ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Brian M. Gibbons, Circuit Court Judge

RECEIVED
APR 09 2018
SC Court of Appeals

Appellate Case No. 2017-000821

THE STATE, ...RESPONDENT,

v.

ADRIAN VASHARD SIMMONS, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-0368

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
OT Wallace Building
Charleston, SC 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2017-000821

THE STATE, ...RESPONDENT,

v.

ADRIAN VASHARD SIMMONS, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-0368

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
OT Wallace Building
Charleston, SC 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

STATEMENT OF ISSUE ON APPEAL

The trial judge properly refused to instruct the jury on the lesser-included offense of first-degree assault and battery because such a charge was not supported by the evidence presented at trial.

STATEMENT OF THE CASE

On August 3, 2015, the Charleston County Grand Jury indicted Appellant for assault and battery of a high and aggravated nature (ABHAN). On August 8, 2016, Appellant proceeded to a jury trial before the Honorable Brian M. Gibbons. J. Seth Whipper, Esquire, represented Appellant; Assistant Solicitors Charles M. Condon, Jr., Esquire, and Marian Askins, Esquire, represented the State. The jury found Appellant guilty as charged and the trial judge sentenced Appellant to twelve years' incarceration.

Appellant filed a timely post-trial motion for a new trial motion on August 15, 2016, which was denied a week later on August 22, 2016. However, Appellant did not receive written notice of the denial until March 17, 2017. Following receipt of the written notice, Appellant filed a notice of appeal on March 27, 2017, and subsequently submitted a brief in support. This Brief of Respondent follows.

STATEMENT OF FACTS

The State's Case

In 2014, Lamont Washington (Victim) owned his own electronics repair business, specializing in smart phones, computers, video game consoles, and televisions. Courtney McDaniel, Appellant's girlfriend at the time, knew Victim through her older brothers and contacted him about repairing a pair of phones for her and Appellant. Victim met with McDaniel and Appellant, took the phones, and told them he would contact them later and give them an estimate for what it would cost to repair the devices. (R.p.34, line 19–R.p.38, line 25).

Approximately one week after obtaining the phones, Victim called McDaniel and informed her the repairs would cost two-hundred dollars per device. McDaniel, who was dealing with numerous expenses at the time, told Victim to fix only Appellant's phone. Victim performed the necessary repairs and informed McDaniel the phone was ready for pick-up. (R.p.39, lines 1–19).

After McDaniel failed to contact him for several weeks, Victim contacted her in an effort to complete the transaction. McDaniel gave Victim Appellant's phone number and told him she would no longer be involved in the situation. Victim contacted Appellant about the phone and, after a few attempts, set a date and time for the exchange of the device and payment. However, Appellant failed to show up the meeting. (R.p.39, line 20–R.p.41, line 3).

Finally, on September 24, 2014, Victim and Appellant agreed to meet at a local juice joint. After arriving at the designated location and waiting a period of time, Victim called Appellant to check on his status. Appellant requested they change the location for the meeting to a nearby home. Victim went to the house, pulled in the driveway, and exited his vehicle. Appellant and another man holding a baby were in front of the house. He shook Appellant's

hand and told him he would retrieve the phone from the backseat of his vehicle. After he turned around to open the door, Appellant hit him in the back of the head. (R.p.41, line 4–R.p.43, line 6).

Joslin Washington, Victim's cousin , was in the vehicle at the time of the assault. He saw Victim and Appellant shake hands and then looked down at his phone. Suddenly, he heard something metallic, possibly brass knuckles, make a "bam" noise and looked up to see Victim's unconscious body fall to the ground as Appellant "jumped backwards." Washington quickly exited and found Appellant patting Victim's pants and stating, "I told him not to disrespect me." Appellant, who had not seen Washington in the car, was surprised when the latter asked him what he was doing. Appellant fled towards the house. Washington pursued him around the back and heard Appellant yell for someone to "go get the guns." Washington picked up Victim, put him in the car, and drove to Victim's parents' home. There, they called 911 for medical aid. (R.p.89, line 25–R.p.113, line 21).

Dr. Alejandro Spiotta, a neurosurgeon with the Medical University of South Carolina, treated Victim that night. Before Victim arrived at the hospital, EMS warned the hospital's staff he was in bad shape, showing signs of severe head trauma such as disorientation, confusion, and paralysis. By the time Victim arrived, he was unable to breathe on his own. A CAT scan revealed Victim had a skull fracture behind his right ear which lacerated a vein and caused bleeding on his brain which, untreated, would have killed him. (R.p.137, line 7–R.p.141, line 5).

Due to the severity of Victim's traumatic brain injury, Dr. Spiotta and other staff performed an emergency craniotomy to remove the fractured bone and a blood clot. Additionally, Dr. Spiotta used a piece of Victim's muscle to suture the laceration and stop the bleeding. After the pressure in Victim's brain sufficiently decreased, Dr. Spiotta replaced the

removed bone using a series of metal plates and brackets. (R.p.141, line 3–R.p.143, line 2; R.p.150, line 4–R.p.151, line 1).

Dr. Spiotta opined Victim's injury was caused by a "high energy" impact, such as a motor vehicle collision or falling from several stories. In his opinion, a mere fall on pavement could not have caused Victim's skull fracture. Dr. Spiotta confirmed Victim's wound was "a severe, life-threatening injury" which, untreated, "would have resulted in death" and caused neurological damage, impacting Victim's brain functions including his abilities to taste and smell. (R.p.143, line 22–R.p.145, line 5; R.p.151, lines 3–24).

Recordings of Appellant's phone calls from jail were also admitted into evidence. During one of Appellant's calls, he denied he and Victim were in a fight and explained that he hit Victim because he felt the latter disrespected him. (R.p.163, line 20–R.p.167, line 17; State's Exhibit 16).

Appellant's Defense

Appellant and his family members testified to a different version of events. Nola Welcome, Appellant's mother, claimed she was inside her home when Victim arrived. She heard an "altercation" outside and saw Appellant and "a young man" arguing. When she went outside a brief time later, she saw the "young man" on the pavement. Appellant's twin brother, Andre Simmons, exited the house when he heard two people talking. He saw Appellant and Victim involved in engage in an argument before the two men "throw hands" at each other, at which point Appellant hit Victim and the latter fell, unconscious, to the ground. (R.p.187, line 14–R.p.191, line 10; R.p.201, line 25–R.p.209, line 14).

Appellant testified Victim was the aggressor in the situation. He claimed Victim was upset because he had previously told him he was unable to pay for the cell phone at that time.

On September 24, 2014, Victim showed up at his house, uninvited, seeking payment for the phone. After Appellant reiterated he was unable to pay for the phone at that time, Victim "tried to grab or punch [Appellant] with his hand." Appellant claimed he ducked and punched Victim in the head. As a result, Victim fell and hit his head on the concrete driveway. (R.p.235, line 10–R.p.243, line 7)

Jury Instructions

Prior to Appellant's testimony, the trial judge held an informal charge conference with the parties. He told the parties he intended to charge ABHAN and self-defense, and also presented the definitions he planned to use for ABHAN and "great bodily injury." Trial counsel argued the trial judge should also charge first-degree assault and battery, complaining that Appellant's actions, as described by the State, could be viewed as an attempt to injure Victim. The State disagreed, arguing the first-degree assault and battery, as described in the subsection claimed by trial counsel, applies only to unsuccessful attempts to injure a person. The trial judge noted he was "leaning" towards the State's interpretation of the statute, but would hold off a final decision on the charge until after the defense completed the presentation of its case. (R.p.220, line 14–R.p.227, line 9).

As promised by trial judge, the discussion regarding the propriety of a first-degree assault and battery charge continued after the defense rested its case. Trial counsel again argued "attempt" under the assault and battery statute included completed batteries. The trial judge restated his position that the "plain and ordinary meaning" of the statute's language meant actual, physical injuries could not be classified as first-degree assault and battery. When trial counsel asked whether there could be any lesser-included offense of ABHAN charged, the trial judge stated no lesser-included charge was appropriate in this case because the evidence showed

Victim suffered a "great bodily injury," and the other degrees of assault and battery applied to lesser degrees of harm. However, he reiterated the defense's evidence did support a charge on self-defense. (R.p.304, line 24–R.p.307, line 25).

ARGUMENT

The trial judge properly refused to instruct the jury on the lesser-included offense of first-degree assault and battery because such a charge was not supported by the evidence presented at trial.

Appellant argues the trial judge erred in refusing to instruct the jury on the lesser-included offense of first-degree assault and battery because the evidence at trial showed his actions could also be classified as an "offer[] or attempt[] to injure another person" pursuant to S.C. Code Ann. § 16-3-600(C)(1)(b).[1] The State disagrees with this allegation of error. The evidence presented at trial indicated Appellant's actions were either ABHAN or self-defense; Appellant's actions, if found unlawful by the jury, could not be defined as degree of assault and battery excluding ABHAN and thus the trial judge was not required to instruct the jury on its lesser-included offenses. Moreover, Appellant's actions do not meet the definition of first-degree assault and battery under the statute.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The law to be charged to the jury 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). "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." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App.

[1] Throughout his brief, Appellant fails to specify which subsection of S.C. Code Ann. § 16-3-600(C)(1)(b) he believes entitled him to the charge on first-degree assault and battery. § 16-3-600(C)(1)(b)(i) applies to offers or attempts to injure another person accomplished by "means likely to produce death or great bodily injury" while § 16-3-600(C)(1)(b)(ii) pertains to offers or attempts to injury which occur "during the commission of a robbery, burglary, kidnapping, or theft." Based on the content of Appellant's brief and the absence of evidence or allegations that Appellant injured Victim during the commission of a separate crime, the State assumes Appellant's argument refers solely to § 16-3-600(C)(1)(b)(i).

1996). The trial court only 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 838, 849 (1993).

"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). "The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tends to show the defendant was guilty only of the lesser offense." State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006). In reviewing a trial judge's jury instructions, 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). An appellate court will not reverse a trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006).

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002) (citing Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)). "The legislature's intent should be ascertained primarily from the plain language of the statute. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." State v. Dupree, 354 S.C. 676, 693, 583 S.E.2d 437, 446 (Ct. App. 2003) (internal citation omitted).

The Omnibus Crime Reduction and Sentencing Reform Act of 2010 (Omnibus Act) substantially overhauled the state's criminal law in regard to assault and battery offenses. State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014). It codified attempted murder in §

16-3-29 (2015) and four degrees of assault and battery in § 16-3-600 (2015). S.C. Code Ann. §§ 16-3-29, -600 (2015). The new degrees of assault and battery are, in descending order of severity, assault and battery of a high and aggravated nature (ABHAN), and assault and battery in the first, second, and third degrees. Middleton, 407 S.C. at 315, 755 S.E.2d at 434. Under the statute, ABHAN is a lesser-included offense of attempted murder. S.C. Code Ann. § 16-3-600(B)(3) (2015). Assault and battery in the first degree is a lesser-included offense of both attempted murder and ABHAN. S.C. Code Ann. § 16-3-600(C)(3) (2015). Further, assault and battery in the second and third degree are each lesser-included offenses of every preceding offense. S.C. Code Ann. § 16-3-600(D)(3) & (E)(3) (2015). Finally, the Omnibus Act abolished the common law offense 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. See Act No. 273, 2010 S.C. Acts 1947.

In relevant part, S.C. Code Ann. § 16-3-600 provides:

> (A) For purposes of this section:
>
> > (1) "Great bodily injury" means bodily injury which causes a substantial risk of death or which causes serious, permanent disgifurement or protracted loss or impairment of the function of a bodily member or organ.
> >
> > (2) "Moderate bodily injury" means physical injury that involves prolonged loss of consciousness, or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ, or injury that requires medical treatment when the treatment requires the use of regional or general anesthesia or injury that results in a fracture or dislocation. Moderate bodily injury does not include one-time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that do not ordinarily require extensive medical care.
>
> . . . .

(B)(1) 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.

. . . .

(C)(1) 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.

. . . .

(D)(1) 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.

. . . .

(E)(1) A person commits the offense of assault and battery in the third degree if the person unlawfully injures another person, or offers or attempts to injury another person with the present ability to do so.

. . . .

(emphasis added).

Appellant's Actions Only Meet the Definitions of ABHAN or Self-Defense

First and foremost, the trial judge did not err because he was not required to charge first-degree assault and battery. Notably, Appellant fails to argue Victim's injuries did not rise to the level of "great bodily injury" nor does he dispute he hit Victim. The only question for the jury was whether Appellant was acting unlawfully when he injured Victim. If the jury believed the State's case, Appellant committed ABHAN. If it believed Appellant's evidence, Appellant acted lawfully in self-defense. No evidence was presented by either party which would indicate Appellant's actions could be viewed as first-degree assault and battery instead of ABHAN. Thus, the trial judge was not required to charge the jury on first-degree assault and battery. See Green, 397 S.C. at 288–90, 724 S.E.2d at 674–75.

In his brief, Appellant tries to circumvent this issue by arguing the ground, not his fist, caused Victim's severe injury. First, the State notes this argument is not preserved for appellate review because it was not presented to the trial judge. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003). Moreover, this interpretation contradicts the definition of ABHAN in the statute. Under § 16-3-600(B)(1)(a), a person commits ABHAN if he unlawfully injures a person and great bodily injury results. Black's Law Dictionary defines a "result" as an action's "physical" or "logical" consequence. (10th ed. 2014). Here, even if Appellant's head injury was caused by falling to the ground, a person falling and hitting his head on the ground is a logical and foreseeable consequence of being punched, and one virtually guaranteed when ambushed. If the jury believed the evidence indicating Appellant unlawfully hit Victim, then regardless of whether Victim's injuries were caused by a fist, weapon, or the ground, the resulting injury firmly defined Appellant's actions as ABHAN, not first-degree assault and

battery. See Dupree, 354 S.C. at 693, 583 S.E.2d at 446 (stating the legislature's intent should be determined primarily from the plain language of the statute).

Appellant's Actions Exceeded an "Offer or Attempt to Injure" Victim

Furthermore, first-degree assault and battery was an inappropriate charge because Appellant's actions do not meet the definition of the offense. Actions which constitute a first-degree assault and battery are: (1) unlawfully injuring a person and that injury either involves nonconsensual touching of their private parts or occurs during the commission of a robbery, burglary, kidnapping, or theft; or (2) a person offers or attempts to injury another person, and that attempt utilizes mean likely to produce death or great bodily injury or occurs during the commission of a robbery, burglary, kidnapping, or theft. Appellant claims his actions could be described as an offer or attempt to injure another person under S.C. Code Ann. § 16-3-600(C)(1)(b). However, Appellant's interpretation of the subsection ignores its plain meaning: it only applies to threats and unsuccessful attempts to injure. Throughout the entirety of § 16-3-600, the statute distinguishes between actual injuries and attempts and offers to harm and punishes accordingly. Notably, § 16-3-600(C), the section defining first-degree assault and battery, separates the offense into two major categories: (1) completed actions which injure other persons; and (2) offers or attempts to injure others. Thus, the plain language of the statute itself indicates an intention to treat completed assaults and batteries differently from threats or failed attempts at such.

Moreover, the penalty structure for the various degrees of assault and battery only supports the plain language of the statute. For example, ABHAN applies only to unlawful injuries which caused great bodily harm or were accomplished by a means likely to cause such damage. Because of the severity of such behavior and its repercussions, ABHAN carries the

toughest potential sentence among the various degrees of assault and battery, maxing out with a possible twenty-year sentence. However, the maximum sentence for first-degree assault and battery is only half as long: Pursuant to § 16-3-600(C)(1)(b)(i), unsuccessful attempts to injure someone, although accomplished by means "likely to produce death or great bodily injury," have only a ten year maximum sentence because a victim was not actually injured by the unlawful conduct. If completed attempts to injure a person are included under § 16-3-600(C)(1)(b)(i), then the exact same behavior, unlawfully injuring someone by a means likely to produce death or great bodily harm would be proscribed by two separate provisions of § 16-3-600, with the only difference being the maximum possible sentence. Not only would this be redundant, but it would undermine the legislature's clear intent to harshly punish those who unlawfully injure others through means likely to produce death or serious injury, an obvious goal given the very existence of § 16-3-600(B)(1)(b). Accordingly, Appellant's interpretation of "offers or attempts to injure" is wholly inconsistent with the purposes of the statute.

Appellant claims it is "unclear" why the legislature would intend for first-degree assault and battery under S.C. Code Ann. § 16-3-600(C)(1)(b) to be a lesser-included offense of ABHAN when the latter requires an injury while the former does not. This argument ignores: (1) the Omnibus Act abolished all common law variations of assaults and batteries and combined all versions of assaults and batteries into § 16-3-600; (2) all degrees of assault and battery are considered lesser included offense of attempted murder, and attempted murder includes both successful and failed attempts to injure;[2] (3) each "degree" of assault and battery under the statute includes several different offenses; and (4) in certain factual scenarios, a State may present a case for ABHAN but the evidence may support a finding of only first-degree assault

[2] Under S.C. Code Ann. § 16-3-29, a person is guilty of attempted murder if he or she, "with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied."

and battery because a jury may find the State failed to prove an actual injury to a victim occurred.

Consider the following hypothetical: Person A is charged with ABHAN for hitting Person B with a baseball bat. The prosecution presented a video showing Person A running after Person B while holding the bat and screaming he wishes to break the other's leg. However, the only evidence Person B was actually injured by the bat is Person B's own testimony; investigating officers failed to find bruising or other indications of physical harm on Person B's body. Additionally, Person A admits he chased Person B with a Bat and screamed he was going to break his leg, but denies making physical contact with Person B. In this situation, a jury would have undisputed evidence Person A committed, at the very least, first-degree assault and battery as defined by § 16-3-600(C)(1)(b). However, given the lack of bruises or other indications of physical harm, the jury may not believe, beyond a reasonable doubt, Person A actually hit Person B with the bat.

In this hypothetical scenario, there is evidence supporting both ABHAN and first-degree assault and battery and the jury should be charged on both offenses. The legislature, fully aware a situation like this may occur, structured § 16-3-600 so that in situations where the State may not prove a battery beyond a reasonable doubt, a defendant may still be punished for a substantiated assault. However, unlike the above hypothetical, the undisputed trial evidence showed Appellant hit victim and that great bodily injury resulted from the attack. Accordingly, Appellant's actions could not be considered an "offer or attempt to injure" under S.C. Code Ann. § 16-3-600(C)(1)(b).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: _____
William F. Schumacher, IV
Bar # 100231
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0368

ATTORNEYS FOR RESPONDENT

April 9, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2017-000821

THE STATE, ...RESPONDENT,

v.

ADRIAN VASHARD SIMMONS, ...APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: _____

William F. Schumacher, IV
Bar # 100231
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0368

ATTORNEYS FOR RESPONDENT

April 9, 2018