STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEMETRIK MAURICE CEASER,

APPELLANT

APPELLATE CASE NO. 2016-000176

FINAL BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the court err by refusing to instruct the jury on the lesser included offense of criminal domestic violence (CDV) when there was evidence upon which the jury could have found Appellant committed only the lesser offense instead of the indicted offense of criminal domestic violence of a high and aggravated nature (CDVHAN)?

STATEMENT OF THE CASE

A Florence County Grand Jury indicted Appellant at the July 10, 2014 term of the Court of General Sessions for criminal domestic violence of a high and aggravated nature (CDVHAN), second degree assault and battery, and unlawful conduct towards a child. R. 242. His case was called to trial on January 19, 2016 before the Honorable G. Thomas Cooper, and a jury. R. 1. Assistant Solicitors Catherine Wyse and Lauren Hummel represented the state, and Daniel Jordan represented Appellant. R. 1.

At the conclusion of the state's case-in-chief, the court directed a verdict of acquittal for unlawful conduct towards a child. R. 136, l. 17 – 137, l. 23. On January 20, 2016, the jury acquitted Appellant of second degree assault and battery and the lesser included offense of third degree assault and battery, but found him guilty of CDVHAN. R. 231, l. 20 – 232, l. 13. Judge Cooper sentenced Appellant to three years imprisonment. R. 240, ll. 1-5.

This appeal follows.

STATEMENT OF FACTS

On the afternoon of March 29, 2014, Kerile Thomas and her mother, Carol Gerald, drove to Appellant's house in Florence to drop off Appellant and Kerile's one year old daughter, Minor, so that she could visit with her father. Appellant and Kerile had dated for a couple of years and lived together until they ultimately separated in February 2014. When they separated, Kerile and Minor moved out of the house they had shared with Appellant.

The three arrived at Appellant's house that afternoon unannounced and, because he was not expecting to watch Minor that day, Appellant had no food in the house for the child. Appellant gave Kerile his debit card and, after leaving Minor with Appellant, Kerile and Carol drove to KFC and purchased chicken and a drink for Minor.

When Kerile and Carol returned to the house, Appellant went outside to meet them while holding Minor. Kerile got out of the car and handed the food to Appellant. The two then began to argue. Kerile was upset because she suspected Appellant had a woman inside the house based on how he was acting and the fact that he refused to allow her to enter the home. R. 22, ll. 1-17. During the argument, Appellant asked for a receipt from KFC and eventually retrieved the receipt from the floor of the car near the front passenger seat. R. 22, l. 18 – 23, l. 3. This further angered Kerile, who did not want Appellant near her car since he would not allow her to enter his house. R. 22, l. 18 – 23, l. 2. The accounts of what occurred after vary.

Appellant testified that "when [he] came back up" from getting the receipt, Kerile, who was approximately the same weight as Appellant, "started hitting [him] with her hip"

and then pushed him in the chest.[1] In return, Appellant "squeezed" the drink that was sitting on top of the car and "what was left in the cup [he] threw on her [Kerile]." R. 146, l. 15 – 147, l. 6. Kerile then struck Appellant and he struck her once in return. After Appellant struck Kerile, Carol, who was two hundred and thirty pounds and much larger than Appellant, got out of the car and "ran straight at [Appellant]." Carol threw her shoe at Appellant and then started grabbing his shirt and hitting him. Appellant, who was still holding Minor, struck Carol to try to stop the attack. Appellant testified he struck Carol because he was "fearful for his daughter," who he was still holding. R. 147, l. 7 – 150, l. 25. He maintained that he struck both women in order to protect himself and his daughter. R. 151, ll. 5-12.

Kerile, who admitted the two began to argue because she suspected Appellant had another woman inside the house, claimed she could not remember anything that happened after Appellant opened her car door and retrieved the receipt. She testified that she recalled trying to "knock the cup out of [her] face" and "a lot of fruit punch in [her] hair," but the "next thing [she] remember[ed] is . . . it was dark." R. 23, l. 2 – 24, l. 2. Kerile claimed that she "blacked out" and that Appellant "knocked [her] unconscious." R. 41, ll. 19-20; R. 43, ll. 9-12. However, she did not remember Appellant striking her nor did she witness the altercation between Appellant and her mother, Carol. R. 45, ll. 3-14. Kerile claimed she never hit or struck Appellant. R. 45, ll. 15-24.

According to Carol, after Appellant retrieved the receipt from the car, he threw the drink in Kerile's face and punched her. R. 59, l. 21 – 62, l. 16. Carol admitted she then got

[1] Kerile was one hundred and sixty-seven pounds. R. 246-262. This Court may take judicial notice that Appellant is one hundred and sixty-six pounds according to the South Carolina Department of Corrections (SCDC) website.

out of the car and began attacking Appellant. She threw her shoe at him and grabbed his shirt and refused to let go until it ripped. R. 62, l. 18 – 64, l. 15.

Kerile was treated at McLeod Regional Medical Center shortly after the altercation. She had a small laceration on her cheek that required a single suture and a fractured cheekbone. R. 117, l. 16 – 118, l. 2; R. 246-262. Kerile remained at the hospital for less than three hours before she was discharged. R. 246-262. The fractured cheekbone required no treatment. Kerile was merely prescribed pain medication. R. 34, ll. 2-8.

Based on Appellant's testimony, the court charged the jury on self-defense. R. 219, l. 21 – 223, l. 2. The jury ultimately acquitted Appellant of second and third degree assault and battery related to Carol, but convicted him of CDVHAN. R. 231, l. 20 – 232, l. 13.

ARGUMENT

The court erred by refusing to instruct the jury on the lesser included offense of criminal domestic violence (CDV) when there was evidence upon which the jury could have found Appellant committed only the lesser offense instead of the indicted offense of criminal domestic violence of a high and aggravated nature (CDVHAN).

Relevant Facts

Defense counsel requested a jury instruction on the lesser included offense of CDV. He argued it was for the jury to determine whether Kerile's injuries constituted "serious bodily injury." R. 175, ll. 10-25.

Citing State v. Golston, 399 S.C. 393, 732 S.E.2d 175 (Ct. App. 2012), the court refused to charge the jury on the lesser included offense of CDV "since there is clearly bodily injury." R. 171, ll. 15-24; R. 176, ll. 10-14. Defense counsel made his objection to the court's ruling clear. R. 178, ll. 3-5.

Discussion

The court erred by refusing to instruct the jury on the lesser included offense of CDV since it was for the jury to determine whether Kerile's injuries constituted "serious bodily injury" as a CDVHAN conviction required. There was evidence upon which the jury could have found Appellant committed only the lesser offense of CDV.

A person is guilty of CDV when the state proves he (1) "cause[d] physical harm or injury to [his] own household member" or (2) offer[ed] or attempt[ed] to cause physical harm or injury to [his] own household member with apparent present ability under circumstances reasonably creating fear of imminent peril." S.C. Code Ann. § 16-25-20(A) (2012); State v. Golston, 399 S.C. 393, 397, 732 S.E.2d 175,178 (Ct. App. 2012). A person

is guilty of CDVHAN when, in addition to proving CDV, the state proves one of the aggravating circumstances set forth in S.C. Code Ann. § 16-25-65(A) (2012). Golston, 399 S.C. at 397, 732 S.E.2d at 178. The aggravating circumstances include (1) "an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim" and (2) "an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death." S.C. Code Ann. § 16-25-65(A) (2012).

"Serious bodily injury" is not defined in the statute. However, it is defined in another section of the Code as "a physical condition which creates a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of a bodily member or organ." S.C. Code Ann. § 23-31-400(A)(2); See Golston, 399 S.C. at 399 n.6, 732 S.E.2d at 179 n.6.

"In most prosecutions for CDVHAN, there will be evidence the defendant committed acts which constitute only CDV in addition to acts which constitute CDVHAN." Golston, 399 S.C. at 397, 732 S.E.2d at 178. The "task of the trial court in deciding whether to charge the lesser offense, and of this court reviewing that decision on appeal, is to examine the record to determine if there is evidence upon which the jury could find the defendant was guilty of the lesser offense, but not guilty of the greater offense." Golston, 399 S.C. at 398, 732 S.E.2d at 178. "[A] trial court 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 848, 849 (1993) (citing Frasier v. State, 306 S.C. 158, 410 S.E.2d. 572 (1991)).

In Golston, this Court held "the existence of evidence that Golston committed simple CDV in addition to CDVHAN does not warrant the charge [of CDV]. There must be evidence from which the jury could conclude the defendant committed only the lesser offense." Id. at 398, 732 S.E.2d at 178 (citing State v. Brown, 269 S.C. 491, 495-496, 238 S.E.2d 174, 176 (1977)).

This Court found the victim's injuries in Golston, which included swelling to her face that was so severe her son could not recognize her and permanent injury to her eyes that required her to wear glasses for the first time, "cannot possibly be found not to be serious." Id. at 399, 732 S.E.2d at 179. The victim, who suffered a severe beating with numerous blows to the face, had difficulty breathing and feeding herself for several days and could not open one of her eyes for ten days. Id. Because the Court found there was "no evidence to support a conclusion that the victim did not suffer serious bodily injury," it held "it was not possible for the jury to find Golston guilty of CDV instead of CDVHAN" and thus the trial court properly refused to charge the lesser offense. Id. at 400, 732 S.E.2d at 179 (internal quotation marks omitted).

This Court did not decide whether the definition of "serious bodily injury" found in S.C. Code Ann. § 23-31-400(A)(2) applies to subsection 16-25-65(A)(1). Golston, 399 S.C. at 399 n.6, 732 S.E.2d at 179 n.6. However, the Court noted that if this definition did apply, it did "not believe there [was] any evidence in the record that the victim's injuries [did] not meet that definition, as she suffered temporary serious disfigurement to her face, protracted loss of the use of her eyes from the swelling, and permanent impairment of vision." Id.

Here, unlike Golston, it is possible the jury could have found Kerile's injuries were not serious. By all accounts, Kerile suffered a single moderate blow to the left cheek that did not cause any permanent injury or disfigurement. She suffered a "simple" laceration that was only three millimeters long and a fractured cheekbone for which she received no treatment besides a prescription for pain medication. Moreover, her hospital stay was less than three hours. R. 246-262. Based on this evidence, the jury could have found Kerile's injuries did not constitute "serious bodily injury" and convicted Appellant of the lesser offense of CDV.[2]

Furthermore, if the jury had considered the definition of "serious bodily injury" found in S.C. Code Ann. § 23-31-400(A)(2), it could not possibly have found Kerile's injuries were "serious." A fractured cheekbone is not a "physical condition which creates a substantial risk of death" nor did this injury cause "serious personal disfigurement" or any "protracted loss or impairment." Kerile merely had temporary pain, which she rated as a "seven" on a scale from one to ten when she was hospitalized, that was treated with medication. R. 246-262.

Significantly, during its nearly three hour deliberation, the jury requested the court provide it with the written definition of CDVHAN. R. 227, l. 21 – 230, l. 9; See R. 263. This shows the jury struggled with determining Appellant's guilt on the indicted offense.

Because there was evidence from which the jury could have concluded Appellant committed only the lesser offense, the trial court erred by refusing to instruct the jury on CDV as a lesser included offense of CDVHAN.

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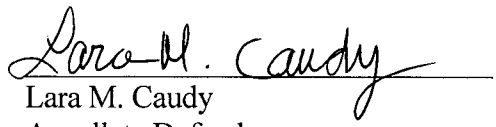
[2] There is absolutely no evidence that Appellant used a weapon during the altercation, and Kerile never testified that she "feared imminent serious bodily injury or death." See S.C. Code Ann. § 16-25-65(A) (2012). Therefore, the state also failed to prove the other two aggravating circumstances necessary for a CDVHAN conviction. See Id.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of January, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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."

January 4, 2017

Lara M. Caudy

Lara M. Caudy
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R. J. Shupe, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 4th day of January, 2017.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of January, 2017.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.