STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY

Court of General Sessions
Scott Sprouse, Circuit Court Judge

Appellate Case No. 2016-000527

THE STATE,

Respondent,

v.

JESUS V. MARTINEZ,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

An Anderson County Grand Jury indicted Appellant for assault and battery of a high and aggravated nature (ABHAN) and pointing and presenting a firearm. (R.* Indictments.) On February 23–24, 2016, Appellant proceeded to a trial before the Honorable Scott Sprouse and a jury. Fletcher N. Smith, Esquire, represented Appellant, and Assistant Solicitor Catherine T. Huey, Esquire, represented the State. The jury found Appellant guilty of both charges, and Judge Sprouse sentenced him to ten years' imprisonment for the ABHAN charge, suspended on the service of three years' imprisonment and followed by probation for five years, and to five years' imprisonment for the pointing and presenting charge, suspended on the service of three years' imprisonment and followed by probation for five years, to be served concurrently. (Tr. 138).

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On February 12, 2015, Appellant arranged to come to the law office of Trey Mills to sign some paperwork in regard to a settlement Mills had obtained for him from an insurance company in relation to a car accident. (Tr. 27, lines 4–24; Tr. 31, lines 13–25; Tr. 32, lines 1–14). Appellant arrived at Mills' office with checks the insurance company had sent him. (Tr. 32, lines 15–17). When Mills sat down at the table in his conference room, having closed the door behind him, and passed the paperwork to Appellant for his signature, Appellant passed an index card to Mills that said, "Sign the check or I will kill you." (Tr. 33, lines 6–14). At first Mills thought it was a joke and explained to Appellant that he had to sign the disbursement before Mills would sign the check. (Tr. 33, lines 14–24). Then Appellant stood up and lifted up his jacket to reveal a black handgun, which he pulled out and pointed at Mills while demanding, "Sign the checks." (Tr. 33, line 25–Tr. 34, line 7). When Mills refused to sign the checks, Appellant punched him in the back of the head, but not hard. (Tr. 34, lines 19–20). Mills stood up, and Appellant tried to hit him with the butt of the gun, hitting him in the back of the head and the back of his right shoulder. (Tr. 35, lines 3–6). Appellant put the gun to Mills' temple and said, "Sign the fucking check or I'll kill you and everybody in the office." (Tr. 35, lines 6–8). Mills signed the check but used a different signature, hoping someone would realize there was a reason he signed it differently. (Tr. 35, lines 9–14).

Appellant then left, taking the index card, the checks, and all the paperwork with him. (Tr. 36, lines 12–22). Mills and one of his employees both called 911. (Tr. 36, line 24–Tr. 37, line 4). After running his vehicle tag number, officers detained Appellant at his home and located the two checks in his truck; however, they did not find a gun or the index card with the threatening note. (Tr. 56, lines 1–14; Tr. 57, lines 2–17; Tr. 59, lines 1–24; Tr. 60, lines 1–17).

At trial, Mills testified regarding the incident. (Tr. 25–52). Ashley Reese, one of his employees, testified that she was familiar with Appellant and had seen him at least twenty times as he visited the law firm. (Tr. 65, line 11–Tr. 66, line 9). She testified he spoke English and she was able to understand him.[1] (Tr. 66, lines 10–17). When she greeted Appellant that day, he acted like he usually did: friendly and flirtatious. (Tr. 66, lines 18–Tr. 67, line 19). However, when Appellant left, he did not acknowledge Reese at all, would not look at her, and appeared angry as he walked stiffly and swiftly out of the building. (Tr. 68, lines 10–19). Reese testified that Mills then came out of the conference room yelling at her to call the cops because Appellant had just pulled a gun on him. (Tr. 68, lines 20–25). She explained that Mills looked disheveled, scared, and shocked and that she had never seen him like that before in the ten years she had worked for him. (Tr. 69, lines 2–8). After she called 911, she checked on Mills and said he was terrified. (Tr. 69, line 22–Tr. 70, line 3). She noted that the chairs were pushed away from the table in the conference room and it looked scattered. (Tr. 70, lines 4–8).

Lisa Hunt, another firm employee who was familiar with Appellant, testified that on February 12, 2015, she heard screaming and walked from her corner office to the front, where she found Reese screaming to lock the doors because Appellant had a gun. (Tr. 71, line 10–Tr. 73, line 7). From the front door, she saw Appellant get into his truck and drive away. (Tr. 73, lines 13–19). Hunt testified that Mills was scared to death, white as a ghost, shaking, and could barely talk and that she thought he was going to pass out. (Tr. 74, lines 10–15).

After the State rested its case, defense counsel moved for a directed verdict, arguing the State did not make a prima facie case that Appellant was guilty of any of the charges. (Tr. 77, lines 2–7). The trial court stated that there was sufficient testimony in the record to "make this a

[1] Appellant had an interpreter at trial. (Tr. 17, lines 23-25).

factual issue" and denied the motion. (Tr. 77, lines 8–11). Defense counsel presented no evidence before resting. (Tr. 84, lines 2–4). The following day, the trial judge held a charge conference, during which lesser-included offenses were discussed. (Tr. 86–91). After closing arguments, the trial judge instructed the jury on the State's burden of proof, reasonable doubt, the presumption of innocence, the defendant's right not to testify, and the elements of the crimes, including the lesser-included offenses of first-, second-, and third-degree assault and battery. (Tr. 114–28). The jury found Appellant guilty of ABHAN and of pointing and presenting a firearm. (Tr. 131, lines 4–22). Following the verdict, defense counsel moved for judgment notwithstanding the verdict and for a new trial, which the trial judge denied. (Tr. 132, lines 13–18). The trial judge sentenced Appellant to ten years' imprisonment for the ABHAN charge, suspended on the service of three years' imprisonment and followed by probation for five years, and to five years' imprisonment for the pointing and presenting charge, suspended on the service of three years' imprisonment and followed by probation for five years, to be served concurrently. (Tr. 138).

ARGUMENT

I.

The trial court properly denied Appellant's motion for a directed verdict because the State presented sufficient evidence of assault and battery of a high and aggravated nature.

Appellant argues the trial judge erred in not directing a verdict of acquittal or granting a new trial, claiming that reasonable men could not find beyond a reasonable doubt from the evidence each and every element of ABHAN. Specifically, he argues the victim did not sustain any serious injuries and was not threatened with force likely to result in death or great bodily injury, as required by the statute. Initially, this issue is not preserved for appellate review because when Appellant moved for a directed verdict at the close of the State's evidence, he merely argued that the State did not make a prima facie case that Appellant was guilty of any of the charges but did not argue anything specific regarding the elements of ABHAN. However, even if this Court finds the issue is properly preserved, the evidence the State presented supports its theory that Appellant hit the victim with his fist and with his gun, meeting the statutory definition of ABHAN, which does not require as one of its elements a serious injury. Therefore, this Court should affirm the trial court's denial of his directed verdict motion.

Initially, the State submits this issue is not properly preserved for appellate review. In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. *State v. Jordan,* 255 S.C. 86, 177 S.E.2d 464 (1970); *State v. Kennerly*, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998), *aff'd,* 337 S.C. 617, 524 S.E.2d 837 (1999). In *Kennerly*, the appellant moved for a directed verdict without stating any specific grounds. The Court of Appeals stated, "A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not presented to

the trial court below." *See State v. Bailey,* 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal."). Here, Appellant merely argued that the State did not make a prima facie case that Appellant was guilty of any of the charges but did not argue anything specific regarding the elements of ABHAN. Thus, the directed verdict issue as to the elements of the offense is not preserved. Even if preserved, the issue is without merit.

Assault and battery of a high and aggravated nature is defined as follows:

> 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.

S.C. Code Ann. § 16-3-600(B)(1) (2015).

It is axiomatic that in ruling on a motion for a directed verdict, the trial court is concerned only with the existence of evidence, not its weight. *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. *Id.* "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury." *Id.* at 292–93, 625 S.E.2d at 648. Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. *State v. Robinson*, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing *Jackson v. Virginia*, 443 U.S. 307

(1979)). The task of the trial court is to simply determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016). The reviewing court should affirm if in viewing the evidence in the light most favorable to the State, "the evidence could induce a reasonable juror to find [the defendant] guilty." *State v. Pearson*, 415 S.C. 463, 474, 783 S.E.2d 802, 807 (2016).

Our Supreme Court has made clear that actual bodily harm to the victim is not necessary to establish ABHAN. *State v. Foxworth*, 269 S.C. 496, 500, 238 S.E.2d 172, 173 (1977); *State v. DeBerry*, 250 S.C. 314, 319–20, 157 S.E.2d 637, 640 (1967). Although those two cases occurred before ABHAN was codified, even the common law version of ABHAN required an "injury." "Assault and battery of a high and aggravated nature is an unlawful act of violent **injury** to the person of another accompanied by circumstances of aggravation, such as the use of a deadly weapon, the infliction of serious bodily injury, the intent to commit a felony, the great disparity between the ages and physical conditions of the parties, a difference in the sexes, indecent liberties or familiarities with a female, the purposeful infliction of shame and disgrace, resistance of lawful authority, and others." *Foxworth*, 269 S.C. at 498, 238 S.E.2d at 173 (emphasis added).

Viewing the evidence presented here, in the light most favorable to the State as this Court must, Mills' testimony that Appellant punched him in the back of the head, pulled a gun on him, **hit him with the butt of the gun**, and held the gun to his temple certainly could lead a rational trier to fact to find all the elements of ABHAN. Appellant seems to focus on the fact that Mills was not **seriously** injured; however, **serious** injury is not required to satisfy the statute. It is worth noting that even when ABHAN was a common law offense that called it "an unlawful act

of violent injury," the Supreme Court determined that actual bodily harm to the victim was not necessary to meet the requirements. Therefore, it would be absurd to think that the language of the codified version that simply provides that a "person unlawfully injures another person" would require a **more** serious injury than the common law language using the adjective "violent." The State acknowledges that the statutory language does require some injury. Clearly, an attempt or a mere assault without a battery would not qualify. However, no requirement exists that the injury be of a certain severity in order to meet the statutory requirement. Nothing in the statute or South Carolina case law indicates the State must present a medical examination or a medical professional's testimony regarding the injury. Victim's testimony that Appellant punched him in the back of the head and hit him with the gun in the back of the head and the back of his right shoulder was sufficient to meet the requirements of an injury and satisfy the statute. Additionally, under subsection (b), if "the act is accomplished by means likely to produce death or great bodily injury," then it meets the qualifications of that offense. When a person uses a gun to hit someone in the back of the head and shoulder, the use of the weapon itself is undoubtedly one that is likely to produce death or great bodily injury. Simply because no great injury or death occurred does not mean the statute was not violated.

The trial judge properly denied Appellant's motion for a directed verdict because the State presented testimony from the victim that Appellant punched him in the head, hit him with the gun, held the gun to his head, and threatened to kill him multiple times. This evidence was sufficient to submit the case to the jury for its resolution, and this Court should affirm the trial court's denial of Appellant's directed verdict motion.

II.

Appellant's argument that the law of assault and battery of a high and aggravated nature is void for vagueness and thus a violation of the due process clause of the Fourteenth Amendment of the United States Constitution is not preserved for appellate review, but even if preserved, the statute does not violate the Constitution based on vagueness.

Appellant argues the law of ABHAN is void for vagueness. However, this issue was never raised to or ruled upon by the trial court and, thus, it is not preserved for this Court's review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."). If this Court somehow finds the issue is preserved, Appellant's argument still fails on the merits because the statute is not one in which a person of common intelligence would be left to guess at its meaning.

Initially, the State submits this issue is not preserved for appellate review. At no time did defense counsel bring up any constitutional issues, and he certainly did not object specifically on the basis of vagueness. In *State v. Neuman*, 384 S.C. 395, 683 S.E.2d 268 (2009), our Supreme Court addressed the State's argument that Neuman did not preserve a vagueness argument because he did not specifically raise it at trial. The Supreme Court determined the argument was preserved due to the fact that Neuman "listed multiple constitutional amendments in an effort to challenge the statute as constitutionally defective" and found "counsel's assertions regarding the Fifth and Fourteenth amendments, as well as his assertion that the statute was 'almost impossible to defend,' necessarily included a due process challenge." *Neuman*, 384 S.C. at 401, 683 S.E.2d at 271. Here, defense counsel made no constitutional challenges whatsoever. Thus, this issue is not preserved for this Court's review and should be dismissed. *See In re McCracken*, 346 S.C.

87, 92, 551 S.E.2d 235, 238 (2001) ("A constitutional claim must be raised and ruled upon to be preserved for appellate review.").

However, if this Court somehow finds the issue is preserved, Appellant's argument still fails because it does not pass the test for unconstitutional vagueness. "Statutes are to be construed in favor of constitutionality; the Court will presume a legislative act is constitutionally valid unless a clear showing to the contrary is made." *State v. Michau*, 355 S.C. 73, 77, 583 S.E.2d 756, 758 (2003) (citing *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994)). The test for determining whether a statute is unconstitutionally vague is as follows:

> The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise judge and jury of standards for the determination of guilt. If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional.

Guinyard v. State, 260 S.C. 220, 226, 195 S.E.2d 392, 394 (1973) (quoting *State v. Albert*, 257 S.C. 131, 134, 184 S.E.2d 605, 606–07 (1971)).

The due-process standard regarding the vagueness doctrine is whether the statute "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *State v. Sullivan*, 362 S.C. 373, 376, 608 S.E.2d 422, 424 (2005) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)); *see also Michau,* 355 S.C. at 75–78, 583 S.E.2d at 758–59 (applying the principle). So long as the statute clearly defines the offense in language that gives notice of the prohibited conduct, our Supreme Court has found it neither vague nor ambiguous. *Guinyard*, 260 S.C. at 226, 195 S.E.2d at 394.

Here, the statute at issue provides: "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." S.C. Code Ann. § 16-3-600(B)(1) (2015). This language certainly gives notice of what conduct is prohibited and does not define the "act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Additionally, section 16-3-600 defines "great bodily injury" in case any man of common intelligence would find that particular term vague. In *Guinyard*, where the prohibited conduct was "having sexual intercourse with a patient or trainee of any State mental health facility," the Supreme Court concluded that "[a]ll that a person need do to avoid the penalties of the statute is simply to refrain from sexual intercourse with a patient of a State mental health facility." *Guinyard*, 260 S.C. at 227, 195 S.E.2d at 395. Following that logic, all a person would need to do here would be to refrain from unlawfully injuring someone in a way where great bodily injury (meaning that which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ) resulted or by means likely to produce death or great bodily injury.

Other statutes that have been found not to be unconstitutionally vague include section 16-17-490 (10), "To so deport himself or herself as to wilfully injure or endanger his or her morals or health or the morals or health of others," where the Supreme Court found that "[a] person of ordinary intelligence and judgment need not guess at conduct which would 'endanger the morals or health' of a minor." *Michau,* 355 S.C. at 77, 583 S.E.2d at 759. In *State v. Green*, our Supreme Court determined that "[a]lthough each of these terms is not defined, we believe a person of common intelligence would not have to guess at what conduct is prohibited by the

statute" in regard to section 16-15-342, the criminal solicitation statute. 397 S.C. 268, 280, 724 S.E.2d 664, 670 (2012). Notably, the Court found that even though no terms were defined, the statute was simple enough for a person of common intelligence to understand. Here, we have the added clarity of the Legislature defining great bodily injury, which indicates it is even more easily understood by a person of common intelligence.

In sum, the State submits the issue of whether the statute is void for vagueness is not preserved for this Court's review, as no constitutional argument was made at trial. However, in any event, this particular statute gives reasonable notice of prohibited conduct in terms that are not so obscure that people of common intelligence would have to guess at their meaning. Thus, the statute is constitutional.

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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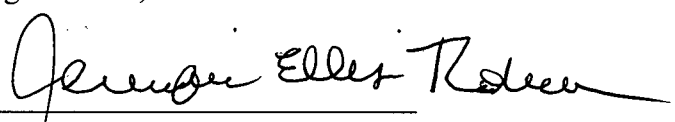
BY: 
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