S.C. 535, 537, 309 S.E.2d 7, 8 (1983); and (3) there is evidence the defendant committed a nonsexual ABHAN contemporaneous with CSC, but there is evidence that instead of CSC the two had consensual sex; *see, e.g., State v. White*, 361 S.C. 407, 412, 605 S.E.2d 540, 542-43 (2004).

Id. at 691 (emphasis added).

In the present case, there is clearly evidence that justifies charging ABHAN because the facts of this case fit within the second class of cases referenced by *Gilmore*. *Id.* It is significant that in the present case, unlike *Geiger*, *Gilmore*, and *State v. Fields*, 589 S.E.2d 792 (S.C. Ct. App. 2003), the Appellant testified. The Appellant, by his own testimony, offered concrete and direct evidence of his theory of the case. Tr. p. 189-217. There is evidence that the Appellant committed a non-sexual ABHAN. The Appellant testified he spanked or struck the victim routinely as a form of punishment. Tr. p. 192, 199-201, 209, 217. In addition, the victim expressly testified that she was groped by the Appellant during the alleged incident. *Id.* There is evidence of a CSC or attempted CSC per the victim's direct testimony. Tr. p. 83-88. However, as is clear from this testimony, the two never actually had sex. Tr. p. 88. This case is clearly covered by the *Gilmore* rule.

It should also be noted that the facts of this case come extremely close to the facts of the first class of cases referenced by *Gilmore*, 719 S.E.2d at 691. Thus, this case may fall under two situations identified by *Gilmore* where ABHAN should be charged.

The Appellant was clearly entitled to an ABHAN charge under the facts of this case. It was patently unjust not to give the jury the opportunity to properly consider ABHAN. Again, the facts of this case closely fit the second class of cases referenced in *Gilmore* and nearly fit the first class of cases referenced therein.

For these reasons, the Appellant submits that his conviction and sentence should be vacated and the case remanded for a new trial.

CONCLUSION

Based on the above, the convictions and sentences should be reversed and the case remanded for a new trial.

Respectfully submitted,

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