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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions

Eugene C. Griffith, Jr., Circuit Judge

Appellate Case No. 2015-002254
General Sessions Case No. 2013-CR-30-0256 & 0257

STATE OF SOUTH CAROLINA

Respondent,

v.

BRAD BERNARD DAWKINS

Appellant.

PETITION FOR REHEARING

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1. The South Carolina Court of Appeals issued its opinion in this matter on November 29, 2017, affirming the conviction and sentence of Appellant. Pursuant to Rules 242, 221, 240, and 267 of the Rules of Appellate Practice, the Appellant respectfully requests this Court to reconsider its decision affirming the Appellant's conviction.

2. The Appellant seeks rehearing only as to issue/argument #1 as raised before this Court. The issue in question as presented to this Court was as follows:

"The trial judge erred in refusing to charge the lesser offense of ABHAN."

The Appellant does not seek rehearing on the other two issues raised during this appeal.

3. The Appellant submits that this Court did not properly consider relevant prior precedent when resolving this issue. First, *State v. Gilmore*, 719 S.E.2d 688, 691 (S.C. Ct. App. 2011) is of particular relevance in this case:

> Our courts have identified three types of cases in which the evidence can support an inference that the defendant is guilty of ABHAN instead of CSC: (1) there is evidence the defendant committed ABHAN by an unlawful sexual touching in the course of attempting CSC, and there is conflicting evidence as to whether the defendant accomplished sexual battery; *see, e.g., State v. Pressley,* 292 S.C. 9, 9–10, 354 S.E.2d 777, 777 (1987); *State v. Mathis,* 287 S.C. 589, 594, 340 S.E.2d 538, 541 (1986); (2) there is evidence the defendant committed a nonsexual ABHAN, such as in a fight, and in addition to evidence to support CSC, there is evidence the two never had sex; *see, e.g., State v. Lambright,* 279 S.C. 535, 537, 309 S.E.2d 7, 8 (1983); and (3) there is evidence the defendant committed a nonsexual ABHAN contemporaneous with CSC, but there is evidence that instead of CSC the two had consensual sex; *see, e.g., State v. White,* 361 S.C. 407, 412, 605 S.E.2d 540, 542–43 (2004).

Appellant submits that (1) and (2), referenced above, fit the facts of this case. Second, in light of the trial Judge's charge on witness credibility it is clear that failure to instruct on ABHAN was prejudicial error. The trial Judge properly charged the jury that they were the judges of witness credibility and that they could believe all or some of a witness' testimony.

> Now, the same constitution which makes me the instructor of the law and the ruler or the, consideration of the legal issues, makes you the judges of the facts. You must determine the facts in this case based upon the evidence which has been presented, testimony which has been presented. And basically surrounding that is you must judge the credibility or the believability of the witnesses who have testified. And I tell you you can use anything in your life experiences in judging a person's credibility in this case as you have sat and listened and watched and heard the testimony presented by the parties in this case. Now, I suggest to you there is some ways maybe you have thought about them in the past but to judge a person's credibility or believability you can take into account many things. Common sense is one, what was the manner and appearance of the witness who testified, was the witness straightforward or was the witness hesitant in answering. How did the witness come to know the facts. What was his or her ability to know or remember these facts. Is there some reason a witness would want to give testimony which would help or hurt one side or the other. In other words, was the witness biased or prejudiced in any manner. Was the testimony of a witness strengthened or weakened by other testimony or other evidence. You may believe as much of the testimony as one witness' testimony as you deem proper, you can believe the testimony of one witness against that of the others, you can believe the others against a single witness, you can believe part of a witness' testimony and disregard or disbelieve the rest. The fact that testimony is not controverted does not mean you must accept it as true, you still must gauge the credibility of the witness who testified and through that testimony make findings of fact. Now, weighing evidence, and to make a determination as to what happened, that is entirely a mental process. You do not count the number of witnesses one side called versus what the other side called to make a determination of that. You must weigh the evidence presented using your good judgment and your common sense.

(R. p. 226, line 18 – p. 228. line 6). This instruction combined with the fact that the Appellant actually testified gave the jury the ability – in fact, they were expressly told they had the ability and duty – to determine what actually occurred between the alleged victim and the Appellant. The Appellant, by his own testimony, offered concrete and direct evidence of his theory of the case. (R. p. 156, line 20 – p. 184, line 3) There is evidence that the Appellant committed a non-sexual ABHAN. The Appellant testified he spanked or struck the victim routinely as a form of punishment. (R. p. 159, lines 17 – 23; p. 166, line 9 – p. 168, line 25; p. 176, lines 7 – 23; p. 184,

lines 8 – 17) In addition, the victim expressly testified that she was groped by the Appellant during the alleged incident. *Id.* There is evidence of a CSC or attempted CSC per the victim's direct testimony. (R. p. 60, line 6 – p. 65, line 25) However, as is clear from the testimony, the two never actually had sex. (R. p. 65, lines 5-7) Thus, facts of this case come extremely close to the first class of cases referenced in *Gilmore, supra*. The facts also could arguably fit under the second class of cases mentioned in *Gilmore*. Because the lesser offense of ABHAN was never charged, the jury never had the chance to properly assess the credibility of the testimony in light of ABHAN. The Appellant was entitled to have the jury make this assessment, respectfully, not this Court. Again, the fact that the Appellant actually testified distinguishes this case from a number others where the appellate courts of this state have found failure to charge a lesser offense of ABHAN to be either harmless or not an abuse of discretion. See *Gilmore*, supra; *State v. Fields*, 589 S.E.2d 792 (S.C. Ct. App. 2003); and *State v. Geiger*, 635 S.E.2d 600 (S.C. Ct. App. 2006).

4. The Appellant submits he is entitled to a rehearing, and requests that his conviction and sentence be overturned.

WHEREFORE, Appellant submits his conviction and sentence be reversed, and his case remanded for a new trial.

Respectfully submitted,

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December 13, 2017

I, Miller W. Shealy, Jr., hereby certify and affirm that on December 13, 2017, this Petition for Rehearing was sent via overnight courier to the South Carolina Court of Appeals and opposing counsel, V. Henry Gunter at the addresses referenced below:

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