STATE OF SOUTH CAROLINA
In The Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Laurens County
Court of General Sessions

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 2017-UP-442 (S.C. Ct. App. filed November 29, 2017)
Appellate Case No. 2018-000458

THE STATE,

RESPONDENT,

v.

BRAD BERNARD DAWKINS,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General
SC Bar No. 102259

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

Post Office Box 516
Greenwood, SC 29648
(864) 942-8800

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL

The Court of Appeals applied the correct standard of review and properly found the trial judge correctly declined to instruct the jury on assault and battery of a high and aggravated nature where the charge was not supported by the facts and evidence presented during trial. (Petitioner's Issues I and II).

STATEMENT OF THE CASE

Procedural History

During its February 2010 term, the Laurens County Grand Jury indicted Petitioner for criminal sexual conduct with a minor in the second degree (2010-GS-30-0257) and lewd act upon a child under the age of sixteen years (2010-GS-30-0256). Petitioner proceeded to a jury trial from October 13-14, 2015, in Laurens, South Carolina before the Honorable Eugene C. Griffith, Jr. At the conclusion of trial, the jury found Petitioner guilty as indicted. Judge Griffith sentenced Petitioner to seven years' imprisonment for criminal sexual conduct in the second degree and ten years' imprisonment suspended upon the service of forty-eight months imprisonment for lewd act on a minor, with the probation to begin at the end of the seven year sentence.

On November 29, 2017, the South Carolina Court of Appeals unanimously affirmed Petitioner's conviction and sentence. State v. Dawkins, Op. No. 2017-UP-442 (S.C. Ct. App. filed November 29, 2017). Petitioner subsequently submitted a petition for rehearing, which was denied on February 8. 2018. Petitioner timely submitted a Petition for Writ of Certiorari and this Return follows.

Factual History

Mother began dating Appellant in late 2005 or early 2006. R. p. 43. Appellant and Mother began cohabiting sometime around August 2007. R. p. 43. Appellant and Mother moved from Simpsonville to a home in Fountain Inn in Laurens County. R. p. 43. While Mother and Appellant were living together, Mother's daughter, Victim, lived in their home. R. p. 44. Appellant and Victim were typically home alone together for an hour or two after school on weekdays before Mother returned home from work. R. p.44. Victim testified that when they

were still living in Simpsonville, Appellant forced her to use sex toys in front of him. R. pp. 57-58. Appellant would direct Victim to touch herself on her vagina with the sex toys. R. p. 58. Victim later clarified that Appellant forced her to penetrate her vagina with one of the sex toys. R. p. 66. Victim testified Appellant continued to force her to use sex toys in front of him once the family moved to Fountain Inn. R. p. 59. When asked when the abuse occurred, Victim stated, "It would just be random. I'd just come home from school and he would tell me to come here or something." R. p. 59.

Victim recalled one specific incident that took place around November 30, 2009, where Appellant physically touched her himself. R. pp. 59-60. On November 30, 2009, Victim was thirteen years old[1]. R. p. 54. Victim testified that on that evening, Appellant took Mother's car and drove Victim into the woods and attempted to pull her pants down. R. p. 60. Victim testified they were still in Laurens County at the time Appellant stopped the car. R. p. 61. Appellant was able to pull Victim's pants and underwear down to Victim's mid-thigh area. R. p. 61. Appellant then touched Victim's breasts. R. p. 62. Victim testified Appellant then exposed his genitals and attempted to have sex with her. R. p. 64. When asked how close Appellant got to having sex with her, Victim stated, "on my vagina." R. p. 64. Victim fought to get Appellant off of her, which eventually caused Appellant to stop. R. p. 65. Appellant told Victim not to tell anyone what happened and that if she told anyone, he would hurt Victim and Mother. R. p. 65. Victim eventually disclosed Appellant's abuse to her friends, Jada and Mike-Mike. R. p. 73. Jada then disclosed the abuse to her parents. R. p. 84. Once law enforcement became involved in the case, Victim told Mother about Appellant's abuse. R. pp. 72-73.

[1] At the time of trial, Victim was nineteen years old and was enrolled as a student at South Carolina State University. R. p. 54.

Investigator Shannon Childress, a Lieutenant in the investigations division of the Laurens County Sheriff's Office, worked on the investigation of Appellant's case. R. p. 20. Investigator Childress spoke with Appellant on December 3, 2009, and subsequently obtained an arrest warrant on December 4, 2009. R. p. 22. When Childress spoke with Appellant, Appellant made a statement to her and another officer, Captain Russell Morgan. R. p. 40. Captain Morgan is employed with the City of Camden Police Department and had the opportunity to assist Laurens County in Appellant's case. R. p. 132. Captain Morgan testified the agencies assisted each other in investigations from time-to-time. R. p. 132. Captain Morgan made notes during the December 3, 2009 interview of Appellant he conducted with Investigator Childress. R. p. 133. Captain Morgan testified:

> Mr. Dawkins in my interview stated that in the past he admitted to seeing the victim, [Victim], in the nude. He stated that in the past he had told the victim to remove all her clothing so that he could whip her. He also stated that at that time that the, [Victim] was approximately 11 years old. He told me also that he had walked in the bedroom one, I guess, evening in the summertime and discovered that she was masturbating. And that during the masturbating incident he stated that she was performing the masturbation with a vibrator that he had provided to her. He also stated to me that [Victim] asked him if she was doing it correctly and if he would show her how to do it. He went on to say that about two weeks later he inquired of [Victim] if she had figured out how to properly use the vibrator and she had responded she had. But at that time, the interview was in conjunction with the allegations that Mr. Dawkins had touched the victim's vaginal area and breasts. And he continued to deny actually doing that.

R. p. 134. At the conclusion of trial, the jury found Appellant guilty of criminal sexual conduct with a minor in the second degree and lewd act upon a child under the age of 16.

ARGUMENT

The Court of Appeals applied the correct standard of review and properly found the trial judge correctly declined to instruct the jury on assault and battery of a high and aggravated nature where the charge was not supported by the facts and evidence presented during trial. (Petitioner's Issues I and II).

Relevant Facts

As noted above, Captain Morgan testified Petitioner told him about an occasion when he "whipped" Victim as a manner of punishment after making her remove her clothes. R. p. 134. During his testimony, Petitioner noted, "I have disciplined [Victim] with her clothes off. I disciplined her at the same time that I disciplined my 16-year-old, 17-year-old. They got in trouble and both of them took their clothes off and both of them got a spanking." R. p. 159. Petitioner elaborated, "I spanked her on her butt, her back, her legs. I spanked her where ever I touched her at for what they had done. R. p. 176. Petitioner testified the spanking incident occurred before the incident involving the sex toy while the family was living on "Georgia Road." R. p. 175, 179.[2] When describing his version of events where he allegedly walked in on Victim using sex toys, Petitioner testified he told her, "I told her that's it. I'm not going to whoop you or anything but that's not what we do." R. p. 168.

At the conclusion of the defense's case, Defense Counsel requested a charge on assault and battery of a high and aggravated nature (ABHAN). R. p. 186. The trial judge found, "I think the age parameter in the element prohibits it from being a lesser included. It eliminates it from being lesser included, and I'm going to stick to my ruling and decline to charge that as a lesser included of either one." R. p. 188. The trial judge later reiterated, "I'll tell you what I'm going to do, decline to charge the lesser included, but your record is complete." R. p. 189.

[2] Mother testified that before the family moved to Fountain Inn, they lived on West Georgia road in Simpsonville. R. p. 43.

Discussion

Petitioner contends the Court of Appeals erred in holding the trial judge properly refused to charge the lesser offense of ABHAN. Petitioner avers the facts of this case fit within two of the types of cases discussed in State v. Gilmore, 396 S.C. 72, 77-78, 719 S.E.2d 688, 691 (Ct. App. 2011), as to scenarios where the evidence supports an inference that the defendant is guilty of ABHAN instead of criminal sexual conduct. Petitioner also asserts the credibility charge given by the trial judge gave the jury the authority to infer a lesser crime occurred. Finally, Petitioner makes a hyper-specific and convoluted argument concerning the appropriate standard of review in examining whether a lesser included offense should have been charged. On the contrary, the Court of Appeals, in applying the correct standard of review, properly held the trial judge appropriately declined to instruct the jury on ABHAN where Petitioner failed to present any evidence that ABHAN instead of criminal sexual conduct with a minor occurred. While Petitioner arguably presented evidence of an additional ABHAN, the evidence presented did not create an inference that the ABHAN occurred instead of CSC. Further, the mere assertion that the jury, in assessing the credibility of the witnesses, could have disbelieved a portion of the Victim's testimony is insufficient to warrant a lesser-included charge.

Standard of Review

In 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). 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). Importantly though, even if an offense is a lesser-included offense of another offense, the trial

judge is only required to instruct the jury on the lesser-included offense when the evidence could support an inference the defendant is guilty of **only** the lesser-included offense and not the greater offense. State v. Lambright, 279 S.C. 535, 537, 309 S.E.2d 7, 8 (1983). "It is well settled that a jury instruction on a lesser included offense is required only when the evidence warrants such an instruction." State v. Coleman, 342 S.C. 172, 175, 536 S.E.2d 387, 389 (Ct. App. 2000). "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 tend 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).

While Petitioner contends there is contradictory and confusing wording in the language of the legal standard of when to charge lesser offenses, this is simply not the case. Petitioner embarks on a hyper-specific analysis of applicable case law, hoping to use subtle distinctions between the language in various cases in order to assert there are a number of different standards employed in these cases. These subtle distinctions in phrasing do not make a difference. The applicable standard is a clearly defined area of law and the fact that the standard has been phrased in different ways by different appellate court judges does not create a due process violation.[3] Instead, the substance of the standard remains the same despite the fact there are very subtle differences in some cases in how the standard is phrased. The Court of Appeals therefore, in citing State v. Forbes, 296 S.C. 344, 372 S.E.2d 591 (1988), did not use an incorrect legal

[3] To the extent Petitioner argues the allegedly inconsistent standard applied creates a procedural due process violation, this argument was not raised to the trial judge or the Court of Appeals and thus is not preserved for review by this Court. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issued not raised to and ruled upon in the trial court will not be considered on appeal."); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 77 (2nd ed. 2002) ("There are two prerequisites to preserving an issue for consideration by the Supreme Court on a writ of certiorari: (1) the issue must have been raised in the initial arguments to the Court of Appeals, and (2) the issue must have been raised in the petition for rehearing before the Court of Appeals."

standard. Rather, the Court chose a correct statement of law in a seminal case and, while there are other ways the standard has been articulated, there is no inconsistency in the law as applied.

Analysis

In Gilmore, the South Carolina Court of Appeals explained:

> 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 that 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).

396 S.C. at 77-78, 719 S.E.2d at 691. Petitioner contends his case fits within either the first or second class of cases mentioned in Gilmore. While Petitioner does not state exactly what conduct on his part amounted to ABHAN in his Petition, in his brief at the Court of Appeals he alleged the evidence of ABHAN presented was: 1) "[t]here 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," 2) "In addition the victim expressly testified that she was groped by the appellant during the alleged incident." Reply Br. of App. p. 4. Neither one of these instances of conduct provide the requisite evidence Petitioner committed ABHAN instead of criminal sexual conduct.

First, there is no allegation Petitioner committed ABHAN as part of the sexual abuse of Victim in Fountain Inn. There is no factual connection between the incidents where Petitioner forced Victim to use sex toys at his direction and the prior incident where Petitioner spanked the

Victim as punishment. In his testimony, Petitioner described his version of events where he allegedly walked in on Victim using sex toys, and testified he told her "I told her that's it. I'm not going to whoop you or anything but that's not what we do." R. p. 168. During cross-examination, Petitioner stated the spanking incident occurred **before** the incident involving the sex toy, while the family was living on "Georgia Road." R. p. 175, 179. There is thus no evidence the abuse that occurred within the home was ABHAN instead of CSC. Petitioner's mere allegation that he also could have been indicted for ABHAN for an entirely separate course of conduct did not warrant the lesser-included charge.

Second, the incident in Petitioner's vehicle similarly did not warrant an ABHAN charge. Petitioner's conduct in the vehicle formed the basis for the lewd act upon a minor charge. ABHAN is not a lesser included charge of lewd act upon a minor; therefore Petitioner's grope of Victim in his vehicle did not justify an instruction on ABHAN.

In Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005), *abrogated by* Smalls v. State, Op. No. 27764 (S.C. Sup. Ct. filed February 7, 2018) (Shearouse Adv. Sh. No. 6 at 43-59), this Court examined the same argument raised by Petitioner in the current case.[4] In Dempsey, the defendant introduced evidence of several instances of him acting violently towards the victim. 363 S.C. at 371, 610 S.E.2d at 815. In examining the facts and circumstances of the case, this Court found there was no evidence Dempsey committed ABHAN rather than CSC with a minor, holding:

> In this case, Dempsey points to evidence that he physically assaulted the victim to support his claim that counsel was ineffective in failing to request an ABHAN charge. The indictment charged that the CSC occurred between December 1996 and June 1997, during which period there was evidence of several instances of sexual battery. While it is true, as Dempsey contends, that there was also evidence of conduct that could be construed as ABHAN, none of these incidents was

[4] While Dempsey was abrogated by Smalls on standard of review grounds, the State submits the persuasive authority of Dempsey in this case remains intact.

> alleged to have occurred instead of the sexual batteries. Under these circumstances, where there is no evidence from which it could be inferred that ABHAN rather than CSC was committed, an ABHAN charge is not warranted.

Id. Dempsey is thus directly applicable to Petitioner's case, where the presentation of evidence of an additional ABHAN did not warrant a charge on ABHAN since there was no factual connection between the two crimes.

All of the evidence presented at trial led to one of two conclusions. Either the jury could believe the State's version of events and find Appellant guilty of criminal sexual conduct in the second degree, or they could believe Petitioner's version of events and find that no sexual battery occurred. See Gilmore, 396 S.C. at 77, 719 S.E.2d at 691 ("The mere existence of evidence of ABHAN . . . is not sufficient to require the jury charge. Rather, there must be evidence the defendant committed ABHAN *instead of* CSC." (italics in original)); State v. Forbes, 296 S.C. 344, 345, 372 S.E.2d 591, 592 (1988) ("Here the evidence shows appellant committed a sexual battery as defined by § 16-3-651(h) or no battery at all. He was therefore not entitled to a charge of ABHAN."); State v. Fields, 356 S.C. 517, 523-524, 589 S.E.2d 792, 795 (Ct. App. 2003) ("Field's mere assertion that the jury might have disbelieved the State's evidence that the sex was not consensual and on the remaining evidence found him guilty of ABHAN does not entitle him to have the lesser offense submitted to the jury."). Therefore, the trial judge properly declined to instruct the jury on ABHAN, as there was no evidence presented at trial supporting the charge. This Court should deny certiorari.

CONCLUSION

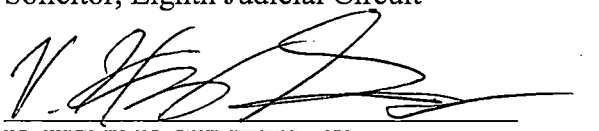
For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit



V. HENRY GUNTER, JR.
S.C. Bar No. 102259

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

April 11, 2018

RECEIVED

APR 12 2018

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Laurens County
Court of General Sessions

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 2017-UP-442 (S.C. Ct. App. filed 11/29/17)
Appellate Case No. 2018-000458

THE STATE,

RESPONDENT,

v.

BRAD BERNARD DAWKINS,

PETITIONER.

PROOF OF SERVICE

I, Destiny Blue, certify that I have served the Return to Petition for Writ of Certiorari on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Miller W. Shealy, Jr., Esquire, 81 Mary Street, Charleston, South Carolina 29403.

I further certify that all parties required by Rule to be served have been served.
This 11th day of April, 2018.

DESTINY BLUE
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727