STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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SC Court of Appeals

Certiorari to Saluda County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 2016-UP-489 (S.C. Ct. App. Filed November 23, 2016)

13-GS-41-357

THE STATE,

RESPONDENT,

V.

JOHNNY JEROME BOYD,

PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 1, 2017.

QUESTION PRESENTED

Did the Court of Appeals err in affirming the trial court's refusal to charge the jury on the lesser included charge of assault and battery second degree which was prejudicial to Boyd because it denied the jury the option of choosing between the victim suffering "great bodily injury" or "moderate bodily injury"[1] when there was evidence of both and the judge did charge the lesser included charges of assault and battery of a high and aggravated nature and assault and battery first degree both which require "great bodily injury?"

[1] State's Exhibits 19-23 (Photographs) and Defendant's Exhibits 1-6 (Photographs) are on file with this Court.

STATEMENT OF THE CASE

On November 19, 2013, the Saluda County Grand Jury indicted Johnny Jerome Boyd on the charge of attempted murder. On December 8-11, 2014, Boyd proceeded to trial before the Honorable DeAndrea Benjamin and a jury. Boyd was represented by Bennette Elliot Casto, and the state was represented by H. Franklin Young. R. 1. The jury found Boyd guilty of the lesser included charge of assault and battery of a high and aggravated nature (ABHAN). R. 384, ll. 13 – R. 385, ll. 8. Judge Benjamin sentenced Boyd to sixteen years imprisonment. R. 398, ll. 14 – 24. Boyd's attorney filed a timely notice of appeal. The Court of Appeals affirmed Boyd's conviction and sentence on November 23, 2016. App. 1-2. Appellate counsel filed a petition for rehearing on December 1, 2016 which was denied on February 1, 2017. App. 16. This petition for a writ of certiorari to the Court of Appeals follows.

ARGUMENT

The Court of Appeals erred in affirming the trial court's refusal to charge the jury on the lesser included charge of assault and battery second degree which was prejudicial to Boyd because it denied the jury the option of choosing between the victim suffering "great bodily injury" or "moderate bodily injury"[2] when there was evidence of both and the judge did charge the lesser included charges of assault and battery of a high and aggravated nature and assault and battery first degree both which require "great bodily injury."

Latoya Abney and Appellant Johnny Boyd had known each other ten years and had been in a romantic relationship four years when this incident occurred on September 15, 2013. They had a one year old son. Latoya lived with her father and three sons, and Boyd lived with his mother. R.128, ll. 2 – R. 129, ll. 6; R. 190, ll. 1 – R. 192, ll. 12.

On the night of September 15, 2013, there had been an incident earlier in the evening involving Latoya's father when the police were called along with DSS. Neither Latoya nor Boyd were involved. Latoya called Boyd, who lived nearby, to tell him DSS had been there as she thought he needed to know since his child lived there. R. 129, ll. 7 – R. 130, ll. 4.

Latoya's story was that Boyd suggested that he spend the night at her house since her father was not there. Her father did not like Boyd. She and her friend, Patrick, picked up Boyd and they returned to Latoya's house about 10:45. She claimed Boyd was drinking but she was not. She however, was in the process of rolling a marijuana cigarette to smoke. Boyd accused her of having sex with another man, and she laughed at him. He then started to "poke" her in her head. She retrieved her box cutter from her purse. He slapped her, and she started swinging at him with the

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[2] State's Exhibits 19-23 (Photographs) and Defendant's Exhibits 1-6 (Photographs) are on file with this Court.

box cutter. A lengthy and violent altercation followed that went through the house and then into the yard and shed behind the house. R. 130, ll. 5 – R. 150, ll. 24.

When Latoya saw Boyd's white t-shirt turn red with blood, she realized he was cut. She admitted that the blood at the scene was Boyd's. When Boyd said he was about to pass out and did, she called 911 and asked for an ambulance. Boyd then awoke and the altercation continued outside. They were going around the vehicle in the yard when Latoya did an about face and the two were facing each other. Boyd then hit her in the head with part of a cinder block. R. 149, ll. 5 – R. 156, ll. 25.

Latoya went down but got up and went to the shed. Boyd continued to follow her and continued to hit her in the face. The police officers arrived about that time. R. 160, ll. 14 – R. 165, ll. 24. During her testimony, she told of being hit in the back with a bicycle. R.161, ll. 10 – R.163 218, ll. 7. During her testimony, she admitted that she had a prior conviction for criminal domestic violence (CDV), possession of marijuana, and shoplifting. R. 166, ll. 4 – 19.

Boyd's story was that Latoya called him and he went to her house the night of September 15, 2013. Latoya was rolling a marijuana cigarette and used her box cutter to split the cigar. He told her that her father must have been upset with her because he caught her with a man in the house. He admitted that a violent altercation began and she used the box cutter to cut him. He tried to unarm her and got cut doing that. He admitted that he hit her with a partial piece of concrete because he wanted to stop her from going to the shed. He knew her father kept many utilities in the shed and he feared she would get something else to attack him. He was bleeding heavily and lost consciousness a couple of times. He did not remember clearly everything that happened. R. 193, ll. 1 – R. 207, ll. 2. He did not intend to kill Latoya. R. 190, ll. 2 – 19.

Officer Joshua Price was the first responder to the scene along with Lieutenant Donovan Shealy. He saw a small child covered in blood being held by Patrick Johnson. The officer heard noises coming from the shed. When he approached the shed, he saw Boyd standing over Latoya and saw him strike her in the face with a clenched fist. Boyd walked out and the officers followed him to the front yard. R. 23, ll. 1 –R. 27, ll. 25.

Sergeant Michael Raffield was the third officer to arrive at the scene. He saw Boyd standing with the other officers in the front yard. Boyd was covered in blood. Officer Raffield feared for Boyd's life as Boyd had an arterial spurt of blood coming from a cut on his neck. Raffield, a nationally registered paramedic for twenty years, found Boyd's behavior was bizarre as Boyd was incoherent. Raffield called for a helicopter to transport Boyd as he believed Boyd might bleed out. R. 82, ll. 12 - R. 87, ll. 11. Raffield believed that the blood throughout the house belonged to Boyd. R. 114, ll. 11 – R. 116, ll. 4.

Boyd was flown to the hospital where he received treatment consisting of numerous stitches and staples. He suffered a cut vein located just above his carotid artery. He was released from the hospital that same night. R. 118, ll. 14 – R. 119, ll. 23.

Gary Seibert was the registered EMT who responded with the ambulance for Latoya. He described her as being in severe pain as she had a "good bit of swelling" to the left side of her face and eye. Her injuries appeared to be severe. She needed to be assessed, treated and transported as soon as possible. R. 60, ll. 11 – R. 68, ll. 20. She was conscious, alert, and oriented. On cross-examination, he admitted that she had no "abnormalities" other than the injury to her eye and face. Her mental status was good. She was transported by land ambulance to the hospital. R. 68, ll. 25 – R. 73, ll. 10.

Latoya had testified that she was treated at the scene and transported. She was treated at the hospital and released that night. R. 174, ll. 10 – 20.

During the judge's discussion with the attorneys on the proper jury charges, defense counsel initially said, after discussing the charges with Boyd, he did not want any lesser included charges to be given. The state requested that ABHAN and assault and battery first degree be given to the jury because there was evidence of both. The solicitor argued that a concrete block was used which could have resulted in death to the victim. R. 279, ll. 1 – R. 293, ll. 18. Defense counsel argued that the issue was whether assault and battery first degree could be charged because it just uses the term "offers" or "attempts." There was no mention of a battery. Both parties had agreed that the language referring to inappropriate sexual touching should not be included because there was no evidence of that. The judge stated that the statute was changed several years before and she thought it would have been corrected but it had not. There had been confusion among the bench and the bar regarding the statute. R. 293, ll. 17 – R. 294, ll. 19.

The state disagreed as there was an offer and attempt because Boyd threw the block at Latoya. Defense counsel now asked the court that assault and battery first degree be removed, although he had not objected at first. Counsel then asked that a charge on assault and battery second degree be given. Based on the testimony, there was evidence of assault and battery second degree. His objection to assault and battery first degree was that there was no mention of a battery in the statute. Therefore, this charge did not fit this factual situation. R. 294, ll. 20 – R. 297, ll. 22.

The judge then said that she would leave the part that provided that if the person unlawfully injures another person. (All had agreed that the section involving inappropriate sexual touching should not be included). Then the judge would include that a person may commit the offense of assault and battery first degree if the person offers or attempts to injure another person with the

present ability to do so and the act is likely to cause death or great bodily injury. R. 298, ll. 1 – R. 299, ll. 7.

The judge then said in discussing assault and battery second degree that the parties would have to define moderate bodily injury. The state argued that the definition of moderate bodily injury stated it required treatment to an organ system of the body other than skin, muscle, connective tissue, except where there was a penetration of skin, muscles, or connective tissue which required surgical repair of a complex nature or when the treatment required the use of regional or general anesthesia. He argued there was no evidence of that in this case. The judge said there had been no testimony of any of that in the record. Defense counsel argued that her eye was an organ that had been injured. Counsel said the issue was that it was for the jury to decide how serious her injuries were, and it would be error to take that decision from the jury. R. 299, ll. 17 – R. 303, ll. 3.

The judge stated:

> I understand. But I'm asking what evidence or testimony has there been that –I don't recall any testimony regarding any regional or general anesthesia having to be used on her. Or any penetration of the skin, muscles, connective tissues that require surgical repair of a complex nature or when the treatment of the injuries required regional or general anesthesia. There's been absolutely no testimony whatsoever of that regarding treatment of Ms. Abney in this case. Now, your client testified that he had stitches and some type of surgical repair. I don't know if he testified regarding regional or general anesthesia, but I think you even pointed out when she was on the stand that she went to the hospital and that was pretty much it.

R. 301, ll. 6 – 20.

The state reiterated that she went and was released. R. 301, ll. 21.

The judge ruled that there was no evidence in the record that supported an assault and battery second degree injury so she was not going to charge it. R. 301, ll. 22 – R. 302, ll. 2.

The judge asked the state what was the great bodily injury under the statute. The state responded:

> It's the offer or attempt, Your Honor, that the state would be proceeding on. The offer attempt is associated with multiple attempts to strike her. The state's evidence is that she was struck. I hold up pictures from the back two times.

R. 303, ll. 4 – 11.

The state continued to argue that it was the permanent disfigurement or protracted impairment of the function of a bodily member or organ. The judge then said:

> So you're saying the difference is that this requires – that (a) (1)[3] does not require any treatment but moderate bodily injury requires treatment.

R. 303, ll. 18 – 24.

The state responded that this statute had caused all kinds of issues like this and "we're stuck with these manipulations of trying to figure out what we're talking about, but unfortunately that's the way it is." Defense counsel asked that out of an abundance of caution, that both assault and battery first degree and second degree be charged out of fairness. R. 304, ll. 1 – 20.

The judge stated that the statute required there be physical injury requiring treatment and there was nothing in the record that said the injury required treatment. R. 304, ll. 21 – R. 305, ll. 25. The judge ruled that she would charge ABHAN, assault and battery first degree. R. 306, ll. 25 – R. 307, ll. 1. Defense counsel pointed out that in all fairness, her decision took from the jury the realistic option and choice that the jury should have. The judge said the testimony was that EMS took her to the hospital but no treatment was required and the statute required treatment to an organ system. R. 307, ll. 2 – R. 308. ll. 20.

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[3] The transcript has (a) (1) but it is clear the judge meant (A) (1) which defines great bodily injury in the statute. 16-3-600 (A) (1).

Following the jury charges, defense counsel objected to the judge not giving the charge on assault and battery second degree. He also renewed prior objections. The judge responded that defense counsel's objection was overruled earlier but it was preserved for the record. R. 374, ll. 15 – 25.

After the jury had begun deliberating, they requested to hear the three charges again on attempted murder, ABHAN, and assault and battery first degree. The judge instructed the jury on all three charges again. R. 377, ll. 1 – R. 383, ll. 17.

The jury found Boyd guilty of the lesser charge of ABHAN. R. 384, ll. 13 – R. 385, ll. 8. Defense counsel renewed all of his motions and objections raised during the trial and pretrial. R. 393, ll. 16.

Discussion

South Carolina Code Section 16-3-600(B)(1) 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.

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

> A person commits the offense of assault 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; or

(b) offers or attempts to injure another person with the present ability to do so, and the act:

(i) is accomplished by means likely to produce death or great bodily injury; or

(ii) occurred during the commission of a robbery, burglary, kidnapping or theft.

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

A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and:

(a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted; or

(b) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing.

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

(1) "Great bodily injury" means bodily injury 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.

(2) "moderate bodily injury' means physical injury requiring treatment to an organ system of the body other than the skin, muscles and connective tissues of the body, except when there is penetration of the skin, muscles, and connective tissues that require surgical repair of a complex nature or when treatment of the injuries requires the use of regional or general anesthesia.

The cardinal rule of statutory construction is to ascertain and effectuate the intention of the legislature. State v. Thomas, 372 S.C. 466, 642 S.E.2d 724 (2007), State v. Scott, 351 S.C. 584, 571 S.E.2d 700 (2002). Penal statutes are to be construed strictly against the State and in favor of the defendant. Id., State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991), State v. Dawkins, 352 S.C. 162, 573 S.E.2d 783 (2002). For the purpose of statutory construction, the Supreme Court does not look merely at a particular clause in which a word may be used, but rather should

look at the word and its meaning in conjunction with the purpose of the whole statute, and in light of the object and policy of the law. Id. Rule that penal statute must be strictly construed is not violated by giving words of statute reasonable meaning according to sense intended. State v. Firemen's Ins. Co. of Newark, N.J., 164 S.C. 313, 162 S.E.334 (1931). The reason of the statute- that is, the motives which led to the making of it, the object in contemplation at the time the Act was passed- is another criterion by which to ascertain the true meaning of the Act. State v. Shaw, 9 S.C. 94 (1878).

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent. State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011).

In State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010), the Supreme Court, citing State v. Knoten, 347 S.C. 296, 555 S.E.2d 391, 394 (2001), held that the law to be instructed to the jury must be determined from the evidence presented at trial.

The Court of Appeals held in State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003), that in reviewing jury charges for error, they must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. The Court went on to rule that a jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. Id.; State v. Jackson, 297 S.C. 523, 377 S.E.2d 570 (1989).

The trial judge in this case misinterpreted the statute. Section 16-3-600(A) (2) provides the definition of moderate bodily injury. It clearly states that "moderate bodily injury" means a physical injury to an organ system that requires treatment other than skin, muscles or connective tissue. Then the remainder of the section refers to the exception for when injuries to skin, muscles and connective tissue can be included under this definition. The exception for skin, muscles or connective tissue is when complex surgery is required or when anesthesia is needed. The use of the

word "or" applies to the exception. The only reasonable or logical interpretation is that moderate bodily injury is a physical injury that needs treatment. For the judge to understand that great bodily injury does not require treatment but moderate bodily injury does is not a reasonable understanding of the intention of the Legislature.

Latoya Abney's injuries met the definition of moderate bodily injury. She agreed that she was treated at the hospital and released. She suffered injuries to her left eye and left side of her face. Her vision in her left eye where she was injured was still more blurry than the right eye. However, she had not sought help for her eye although she was told to follow up if needed. R. 175, ll. 25 – R. 177, ll. 1.

There was no indication that the vision problem was permanent. The state did not call a medical expert to testify regarding her injuries. Just because she had not sought treatment did not mean further treatment was not needed.

The judge did not have a clear understanding of the evidence presented as she stated there was no evidence in the record that Latoya received treatment. On Page 250, ll. 10 – 20 of the record, Latoya testified on cross-examination that she was treated when law enforcement arrived and then taken to the hospital, again treated and released. The solicitor asked her about being treated and released at the hospital. R. 175, ll. 25 – R. 176, ll. 2.

The EMT, Gary Seibert, who treated Latoya at the scene, testified that she "needed to be assessed, treated and transported as soon as possible." R. 67, ll. 11 – 20.

The trial judge erred in not allowing the jury the choice of whether Latoya's injuries met the definition of great bodily injury or moderate bodily injury. This was a fact that the jury should have decided. The judge erred by not charging the jury on assault and battery second degree because both ABHAN and assault and battery first degree require great bodily injury. There was evidence of

moderate bodily injury in the record. Latoya was treated and released from the hospital the same night. She was not bleeding as the blood at the scene was Boyd's. R. 54, ll. 24 – R. 55, ll. 4. Latoya was driven to the hospital by ambulance. Boyd was transported by helicopter. The EMT said that Latoya's mental status was good. R. 70, ll. 11 – 14. The EMT agreed that he arrived on the scene and that he treated Latoya. R. 69, ll. 1 – 7. Sergeant Raffield testified that Latoya's injuries appeared serious but not like a car wreck. She talked to him and was able to explain what happened. R. 88, ll. 1 – R. 89, ll. 15.

There was evidence in the record of moderate bodily injury pursuant to the definition as stated in Section 16-3-600 (A)(2). The trial judge erred in not charging the jury on assault and battery second degree because the judge's charge taken as a whole did not cover the law as presented through the evidence.

The circuit court is to charge the jury on the lesser included offense if there is any evidence from which the jury could infer that the lesser rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002).

The Court of Appeals misapprehended the issue as they cited State v. Geiger , 370 S.C. 600, 635 S.E.2d 669 (Ct. App. 2006) for the proposition that in order to justify charging the lesser crime, the evidence presented must allow a rational inference that the defendant was guilty only of the lesser offense. The court continued to cite Geiger that the trial court looks to the totality of evidence in evaluating whether such an inference has been created. App. 2.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be granted to allow full briefing on this issue.

Respectfully Submitted,

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of February, 2017.

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THE STATE,

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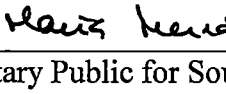
PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Johnny Jerome Boyd, #305494, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 28th day of February, 2017.

LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 28th day of February, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.