STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Beaufort County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2016-000612

THE STATE,

Respondent,

vs.

BENJAMIN CERVANTES HERNANDEZ,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Any issue with the trial judge's refusal to instruct the jury on first-degree and second-degree assault and battery as purported lesser-included offenses of second-degree criminal sexual conduct with a minor is not properly preserved for appellate review because defense counsel waived any such issue during trial by directly indicating to the trial judge she had no objections to the jury instructions as presented after the trial judge finished instructing the jury on the applicable law. However, regardless of any issue preservation concerns, the trial judge properly declined to instruct the jury on the statutory offenses of first-degree and second-degree assault and battery because those offenses are not lesser-included offenses of second-degree criminal sexual conduct with a minor.

STATEMENT OF THE CASE

In July of 2015, Appellant Benjamin Cervantes Hernandez was arrested following an investigation into allegations he sexually abused several young girls. In October of 2015, the Beaufort County Grand Jury indicted Appellant for one count of second-degree criminal sexual conduct with a minor along with two counts of third-degree criminal sexual conduct with a minor. On February 22, 2016, a jury trial was commenced in the Beaufort County Court of General Sessions with the Honorable John C. Hayes, III, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant of second-degree criminal sexual conduct with a minor and acquitted him of the other two charges. Following the verdict, the trial judge sentenced Appellant to a fifteen-year term of imprisonment. Thereafter, on March 3, 2016, Appellant filed motions seeking a new trial and reconsideration of his sentence, and the trial judge denied both motion through a written order dated March 8, 2016. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

On July 17, 2015, Maria Pizana-Covos ("Mother") was at her residence in Bluffton, South Carolina, when her eleven-year-old daughter ("Victim 1") disclosed she had been sexually abused by Appellant Benjamin Cervantes Hernandez, a thirty-six-year-old family friend and construction worker that was visiting with them at the time.[1] (Tr. pp. 207-209; p. 211; p. 249; p. 257; p. 265; State's Ex. # 6 (Recording of Appellant's Interview)). In addition to Victim 1's disclosure, Mother's nine-year-old daughter ("Victim 2") along with an eleven-year-old girl ("Victim 3") visiting with Mother and her family also disclosed they were sexually abused by Appellant.[2] (Tr. p. 208; p. 214; pp. 284-285; p. 290; p. 292; pp. 294-295; p. 298). In response, Mother immediately confronted Appellant about the allegations before quickly alerting the authorities of what had been disclosed, and law enforcement officers were dispatched to Mother's home. (Tr. pp. 211-214; pp. 233-234; pp. 248-249; pp. 310-311; p. 319).

Shortly thereafter, Detective Baker Odom, Officer William Ferrelli, Officer Lindsey Gibson, and Officer Bonifacio Perez from the Bluffton Police Department arrived at Mother's home and spoke with Mother, her family, and the other people present at the scene. (Tr. pp. 233-234; pp. 248-249; pp. 310-311; pp. 318-319). During the officers' conversations with the girls at the residence, Victim 1, Victim 2, and Victim 3 all disclosed they had been sexually abused at that location earlier that night. (Tr. pp. 234-236; p. 249). Meanwhile, Appellant, who was still present at the scene, approached Officer Ferrelli, pulled him away from the others, and indicated he needed to speak with him. (Tr. pp. 236-237; pp. 249-250; p. 253; p. 311). Officer Ferrelli

[1] Regarding Appellant's connection to Mother's family, Appellant claimed to be a distant relative of Mother's husband, Efrian Jimenez, while Victim 1 indicated she treated Appellant like an uncle. (Tr. pp. 207-208; p. 259; State's Ex. # 6).

[2] During trial, Mother identified Victim 3 as a family friend, but Victim 3 identified herself as a cousin of Victim 1 and Victim 2. (Tr. p. 214; p. 286).

then engaged in a conversation with Appellant with the assistance of Officer Perez, who served as a translator, and Appellant was arrested as a result of what he revealed during that conversation. (Tr. p. 250; p. 311; p. 317; pp. 319-320; State's Ex. # 1 (Recording from Officer's Body Camera)).

Following his arrest, Appellant was transported to the police department and, with Officer Perez again translating, was interviewed by Detective Odom. (Tr. pp. 311-312; p. 314). During the interview, Appellant acknowledged several different events occurred on the night of the incident that involved Victim 1, Victim 2, and Victim 3. (State's Ex. # 6). Regarding Victim 2 and Victim 3, Appellant claimed he was kissed by Victim 2 and pushed in the back by Victim 3. (Tr. p. 317; State's Ex. # 6). Regarding Victim 1, Appellant claimed he allowed something "sinful" to happen for which he was very remorseful. (Tr. p. 314; State's Ex. # 6). Specifically, Appellant asserted he went to check on Mother's infant son while he was visiting the home, Victim 1 kissed him between his cheek and lips when he went into the baby's room to do so, and he responded by putting his hands up. (State's Ex. # 6). When he put his hands up, Appellant alleged Victim 1, whom he contended was very strong, grabbed one of his hands, pulled it underneath her underwear onto her vagina, and firmly pressed it into her body, which led to him feeling "moisture." (Tr. p. 314; State's Ex. # 6). At that point, Appellant insisted he stopped touching Victim 1, and he stated he admonished her before going to the bathroom to wash his hands. (State's Ex. # 6). After that, Appellant indicated he resumed interacting with the family but did not reveal what had occurred to Mother at that time. (State's Ex. # 6). Appellant further asserted he was not sure whether he actually penetrated Victim 1's vagina during the incident, and he insisted he was physically overpowered by his eleven-year-old victim despite how impossible such a feat would seem. (State's Ex. # 6).

Thereafter, on August 5, 2015, Kendra Twitty, a forensic interviewer and therapist at a children's advocacy center, individually conducted forensic interviews of Victim 1, Victim 2, and Victim 3.[3] (Tr. pp. 302-303). During the interviews, each of the girls again disclosed they were sexually abused by Appellant.[4] (State's Ex. # 2 (Recording of Victim 1's Forensic Interview); State's Ex. # 3 (Recording of Victim 3's Forensic Interview); State's Ex. # 4 (Recording of Victim 2's Forensic Interview)).

Subsequently, Appellant was indicted for one count of second-degree criminal sexual conduct with a minor in regard to the allegations involving Victim 1 along with two counts of third-degree criminal sexual conduct with a minor in regard to the allegations involving Victim 2 and Victim 3, and he proceeded forward to trial. (Tr. pp. 27-28; Indictments). During trial, Mother testified about the events that led her to alert law enforcement of the reported sexual abuse, and the officers involved in the investigation testified about their responses to the allegations along with the details of their conversations with Appellant about the sexual abuse. (Tr. pp. 207-218; pp. 233-237; pp. 248-253; pp. 310-324). Additionally, the forensic interviews of the victims were played for the jury along with recordings of Appellant's statements about the incident. (Tr. p. 251; pp. 304-309; pp. 321-324).

In addition to that testimony and evidence, each of Appellant's victims testified about their experiences on the date of the incident. (Tr. pp. 255-299). Specifically, Victim 1 testified Appellant visited her home on that date, touched her "private part" while she was on a couch,

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[3] In addition to the forensic interview, Karen Drozd, a sexual assault nurse examiner at the Medical University of South Carolina, conducted a medical examination of Victim 1 on July 18, 2015. (Tr. pp. 219-220; p. 222). During the examination, Drozd found no signs of obvious trauma to Victim 1's body but discovered redness and missing skin near the entrance to Victim 1's vagina along with signs of a rash on both of Victim 1's legs next to her vagina. (Tr. pp. 233-224; p. 229).

[4] Specifically, during her interview, Victim 1 recounted Appellant came into her baby brother's room and began touching her body on the night of the incident. (State's Ex. # 2). Furthermore, Victim 1 indicated it hurt when Appellant touched her vagina, but she stated she was not sure if anything went inside of her vagina when he did so. (State's Ex. # 2).

prevented her from leaving and touched her breasts while she was in her baby brother's room, put his hand in her underwear at a later point when she was in her baby brother's room, digitally penetrated her vagina, warned her it would "get worse" if she said anything about what had occurred, and told her he wanted to kiss her. (Tr. p. 257; pp. 259-263; pp. 265-266; p. 270; p. 272). Victim 1 further acknowledged she told Twitty during a forensic interview she was not sure if any penetration occurred during the incident, but she asserted she made that statement because she did not understand Twitty's question at the time. (Tr. p. 277; p. 283). Similarly, Victim 2 stated Appellant attempted to kiss her on the mouth after she jumped on him on the date of the incident and later touched her "private part" while she was sitting on his lap. (Tr. pp. 295-298). Likewise, Victim 3 stated Appellant touched her "private part" underneath the kitchen table on the date of the incident and attempted to put his hand down her pants when she was alone with him in one of the home's bedrooms. (Tr. p. 285; pp. 287-290).

Thereafter, Appellant testified in his own defense and offered a somewhat contradictory account of the events that occurred on the date of the incident. (Tr. pp. 344-358). Regarding those events, Appellant flatly denied inappropriately touching Victim 2 and Victim 3, but he asserted Victim 2 did kiss him near his lips at some point on the date of the incident. (Tr. pp. 350-354). Furthermore, regarding Victim 1, Appellant claimed he went into Mother's baby's bedroom, moved the baby away from the edge of the bed, and was grabbed and kissed by Victim 1 at that time. (Tr. pp. 344-345). After he was kissed, Appellant stated he pushed Victim 1 away, but she responded by grabbing his hand, putting it inside of her pajamas, and using her hand to make "pressure between her legs" with his hand. (Tr. p. 345). When that occurred, Appellant acknowledged his hand touched Victim 1's genital area underneath her underwear, and he stated he felt moisture when it did so. (Tr. p. 358). However, aside from that, Appellant

denied he touched Victim 1's breasts, denied he forced Victim 1 to stay in a room with him, and denied he made any inappropriate comments to Victim 1. (Tr. pp. 347-350).

Subsequently, at the conclusion of the evidentiary phase of trial, defense counsel requested the trial judge instruct the jury on first-degree and second-degree assault and battery as lesser-included offenses of second-degree criminal sexual conduct with a minor and on second-degree and third-degree assault and battery as lesser-included offenses of third-degree criminal sexual conduct with a minor. (Tr. pp. 363-364). In support of those requests, defense counsel contended first-degree assault and battery was the "equivalent" of the former common-law offense of assault and battery of high and aggravated nature, which had previously been found to be a lesser-included offense of some criminal sexual conduct offenses, while contending there was evidence presented that could support the elements of that offense. (Tr. pp. 364-366). Furthermore, defense counsel argued second-degree assault and battery is a lesser-included offense of third-degree criminal sexual conduct with a minor in light of the fact that offense required proof of lewd and lascivious intent while second-degree assault and battery did not. (Tr. pp. 366-367).

After considering the arguments of counsel, the trial judge denied defense counsel's requests. (Tr. pp. 367-368). In doing so, the trial judge explained the legislature replaced the prior common-law assault and battery offenses with a tiered assault and battery statutory scheme, specifically delineated the offenses to which those new statutory offenses would be considered to be lesser-included offenses, and could have indicated those new offenses be treated as lesser-included offenses of criminal sexual conduct if such a result had been desired. (Tr. pp. 367-368).

Thereafter, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (Tr. pp. 369-399). During his jury charge, the trial

judge instructed the jury on the elements of the indicted offenses of second-degree and third-degree criminal sexual conduct with a minor but did not present instructions on any other offenses.[5] (Tr. pp. 395-396). Following those instructions, the trial judge inquired of the parties whether they had any issues with the jury charge as presented, and defense counsel expressly responded, "No, Your Honor." (Tr. p. 399).

Subsequently, at the conclusion of trial, the jury convicted Appellant of second-degree criminal sexual conduct with a minor in regard to Victim 1 and acquitted him of the remaining charges related to Appellant's other two victims.[6] (Tr. p. 406). Following the verdict, the trial judge sentenced Appellant to a fifteen-year term of incarceration. (Tr. p. 420). Defense counsel then filed post-trial motions seeking reconsideration of Appellant's sentence along with a new trial for several different reasons, including the trial judge's refusal to instruct the jury on any lesser-included offenses, and the trial judge promptly denied those motions. (Motion for New Trial; Motion to Reconsider Sentence; Order, dated Mar. 8, 2016).

[5] As part of his jury charges, the trial judge presented an instruction to the jury that improperly singled out the testimony of juvenile witnesses and appeared to incorrectly suggest the testimony of such witnesses warranted more scrutiny than the testimony of other witnesses for a variety of reasons that are applicable to all witnesses regardless of age. (Tr. pp. 394-395). Specifically, the trial judge instructed the jury: "During the trial, you've heard testimony from children. Where a witness is a child you must determine, as which any witness, whether the testimony is believable. In deciding believability, you may consider not only matters that I have already discussed with you about all witnesses, but you may also consider the age of the child, the child's ability to observe and remember facts, and the child's ability to understand and answer questions. Because young children may not fully understand what is happening, here, it is up to you to decide whether the child understood the seriousness of appearing as a witness at this trial; whether the child understood the questions; whether the child has a good memory; and whether the child understands the difference between lying and telling the truth. In addition, young children may be influenced by the way the questions are asked. It is up to you to decide whether the child understood the questions asked." (Tr. pp. 394-395).

[6] Notably, the jurors determined the testimony of Victim 2 and Victim 3 was not sufficient to satisfy the State's burden of proof despite the fact the trial judge had instructed them "the testimony of victims need not be corroborated" in criminal sexual conduct cases. (Tr. p. 396).

ARGUMENT

Any issue with the trial judge's refusal to instruct the jury on first-degree and second-degree assault and battery as purported lesser-included offenses of second-degree criminal sexual conduct with a minor is not properly preserved for appellate review because defense counsel waived any such issue during trial by directly indicating to the trial judge she had no objections to the jury instructions as presented after the trial judge finished instructing the jury on the applicable law. However, regardless of any issue preservation concerns, the trial judge properly declined to instruct the jury on the statutory offenses of first-degree and second-degree assault and battery because those offenses are not lesser-included offenses of second-degree criminal sexual conduct with a minor.

Appellant contends the trial judge erred in declining to instruct the jury on the statutory offenses of first-degree and second-degree assault and battery. In support of that contention, Appellant maintains first-degree and second-degree assault and battery should be considered to be a lesser-included offense of second-degree criminal sexual conduct with a minor in light of the fact the common-law offense of assault and battery of a high and aggravated nature has previously been found to be a lesser-included offense of some criminal sexual conduct offenses. Furthermore, Appellant maintains the facts of his case justified charges on first-degree and second-degree assault and battery as lesser-included offenses. Initially, any issue with the trial judge's jury instructions is not properly preserved for appellate review in Appellant's case because defense counsel waived any such issue by specifically indicating to the trial judge she had no objections to the jury charge after it was presented to the jury. However, notwithstanding any issue preservation concerns, first-degree and second-degree assault and battery are not lesser-included offenses of second-degree criminal sexual conduct with a minor in light of the fact second-degree criminal sexual conduct with a minor does **not** include all the elements of either first-degree or second-degree assault and battery. Moreover, first-degree and second-degree assault and battery are not lesser-included offenses of second-degree criminal sexual conduct with a minor in light of the fact the legislature elected not to recognize them as such.

Therefore, the trial judge properly declined to instruct the jury on first-degree and second-degree assault and battery in Appellant's case. Appellant's conviction should be affirmed.

A. Waiver of Any Issue Regarding the Trial Judge's Jury Instructions

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). Significantly, the application of issue preservation requirements ensures the trial court has an opportunity "to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). In order for an issue to properly be preserved for appellate review, the issue must be: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). Importantly, "[i]f a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

Moreover, even if a party properly raises an objection during trial, a party may still waive his right to argue error in regard to that objection on appeal under certain circumstances. See State v. O'Neal, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) (recognizing a previously-raised objection can be waived). Significantly, one of the ways a party can waive an objection is by indicating to the trial judge the party does not have an objection to an issue to which the party previously raised an objection. See State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) (holding Brown's issue with a jury instruction was not preserved for appellate review

where Brown explicitly stated to the trial judge he had no objection to the instruction); State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) (holding Rios waived his right to allege error with a jury charge on appeal where the trial court specifically asked if there were any objections to the instructions given and Rios responded there were none); State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) ("Dicapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue Dicapua had with the videotape."); cf. Commonwealth v. Moury, 992 A.2d 162, 178 (Pa. Super. Ct. 2010) ("Generally, a defendant waives subsequent challenges to the propriety of the jury charge on appeal if he responds in the negative when the court asks whether additions or corrections to a jury charge are necessary.").

In the case sub judice, any issue in regard to the trial judge's instructions to the jury was not properly preserved for appellate review. That is true because, even though defense counsel initially requested the trial judge instruct the jury on first-degree and second-degree assault and battery as purported lesser-included offenses of second-degree criminal sexual conduct with a minor and the trial judge denied those requests after explaining why he did not believe the requested charges were appropriate, defense counsel subsequently expressly waived any issue regarding the trial judge's jury instructions by directly and unreservedly affirming to the trial judge she had no issues with or objections to the jury charge as presented, which, significantly, did **not** include any instruction on lesser-included offenses. See Brown, 402 S.C. at 125, 740 S.E.2d at 496 ("[Brown]'s trial counsel stated explicitly that he had no objection to the trial court's instruction. Thus, [Brown]'s argument that the trial court erred in failing to apply section

16-13-30 as amended is unpreserved."); Rios, 388 S.C. at 342, 696 S.E.2d at 612 ("Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, 'None.' By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal."); see also Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) ("When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review."); see, e.g., Rule 20(b), SCRCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection. Failure to object in accordance with this rule shall constitute a waiver of objection."). Accordingly, in light of the fact defense counsel directly affirmed she had no issues with or objections to the jury instructions after they were given, any issue Appellant may have had in regard to the trial judge's jury instructions was expressly waived, and no issue regarding the trial judge's failure to instruct the jury on first-degree and second-degree assault and battery can properly be raised or addressed on appeal. See State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court "cannot address unpreserved errors"). Appellant's conviction should be affirmed.

B. Propriety of the Trial Judge's Jury Instructions

The purpose of a trial judge's jury instructions is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). When instructing a jury on the law, a trial judge is required to charge only the current and correct law of South Carolina, and the law to be charged is determined by the evidence presented at trial.

State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009); see State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003) ("In general, the trial judge is required to charge only the current and correct law of South Carolina, . . . and the law to be charged to the jury is determined by the evidence at trial." (citations omitted)). Ordinarily, a trial court has a duty to give a requested instruction when it correctly states the law applicable to the issues and is supported by the evidence, but a trial judge should decline to give a requested instruction when it tenders an issue that is not presented or supported by the evidence. State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996); see State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975) ("No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence.").

When 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 accepted test for determining whether an offense is a lesser-included offense of another, an offense is considered to be a lesser-included offense of a greater offense if the greater offense includes all 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). Significantly, 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.").

Importantly, a trial judge's jury instructions are appropriate if they are substantially correct and adequately cover the law applicable to the case. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law."). Moreover, a trial judge only commits reversible error if the judge prejudicially 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 848, 849 (1993); see Taylor, 356 S.C. at 231, 589 S.E.2d at 2 ("To warrant reversal, a trial judge's charge must be both erroneous and prejudicial."). In reviewing a trial judge's jury instructions for error, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); see Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation in analyzing whether the defendant's due process rights have been violated."). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal."); see also State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied.").

In the case at bar, the trial judge committed no error in declining to instruct the jury on the offenses of first-degree and second-degree assault and battery because those crimes are not

lesser-included offenses of second-degree criminal sexual conduct with a minor. That is true because, looking to the elements of the offenses, second-degree criminal sexual conduct with a minor does **not** include all the elements of either first-degree or second-degree assault and battery. Compare S.C. Code Ann. § 16-3-655(B) (defining the offense of second-degree criminal sexual conduct with a minor, which requires proof: (1) the actor engaged in a sexual battery with a victim who was between eleven and fourteen years old; or (2) the actor engaged in a sexual battery with a victim who was at least fourteen years old but less than sixteen years old and the actor was in a "position of familial, custodial, or official authority to coerce the victim to submit" or was older than the victim); and S.C. Code Ann. § 16-3-651 (defining sexual battery for purposes of criminal sexual conduct offenses as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except where such intrusion is accomplished for medically recognized treatment or diagnostic purposes"); with S.C. Code Ann. § 16-3-600(C)(1) (defining the offense of first-degree assault and battery, which requires proof: (1) the actor injured another through nonconsensual touching of the private parts with lewd and lascivious intent or during the course of a robbery, burglary, kidnapping, or theft; or (2) the actor offered or attempted to injure another person with the present ability to do so by a means likely to produce death or great bodily injury or during the commission of a robbery, burglary, kidnapping, or theft); and S.C. Code Ann. § 16-3-600(D)(1) (defining the offense of second-degree assault and battery, which requires proof the actor injured another person or offered or attempted to injure another person with the present ability to do so and: (1) moderate bodily injury resulted or could have resulted; or (2) the act involved the nonconsensual touching of the private parts of a person above or underneath the person's clothing). Specifically, second-degree

criminal sexual conduct with a minor does **not** include any elements requiring proof of an injury or an offer or attempt to injure, proof of nonconsensual touching of a person's private parts, proof of lewd and lascivious intent, proof establishing another crime like a robbery or a burglary was committed, proof establishing death or great bodily injury could have resulted, or proof establishing moderate bodily injury was inflicted or could have been inflicted. As a result, first-degree and second-degree assault and battery are not lesser-included offenses of second-degree criminal sexual conduct with a minor under the recognized and accepted test for determining whether offenses are lesser-included offenses of another. 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."), overruled on other grounds by State v. Gentry, 563 S.C. 93, 610 S.E.2d 494 (2005).

Recognizing that fact, Appellant concedes on appeal first-degree and second-degree assault and battery are not lesser-included offenses of second-degree criminal sexual conduct with a minor pursuant to the traditional elements test while contending they should nonetheless be treated as such based on "[t]radition, justice, and fairness[.]" In support of that contention, Appellant relies primarily on the fact the common-law offense of assault and battery of a high and aggravated nature – prior to its **abolition** though the passage of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 – had historically been considered to be a lesser-included offense of first-degree criminal sexual conduct purely as a matter of common-law tradition.[7] See Primus, 349 S.C. at 581, 564 S.E.2d at 106 ("[E]mploying the traditional

[7] In further support of his argument on appeal, Appellant contends the legislature's use of the phrases "lewd and lascivious intent" and "private parts" in the first-degree and second-degree assault and battery statutes demonstrated an intent on the part of the legislature for those statutory offenses to be considered to be lesser-included offense of second-degree criminal sexual conduct with a minor. Notably though, the former offense of committing a lewd act on a minor was **not** historically recognized by our appellate courts as a lesser-included offense of any criminal sexual conduct with a minor offenses. See State v. Norton, 286 S.C. 95, 96, 332 S.E.2d 531, 532 (1985) (instructing "the offense of committing a lewd act upon a minor is not a lesser included offense of first degree criminal sexual

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." (emphasis added and citations omitted)); State v. Elliott, 346 S.C. 603, 607, 552 S.E.2d 727, 729 (2001) (finding common-law assault and battery of a high and aggravated nature to be a lesser-included offense of assault with intent to commit criminal sexual conduct in light of the fact common-law assault and battery had been considered to a lesser-included offense of assault with intent to ravish, a predecessor to assault with intent to commit criminal sexual conduct), overruled on other grounds by State v. Gentry, 563 S.C. 93, 610 S.E.2d 494 (2005); 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.").

Importantly though, in abolishing the former assault and battery offenses along with any common-law traditions related to those offenses, the legislature in South Carolina specifically identified the different offenses to which the new statutory assault and battery offenses could be considered to be lesser-included offenses. See Elliott, 346 S.C. at 607, n. 2, 552 S.E.2d at 729 ("[T]he legislature, in enacting the CSC statutes, is presumed to know the common law **and**

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conduct on a minor" while further recognizing the statute defining the offense of committing a lewd act upon a minor made it unlawful "for any person over the age of fourteen years to wilfully and lewdly commit or attempt any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child"). In light of that fact, the legislature's use of language regarding "lewd and lascivious intent" and "private parts" in the assault and battery statutes demonstrates an intent for those statutory offenses **not** to be considered to be lesser-included offenses of criminal sexual conduct with a minor offenses. See State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 197-198 (1997) ("The General Assembly is presumed to be aware of the common law[.]"); State v. King, 412 S.C. 403, 409, 772 S.E.2d 189, 192 (Ct. App. 2015) ("The Legislature is presumed to know how the terms and phrases it uses in a statute have been interpreted in the past.").

could have provided that ABHAN not be treated as a lesser offense of ACSC, as it was of AIR." (emphasis added)); see also Act No. 273, § 7, 2010 S.C. Acts & Joint Resolutions ("The common law offenses of assault and battery with intent to kill, assault with intent to kill, assault and battery of a high and aggravated nature, simple assault and battery, assault of a high and aggravated nature, aggravated assault, and simple assault are abolished for offenses occurring on or after the effective date of this act."). Tellingly, the legislature elected **not** to recognize first-degree assault and battery, second-degree assault and battery, or any of the other new statutory assault and battery offenses as lesser-included offenses of any criminal sexual conduct offenses, including second-degree criminal sexual conduct with a minor. See S.C. Code Ann. § 16-3-600(C)(3) ("Assault and battery in the first degree is a lesser-included offense of assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29."); S.C. Code Ann. § 16-3-600(D)(3) ("Assault and battery in the second-degree is a lesser-included offense of assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Sections 16-3-29."). Because the legislature specifically chose to identify first-degree and second-degree assault and battery as lesser-included offenses of certain specified offenses while choosing not to identify them as lesser-included offenses of any criminal sexual conduct offenses, the statutory offenses of first-degree and second-degree assault and battery are **not** lesser-included offenses of second-degree criminal sexual conduct with a minor, and the trial judge properly declined to instruct the jury on first-degree and second-degree assault and battery 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). Accordingly, Appellant's conviction 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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