

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**

AUG 02 2018

SC Court of Appeals

Appeal from Beaufort County  
Honorable John C. Hayes, III, Circuit Court Judge  
Appellate Case No. 2016-000612

THE STATE,

Respondent,

vs.

BENJAMIN CERVANTES HERNANDEZ,

Appellant.

**RESPONDENT'S PETITION FOR REHEARING**

On August 1, 2018, this Court issued an unpublished opinion in which it unanimously affirmed Appellant Benjamin Cervantes Hernandez's conviction for second-degree criminal sexual conduct with a minor. State v. Hernandez, Op. No. 2018-UP-343 (S.C. Ct. App. filed Aug. 1, 2018). In affirming Hernandez's conviction, this Court held the trial judge committed no error by determining the statutory offenses of first-degree and second-degree assault and battery were not lesser-included offenses of second-degree criminal sexual conduct with a minor. Respondent ("the State") believes this Court's holding was entirely correct and its opinion was well-reasoned.<sup>1</sup> Moreover, the State respectfully submits this Court's opinion warrants

<sup>1</sup> Although the State fully agrees with this Court's ultimate conclusion in Hernandez's case, the State continues to maintain any issue Hernandez may have had with the trial judge's jury instructions was waived when defense counsel expressly affirmed to the trial judge she had no issues with or objections to the jury instructions after they were presented. See State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) ("[Brown]'s trial counsel stated explicitly that he

publication for the benefit of the bench and bar since it addressed an important legal issue that has not yet been directly addressed in a published appellate decision but has arisen a number of times since the Omnibus Crime Reduction and Sentencing Reform Act of 2010 was enacted. However, out of concern a footnote included in the opinion could potentially be misconstrued and may lead to misapprehension of the case cited in the footnote, the State respectfully petitions for rehearing pursuant to Rule 221(a), SCACR.

Specifically, in its opinion, this Court correctly found first-degree and second-degree assault and battery were not lesser-included offenses of second-degree criminal sexual conduct with a minor pursuant to either the elements test for determining whether a particular offense is a lesser-included offense of another or any relevant statutory provisions. See Knox v. State, 340 S.C. 81, 85, 530 S.E.2d 887, 889 (2000) (“A lesser offense is included in the greater only if each of its elements is *always* a necessary element of the greater offense.”), overruled on other grounds by State v. Gentry, 563 S.C. 93, 610 S.E.2d 494 (2005); S.C. Code Ann. § 16-3-600(C)(3) (“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.”); S.C. Code Ann. § 16-3-600(D)(3) (“Assault and battery in the second-degree is a lesser-included offense of assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Sections 16-3-29.”). However, as part of its opinion, this Court included a footnote stating the following:

In an unpublished opinion from November 29, 2017, State v. Dawkins, 2017 WL 5900266, at \*1 (Ct. App. 2017), this court held ABHAN *is* a lesser-included offense of CSC with a minor because

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had no objection to the trial court’s instruction. Thus, [Brown]’s argument that the trial court erred in failing to apply section 16-13-30 as amended is unpreserved.”).

our courts have traditionally made such a finding. We find no published cases since 2010, when the Legislature codified assault and battery in the first to third degrees, that have held assault and battery in the first and second degree are the lesser-included offenses of CSCM in the second degree.

(emphasis added and citations omitted).

In State v. Dawkins, Op. No. 2017-UP-442 (S.C. Ct. App. filed Nov. 29, 2017), this Court addressed—amongst other issues—the issue of whether the trial judge erred by refusing to instruct the jury on common law assault and battery of a high and aggravated nature (“ABHAN”) as a lesser-included offense of second-degree criminal sexual conduct with a minor. In that case, Dawkins was charged with second-degree criminal with a minor for acts committed on or before November 30, 2009, which was a time period *prior to* the passage of the Omnibus Crime Reduction and Sentencing Reform Act of 2010. As a result, this Court’s conclusion common law ABHAN was a lesser-included offense of second-degree criminal sexual conduct with a minor in Dawkins was wholly based on the law in effect before common law ABHAN was abolished.<sup>2</sup>

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<sup>2</sup> Despite the fact common law ABHAN had been abolished, a jury charge on that particular offense could still have been properly presented to the jury in Dawkins’s case had it been warranted by the evidence because the General Assembly elected to include a savings clause in the Omnibus Crime Reduction and Sentencing Reform Act of 2010. See Act No. 273, § 65, 2010 S.C. Acts & Joint Resolutions (“The repeal or amendment by the provisions of this act or any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.”); see also State v. Bolin, 381 S.C. 557, 562, 673 S.E.2d 885, 887 (Ct. App. 2009) (“By stating that the Act is to have no effect on pending actions, criminal prosecutions, rights, duties, or liabilities, and that all laws repealed or amended by the Act must

In Hernandez’s case, the second-degree criminal sexual conduct with a minor charge for which he was ultimately convicted arose *after* the new legislation was enacted and common law ABHAN had been abolished in South Carolina. See State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) (“Though the passage of the Act, the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses.”); see also Act No. 273, § 7, 2010 S.C. Acts & Joint Resolutions (“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.”). Under those circumstances, the decision in Dawkins has no relevance to Hernandez’s case since its conclusions were based on the law in effect prior to the adoption of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 as opposed to after its adoption. Therefore, by referencing Dawkins in the footnote and stating this Court held ABHAN *is*—instead of *was*—a lesser-included offense of criminal sexual conduct with a minor, this Court’s opinion could potentially be misconstrued or misapprehended to unintentionally suggest ABHAN—either common law or statutory—remains a potential lesser-included offense of criminal sexual conduct offenses, including the offense of second-degree criminal sexual conduct with a minor. See, e.g., Shenoa L. Payne, *The Ethical Conundrums of Unpublished Opinions*, 44 Willamette L. Rev. 723, 728 (2008) (“With such widespread national availability of ‘unpublished’ opinions, the term ‘unpublished’ has a new and ironic meaning. . . . Even though a court may wish to prevent a particular opinion from having precedential effect, the court is at least aware that, whether

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be treated as remaining in full force and effect, the clear language of the Act indicates that it is prospective.”).

designated 'published' or 'unpublished,' its opinion is 'going to be read, collected, and analyzed.' ” (footnotes omitted).

Accordingly, for the foregoing reasons, the State respectfully urges this Court to reconsider this matter pursuant to Rule 221(a), SCACR, vacate its prior opinion, and issue a new published opinion that either omits the footnote referencing the unpublished decision in Dawkins or includes additional language in the footnote making it clear the Dawkins decision dealt with common law ABHAN as a lesser-included offense of criminal sexual conduct with a minor *prior to* the passage of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 while still affirming Hernandez’s conviction for all the reasons this Court previously articulated. By doing so, this Court will provide needed guidance to the bench and bar on an important legal issue that has not yet been addressed in a published appellate decision in South Carolina while simultaneously preventing any unintended confusion on the issue of whether ABHAN remains a lesser-include offense of criminal sexual conduct offenses arising after the change in the law that took place in 2010.

Respectfully submitted,

ALAN WILSON  
Attorney General

MARK R. FARTHING  
Assistant Attorney General

By:

  
Mark R. Farthing

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August 2, 2018

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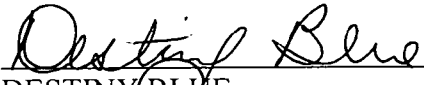
Appellant.

**PROOF OF SERVICE**

I, Destiny Blue, certify I have served the within Respondent's Petition for Rehearing on Appellant by sending two copies of the same to:

Susan B. Hackett, Esq.  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.  
This 2nd day of August, 2018.

  
\_\_\_\_\_  
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ALAN WILSON  
ATTORNEY GENERAL

August 2, 2018

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**SC Court of Appeals**

The Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RE: State v. Benjamin Cervantes Hernandez – Appellate Case No. 2016-000612

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Respondent's Petition for Rehearing, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Mark R. Farthing  
Assistant Attorney General  
Bar Number 76901

MRF/  
Enclosures

cc: Susan B. Hackett, Esquire  
Victim Advocacy Division