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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY

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SC Court of Appeals

Court of General Sessions

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2015-002254

THE STATE,

Respondent,

v.

BRAD BERNARD DAWKINS,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial judge properly declined to instruct the jury on assault and battery of a high and aggravated nature where that offense is not a lesser-included offense of criminal sexual conduct with a minor, and, even if it somehow was, was not supported by the facts and evidence presented during trial.

II.

The trial judge properly denied Appellant's motion for directed verdict where the State presented sufficient evidence indicating venue was proper in Laurens County.

III.

Appellant's argument concerning the Solicitor's closing argument is not preserved for appellate review. Even if Appellant's argument was preserved, Appellant was not prejudiced to the point where the Solicitor's comments rendered Appellant's trial fundamentally unfair.

STATEMENT OF THE CASE

During its February 2010 term, the Laurens County Grand Jury indicted Appellant for criminal sexual conduct with a minor in the second degree (2010-GS-30-0257) and lewd act upon a child under the age of sixteen years (2010-GS-30-0256). Appellant proceeded to a jury trial from October 13-14, 2015, in Laurens, South Carolina before the Honorable Eugene C. Griffith, Jr. At the conclusion of trial, the jury found Appellant guilty as indicted. Judge Griffith sentenced Appellant to seven years' imprisonment for criminal sexual conduct in the second degree and ten years' imprisonment suspended upon the service of forty-eight months imprisonment for lewd act on a minor, with the probation to begin at the end of the seven year sentence. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Mother began dating Appellant in late 2005 or early 2006. R. p. 43. Appellant and Mother began cohabiting sometime around August 2007. R. p. 43. Appellant and Mother moved from Simpsonville to a home in Fountain Inn in Laurens County. R. p. 43. While Mother and Appellant were living together, Mother's daughter, Victim, lived in their home. R. p. 44. Appellant and Victim were typically home alone together for an hour or two after school on weekdays before Mother returned home from work. R. p.44. Victim testified that when they were still living in Simpsonville, Appellant forced her to use sex toys in front of him. R. pp. 57-58. Appellant would direct Victim to touch herself on her vagina with the sex toys. R. p. 58. Victim later clarified that Appellant forced her to penetrate her vagina with one of the sex toys. R. p. 66. Victim testified Appellant continued to force her to use sex toys in front of him once the family moved to Fountain Inn. R. p. 59. When asked when the abuse occurred, Victim stated, "It would just be random. I'd just come home from school and he would tell me to come here or something." R. p. 59.

Victim recalled one specific incident that took place around November 30, 2009, where Appellant touched her himself. R. pp. 59-60. On November 30, 2009, Victim was thirteen years old[1]. R. p. 54. Victim testified that on that evening, Appellant took Mother's car and drove Victim into the woods and attempted to pull her pants down. R. p. 60. Victim testified they were still in Laurens County at the time Appellant stopped the car. R. p. 61. Appellant was able to pull Victim's pants and underwear down to Victim's mid-thigh area. R. p. 61. Appellant then touched Victim's breasts. R. p. 62. Victim testified Appellant then exposed his genitals and attempted to have sex with her. R. p. 64. When asked how close Appellant got to having sex with her, Victim

[1] At the time of trial, Victim was nineteen years old and was enrolled as a student at South Carolina State University. R. p. 54.

stated, "on my vagina." R. p. 64. Victim fought to get Appellant off of her, which eventually caused Appellant to stop. R. p. 65. Appellant told Victim not to tell anyone what happened and that if she told anyone, he would hurt Victim Mother. R. p. 65. Victim eventually disclosed Appellant's abuse to her friends, Jada and Mike-Mike. R. p. 73. Jada then disclosed the abuse to her parents. R. p. 84. Once law enforcement became involved in the case, Victim told Mother about Appellant's abuse. R. pp. 72-73.

Investigator Shannon Childress, a Lieutenant in the investigations division of the Laurens County Sheriff's Office, worked on the investigation of Appellant's case. R. p. 20. Investigator Childress spoke with Appellant on December 3, 2009, and subsequently obtained an arrest warrant on December 4, 2009. R. p. 22. When Childress spoke with Appellant, Appellant made a statement to her and another officer, Captain Russell Morgan. R. p. 40. Captain Morgan is employed with the City of Camden Police Department and had the opportunity to assist Laurens County in Appellant's case. R. p. 132. Captain Morgan testified the agencies assisted each other in investigations from time-to-time. R. p. 132. Captain Morgan made notes during the December 3, 2009 interview of Appellant he conducted with Investigator Childress. R. p. 133. Captain Morgan testified:

> Mr. Dawkins in my interview stated that in the past he admitted to seeing the victim, [Victim], in the nude. He stated that in the past he had told the victim to remove all her clothing so that he could whip her. He also stated that at that time that the, [Victim] was approximately 11 years old. He told me also that he had walked in the bedroom one, I guess, evening in the summertime and discovered that she was masturbating. And that during the masturbating incident he stated that she was performing the masturbation with a vibrator that he had provided to her. He also stated to me that [Victim] asked him if she was doing it correctly and if he would show her how to do it. He went on to say that about two weeks later he inquired of [Victim] if she had figured out how to properly use the vibrator and she had responded she had. But at that time, the interview was in conjunction with the allegations that Mr. Dawkins had touched the victim's vaginal area and breasts. And he continued to deny actually doing that.

R. p. 134. At the conclusion of trial, the jury found Appellant guilty of criminal sexual conduct with a minor in the second degree and lewd act with a child under the age of 16.

ARGUMENT

I.

The trial judge properly declined to instruct the jury on assault and battery of a high and aggravated nature where that offense is not a lesser-included offense of criminal sexual conduct with a minor, and, even if it somehow was, was not supported by the facts and evidence presented during trial.

Relevant Facts

At the conclusion of the defense's case, Defense Counsel requested a charge on assault and battery of a high and aggravated nature (ABHAN). R. p. 186. The trial judge found, "I think the age parameter in the element prohibits it from being a lesser included. It eliminates it from being lesser included, and I'm going to stick to my ruling and decline to charge that as a lesser included of either one." R. p. 188. The trial judge later reiterated, "I'll tell you what I'm going to do, decline to charge the lesser included, but your record is complete." R. p. 189.

Discussion

Appellant asserts the trial judge erred in refusing to charge the jury on ABHAN. Specifically, Appellant cites various challenges to Victim's credibility as evidence from which the jury could have found ABHAN. Appellant contends these challenges to Victim's credibility could have led the jury to infer there was inappropriate physical contact between Victim and Appellant that did not amount to criminal sexual conduct. As support for his argument, Appellant avers South Carolina Courts have not followed a strict elements test to determine lesser offenses. Appellant asserts courts instead focus on considerations of legal policy and common law precedent in determining whether a crime is a lesser offense. Contrary to Appellant's contentions, ABHAN is not a lesser-included offense in light of the fact criminal sexual conduct with a minor in the second degree does **not** include all of the elements of ABHAN. Moreover, ABHAN is not a lesser-included offense of criminal sexual conduct with a minor in the second

degree 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 ABHAN in Appellant's case. However, even assuming ABHAN was a lesser-included offense of criminal sexual conduct in the second degree, the trial judge still nonetheless properly declined to instruct the jury on ABHAN because the testimony and evidence presented during trial did not support such a charge.

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."). 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).

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 current case, the trial judge committed no error in declining to instruct the jury on the offense of ABHAN because that crime was not a lesser-included offense of criminal sexual conduct in the second degree. Furthermore, even if ABHAN somehow was a lesser-included offense of criminal sexual conduct with a minor in the second degree, 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, criminal sexual conduct with a minor in the second degree does **not** include all of the elements of ABHAN. Compare S.C. Code Ann. § 16-3-655(B) (stating a person is guilty of criminal sexual conduct with a minor in the second degree if: 1) the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age; or 2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430 (D); with S.C. Code Ann. § 16-3-600 (B)(1) (stating a person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and: a)

great bodily injury to another person results; or b) the act is accomplished by means likely to produce death or great bodily injury). As a result, ABHAN is not a lesser-included offense of criminal sexual conduct with a minor in the second degree 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 this fact, Appellant attempts to argue that South Carolina courts have not followed the elements test to determine lesser offenses and instead focus on considerations of legal policy and common law precedent in determining whether a crime is a lesser offense. In support of his argument, Appellant notes that prior to its abolition through the passage of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, ABHAN had traditionally been considered to be a lesser-included offense of criminal sexual conduct in the first degree. 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 ABHAN-or any of the other new statutory assault and battery offenses- as a lesser included offense of criminal sexual conduct with a minor in the second degree. See S.C. Code Ann. § 16-3-600(B)(1)(3) ("Assault and battery of a high and aggravated nature is a lesser-included offense of attempted murder, as defined in Section 16-3-29). Because the legislature specifically chose to identify ABHAN as a lesser-included offense of a certain specified offense while choosing not to identify it as a lesser-included offense of criminal sexual conduct with a minor, the statutory offense of ABHAN is **not** a lesser-included offense of criminal sexual conduct with a minor in the second degree, and the trial judge properly declined to instruct the jury on ABHAN 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 ABHAN is somehow a lesser-included offense of criminal sexual conduct with a minor in the second degree, the trial judge's decision not to charge the jury on ABHAN was proper and justified in Appellant's case because the evidence presented during trial did not support an instruction on that particular offense. There was no evidence presented that established Appellant was guilty of ABHAN instead of criminal sexual conduct with a minor in the second degree. The evidence at trial established Appellant directed Victim to penetrate herself with sex toys in his presence and that on one occasion, Appellant drove Victim into the woods where he proceeded to climb on top of her and attempt to penetrate her. There was no evidence whatsoever that Appellant committed ABHAN, as there was no unlawful injury that either produced great bodily injury or was likely to produce great bodily injury. Instead, all of the evidence presented at trial established Appellant was guilty of criminal sexual conduct with a minor in the second degree. 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)); 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."). Therefore, the trial judge properly declined to instruct the jury on ABHAN, as there was no evidence presented at trial supporting the charge. Appellant's convictions and sentences should be affirmed.

II.

The trial judge properly denied Appellant's motion for directed verdict where the State presented sufficient evidence indicating venue was proper in Laurens County.

Relevant Facts

At trial, Mother testified the family lived in Fountain Inn in Laurens County. R. p. 43. Defense Counsel later asked Mother how she knew the home was in Laurens County and not Greenville County. R. p. 45. Mother replied the zip code given to her by the postal office indicates the home is in Laurens County. R. p. 45. Victim later testified the family moved to Fountain Inn in Laurens County and the abuse continued in Laurens County. R. p. 59. As to the incident on November 30, 2009, Victim testified that when Appellant drove her into the woods, they were still in Laurens County. R. p. 61. Defense Counsel later asked Victim how she knew she was in Laurens County when Appellant drove her into the woods. R. p. 105. Victim responded she was familiar with the area. R. p. 105.

Defense Counsel later made a motion for directed verdict and motion to quash the indictments, asserting there was insufficient specificity as to where the incidents occurred. R. pp. 139-41. The trial judge found:

> I'll deny on the vagueness of the document or insufficiency of the documents, I'm going to deny the directed verdict motion and that's what I understood the motion to be about. The issue of whether or not the incident in the car occurred in Laurens County, there is sufficient evidence and the young lady testified that she believed it to be Laurens County. She went on a short drive in the woods. She believes herself to be in Laurens County. I think that's another factor to sufficiently say it's in Laurens County. Where I have a problem, it just happened and never say where. She said she believed in Laurens County. So on that issue also it's the jurisdiction of where the incident in the car took place to be in Laurens County. I'll deny directed verdict.

R. p. 143.

Discussion

Appellant contends the trial judge erred in refusing to grant the Appellant's motion for directed verdict because the State failed to establish the county in which the offenses occurred. In support of this argument, Appellant argues, "At best there was substantial confusion about whether the alleged act of criminal sexual conduct occurred in Greenville or Laurens County." Br. of App. p. 9. This argument lacks merit, as the State presented adequate evidence that the offense was committed in Laurens County.

"A criminal defendant is entitled to a directed verdict when the State fails to present evidence that the offense was committed in the county alleged in the indictment." State v. Williams, 321 S.C. 327, 333, 468 S.E.2d 626, 630 (1996). "The standard for establishing venue is not a stringent one, for 'venue, like jurisdiction, in a criminal case need not be affirmatively proved, and circumstantial evidence of venue, although slight, is sufficient." State v. Crocker, 366 S.C. 394, 404, 621 S.E.2d 890, 895 (Ct. App. 2005) (quoting Williams, 321 S.C. at 334, 468 S.E.2d at 630). Venue in a criminal case need not be affirmatively proved if there is sufficient evidence from which it can be inferred. State v. Brisbon, 323 S.C. 324, 327, 474 S.E.2d 433, 435 (1996). "Where uncertainty exists, the accused may be tried in any county in which evidence indicates the crime might have been committed." 21 Am. Jur. 2d Criminal Law § 459.

In Appellant's case, Victim testified Appellant abused her in the family's Fountain Inn home. Both Mother and Victim testified the home was located in Laurens County. As to the November 30, 2009, incident, Victim testified that she and Appellant were in Laurens County when Appellant drove Mother's car into the woods and inappropriately touched Victim. Victim stated she knew the wooded area was in Laurens County because she was familiar with the area. All of this evidence provides sufficient proof from which it can be inferred the offense occurred

in Laurens County. The trial judge, therefore, properly denied Appellant's directed verdict motion. Appellant's convictions and sentences should be affirmed.

III.

Appellant's argument concerning the Solicitor's closing argument is not preserved for appellate review. Even if Appellant's argument was preserved, Appellant was not prejudiced to the point where the Solicitor's comments rendered Appellant's trial fundamentally unfair.

Relevant Facts

During the State's closing argument, the Solicitor stated:

> The police can make arrests, His Honor can convene a court, I can come to the courtroom, but until you, they jury's, make a decision, justice is on hold and that's fine. That's the way our law is. I appreciate the fact that Mr. Brown comes in here and puts a vigorous defense up for his client, because that's the way our justice system works. But the only one here that's part of this court system that doesn't have an oath binding him to seek justice is the defense attorney. The Judge has that job. I have an ethical obligation as a prosecutor to seek justice. Mr. Brown has an ethical obligation to seek beneficial for his client and I respect that. I don't have a problem with it. But don't think for a second his job is to simply shine a light on the truth for your benefit, because it's not. Otherwise, he wouldn't have asked questions about what does provide mean when his client says it didn't happen. He wouldn't wave every red flag over here to the left hoping you don't keep your sights on the one issue that matters.

R. p. 204. Defense Counsel did not offer any objection to the Solicitor's comments.

Discussion

Appellant asserts the Solicitor's comments during closing argument violated due process and denied Appellant a fair trial. As a threshold matter, this argument is not preserved for appellate review. However, even if Appellant's argument was preserved, the argument lacks merit, as any alleged error by the Solicitor did not so infect the trial with unfairness as to make the resulting conviction a denial of due process.

Appellant's argument is not preserved for appellate review, as Defense Counsel did not object to the Solicitor's closing statements **at any time**. If an error is not presented to and ruled

upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). State v. Varvil, 338 S.C. 335, 339, 526 S.E.2d 248, 251 (Ct. App. 2000) (finding the failure to object to comments made during argument precludes appellate review of the issue; solicitor's interjection of personal beliefs). State v. Wilkins, 310 S.C. 81, 89-90, 425 S.E.2d 68, 73 (Ct. App. 1992) (holding defendant lost right to challenge propriety of prosecutor's opening argument by failing to contemporaneously object). Since Defense Counsel did not object to the Solicitor's statements during closing argument, this error is not preserved for Appellate review.

Even if Appellant's argument were preserved for review, the Solicitor's comments did not reach the level of prejudice necessary to warrant a reversal. The complained-of comments by the Solicitor were mere rhetorical flourishes and did not make respondent's trial so fundamentally unfair as to deny him due process. See State v. Plath, 281 S.C. 1, 17, 313 S.E.2d 619, 628 (1984) ("[A]ppellants complain of rhetorical flourishes engaged in by the Solicitor in his summation . . . . An inelegant turn of phrase or momentary lapse of good taste will rarely constitute prejudicial error, nor does robust language necessarily inject an arbitrary factor into a trial such as this one. Finding no prejudice here, we dismiss these claims of error as frivolous."). In the context of the full trial amongst all the evidence presented, the Solicitor's comments were not significant enough to garner the requisite prejudice to warrant a reversal. Appellant's convictions and sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,

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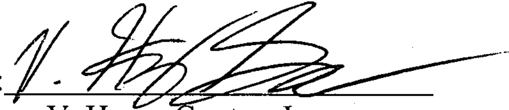
BY: 
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STATE OF SOUTH CAROLINA
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Eugene C. Griffith, Jr., Circuit Court Judge

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THE STATE, ... RESPONDENT

v.

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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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August 10, 2016