STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Charleston County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ADRIAN VASHARD SIMMONS,

APPELLANT

APPELLATE CASE NO 2017-000821

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to instruct the jury on the lesser included offense of first degree assault and battery?

STATEMENT OF THE CASE

In August of 2015, the Charleston County Grand jury indicted Appellant, Adrian Simmons, for assault and battery of a high and aggravated nature [ABHAN], indictment #2015-GS-10-4889. (R. p. 363). On August 8, 2016, Appellant proceeded to jury trial before the Honorable Brian M. Gibbons. J. Seth Whipper represented Appellant at trial. Charles Molony Condon, Jr. and Marian Askins prosecuted the case. The jury returned a verdict of guilty and Judge Gibbons sentenced Appellant to twelve (12) years in prison. Appellant filed a timely post-trial motion for a new trial on August 15, 2016. Judge Gibbons denied the motion on August 22, 2016, but trial counsel did not receive written notice of the denial until March 17, 2017. A timely notice of intent to appeal was filed on March 27, 2017. This appeal follows.

ARGUMENT

The trial judge erred in refusing to instruct the jury on the lesser included offense of first degree assault and battery.

In July of 2014, Lamont Washington agreed to repair Appellant's cell phone. (R. p. 238, lines 5-20). At trial Appellant testified that Courtney McDaniel, the mother of Appellant's child, told Washington in August that they did not want the phone at that time due to some family problems. (R. p. 239, lines 3-16). Appellant testified that he told Washington in September that he did not have the money to pay for the repairs to the phone. (R. p. 240, lines 13-17). On September 24, 2014, however, Washington drove to Appellant's house and confronted him about the phone. (R. p. 241, line 14 – p. 242, lines 1-5). Appellant testified that when he told Washington he did not have the money to pay for the repairs, Washington asked why it was taking so long to pay. Appellant then testified, "So I don't know if the first hand was a punch or was a grab, but he tried to grab or punch me with this hand. He threw this hand. I ducked down. I hit him. And he dropped down. And he hit his head on the concrete right here. Like, you could still, like, see the blood stain from like where he had landed." (R. p. 242, lines 6-11). Appellant further testified, "I didn't know, like, I had that strength to hit him. But in back of my mind, he must be like was on some type of medication or something, but he just dropped down and hit his head." (R. p. 243, lines 4-7). In contrast, Washington testified that he turned around to retrieve the phone from the car and then woke up in the hospital. (R. p. 41, line 19 – p. 42, lines 1-9). Washington was treated at the hospital for a fractured skull which caused an epidural hematoma. (R. p. 140, lines 2-25).

Appellant requested a jury instruction on the lesser included offense of first degree assault and battery. The State objected. (R. pp. 221 – 227). The prosecutor argued, "A and B

first is a threat of injury, but not actually injury, is how I read Subsection (B), because it says offer or attempts to injure another person. So it's offering to injure another person or attempting to injure another person, where in this case, there is actual injury." (R. p. 223, lines 6-11). The judge withheld ruling on the lesser included offense but indicated that first degree assault and battery required an attempt without injury. (R. p. 225, lines 18 – p. 226, 227, lines 1-3). After the defense rested the judge heard further argument on charging the lesser included offense of first degree assault and battery. (R. p. 305, lines 1-20). The judge refused to charge the lesser included offense writing:

> So it has to go to Subsection (b). Subsection (b) says: Offers or attempts to injury [sic.]. So you have an offer, offers to injure. That's like fighting words, I'm going to beat your butt, or whatever, or attempts, that's where you actually swing at somebody with brass knuckles, but you don't actually hit them; offers or attempts to injure another person with the present ability to do so, and the act is accompanies by means likely to produce death and great bodily injury. That's what the statute says. I'm giving it its plain and ordinary meaning. I find it is not applicable here; therefore, I'm not going to charge it.

(R. p. 306, lines 10-22). The trial judge erred.

S.C. Code §16-3-600 provides:

> (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 ... 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.

(emphasis added). S.C. Code §16-3-600(C)(3) provides, "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." The trial judge correctly found that section (C)(1)(a) was inapplicable. There is no allegation that the injury involved nonconsensual touching of the private parts with lewd and lascivious intent or occurred during the commission of a robbery, burglary or kidnapping or theft. The trial judge, however, erred in refusing to instruct the jury with the lesser included offense of first degree assault and battery pursuant to section (C)(1)(b).

"'The law to be charged to the jury is determined by the evidence presented at trial.'" State v. Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014) (quoting State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993)). "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense." Id. (citations omitted). In determining whether the evidence requires a charge on a lesser-included offense, courts view the facts in the light most favorable to the defendant. Id. (citing State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512–13 (2000)).

The State argued and the trial judge agreed that Appellant was not entitled to a charge on the lesser included offense of first degree assault and battery under section (C)(1)(b) because there was an injury. The statute is unclear as to whether first degree assault and battery requires the **absence** of a resulting injury. As noted by trial counsel, (R. p. 225, lines 5-7), the offense is titled assault and **battery** in the first degree, not assault in the first degree. The text of subsection (b), however, defines assault and battery in the first degree as an offer or attempt to injure another person with the present ability to do so, and the act is accomplished by means

likely to produce death or great bodily injury. In State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014), the South Carolina Supreme Court clarified that first degree assault and battery under section (C)(1)(b) does not require an injury. The Court in Middleton did not address whether first degree assault and battery under section (C)(1)(b) requires the **absence** of resulting injury.

In Kerr v. State, 345 S.C. 183, 188, 547 S.E.2d 494, 496–97 (2001), the South Carolina Supreme Court wrote:

> The primary rule of statutory construction is that the Court must ascertain the intention of the legislature. E.g., State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning, without resort to subtle or forced construction to limit or expand the statute's operation. Id. Furthermore, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant. Id.

In State v. Hudson, 336 S.C. 237, 246–47, 519 S.E.2d 577, 582 (Ct. App. 1999), the South Carolina Court of Appeals wrote:

> If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation and the court has no right to look for or impose another meaning. Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995); Brassell, supra. When the terms of a statute are clear, the court must apply those terms according to their literal meaning. Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994). However, if the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. Baucom, supra. Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. City of Sumter Police Dep't, supra.

Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992).

Viewing the statute as whole first degree assault and battery does not require the **absence** of a resulting injury. S.C. Code §16-3-600 is titled Assault and battery; definitions; degrees of offenses. S.C. Code §16-3-600 provides four degrees of offense: 1.) assault and battery of a high and aggravated nature [ABHAN]; 2.) assault and battery in the first degree; 3.) assault and battery in the second degree; and 4.) assault and battery in the third degree. S.C. Code §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." S.C. Code §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." S.C. Code §16-3-600(E)(1) provides, "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 injure another person with the present ability to do so." Sections (B), (D) and (E) require an unlawful injury to another person or an offer or attempt to injure another person with the present ability to do so. Section (C)(1)(b) is the only section that refers only to an "offer or attempt to injure another person with the present ability to do so."

If, however, the legislature intended for section (C)(1)(b) to require the **absence** of injury, it is unclear why the legislature designated assault and battery first degree as a lesser included offense of ABHAN. If the **absence** of injury is required, section (C)(1)(b) would never be a lesser included offense of ABHAN because ABHAN requires an injury. Additionally, the

legislative history materials from the Omnibus Crime Reduction and Sentencing Reform Act of 2010 reflect that, "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." The legislature was fully aware of the common law offense of aggravated assault. If the legislature intended to require an absence of injury for assault and battery first degree under section (C)(1)(b), the legislature could have simply titled the offense as aggravated assault. Instead, the offense is titled assault and battery first degree.

Alternatively, even if first degree assault and battery pursuant to section (C)(1)(b) requires the absence of a resulting injury, the judge still erred in failing to instruct the jury on the lesser included offense because there is evidence from which the jury could find that the injury was not a result of Appellant's admitted hit. As correctly noted by the trial judge, ". . . . the defense's theory [was] that the injury was [sic] occurred by the victim falling down." (R. p. 223, lines 14-15). Appellant admitted that he hit Washington but argued that the fall and not the hit caused the injury. Under the specific facts of this case, the jury could have found that the hit was a failed attempt to injure Washington. The injury suffered was the result of Washington falling backward on the pavement rather than being hit by Appellant. Pursuant to section (C)(1)(b) the jury could have found that Appellant attempted to injure Washington by hitting him. Appellant had the present ability to injure Washington and the act was accomplished by means likely to produce death or great bodily injury. The hit, however, did not cause the resulting injury to Washington. The hit resulted in no injury to Washington, satisfying the absence of resulting

injury if such is required. Instead, the injury was the result of Washington falling backward and hitting his head on the pavement.

CONCLUSION

Based on the above argument, this Court should reverse Appellant's conviction and sentence and remand for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of April, 2018.

CERTIFICATE OF COUNSEL FOR APPELLANT

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."

April 10, 2018

Kathrine H. Hudgins
Appellate Defender

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

ATTORNEY FOR APPELLANT