

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

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SC Court of Appeals

STATE OF SOUTH CAROLINA

Respondent,

v.

BRAD BERNARD DAWKINS

Appellant.

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

CASES:

Dempsey v. State, 610 S.E.2d 812 (S.C. 2005)3

State v. Fields, 589 S.E.2d 792 (S.C. Ct. App. 2003) 4

State v. Geiger, 635 S.E.2d 600 (S.C. Ct. App. 2006) 3, 4

State v. Gentry, 610 S.E.2d 494 (S.C. 2005) 3

State v. Gilmore, 719 S.E.2d 688 (S.C. 2011) 3, 4

State v. Lambright, 309 S.E.2d 7 (S.C. 1983)3

State v. Mathis, 340 S.E.2d 538 (S.C. 1986)3

State v. Pressley, 354 S.E.2d 777 (S.C. 1987)3

State v. Primus, 564 S.E.2d 103 (S.C. 2002)3

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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. In fact, the rule of *Primus* has been affirmed by 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 ABAHAN 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. (R. p. 156, line 20 – p. 184, line 3) 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. (R. p. 159, line 17 – 23; p. 166, line 9 – p. 168, line 25; p. 176, lines 7 – 23; p. 184, line 8 – 17) 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. (R. p. 60, line 6 – p. 65, line 25) However, as is clear from this testimony, the two never actually had sex. (R. p. 65, lines 5 – 7) It should also be noted that the facts of this case come extremely close to the first class of cases referenced by *Gilmore*, 719 S.E.2d at 691.

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.

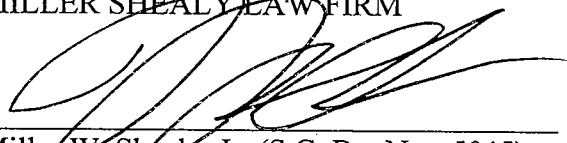
CONCLUSION

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

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Respectfully submitted,

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August 7, 2016

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Saluda County
Eugene C. Giffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

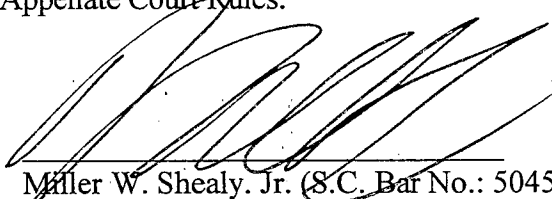
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APPELLANT

CERTIFICATION OF COMPLIANCE

I hereby certify that this Final Reply Brief of Appellant is submitted in accordance with Rule 211 of the South Carolina Appellate Court Rules.



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August 7, 2016

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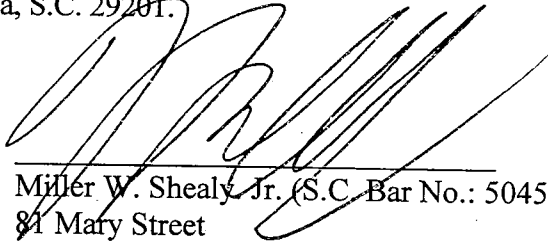
APPELLANT

PROOF OF SERVICE

Undersigned counsel has on this day filed the Final Reply Brief of Appellant in accordance with Rule 211 of the South Carolina Appellate Court Rules.

Fifteen copies (one unbound) have been mailed via U.S. mail, postage prepaid, to the Clerk of Court for the South Carolina Court of Appeals, 1220 Senate Street, Columbia, S.C. 29201.

Additionally, one copy of this brief has been mailed via U.S. mail, postage prepaid, to V. Henry Gunter, Jr., Assistant Attorney General, Office of the Attorney General, 1000 Assembly Street, Suite 501, Columbia, S.C. 29201.



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August 8, 2016

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