STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BENJAMIN CERVANTES HERNANDEZ,

APPELLANT

APPELLATE CASE NO. 2016-000612

Appeal from Beaufort County

John C. Hayes, III, Circuit Court Judge

Opinion No. 2018-UP-343

PETITION FOR REHEARING

On August 1, 2018, this Court issued a per curiam unpublished opinion affirming Appellant's conviction and sentence. State v. Hernandez, 2018-UP-343 (S.C. Ct. App. filed Aug. 1, 2018). The issue on appeal was whether assault and battery in the first and second degrees are lesser-included offenses of criminal sexual conduct with a minor (CSCM) in the second degree. This Court held they were not. Pursuant to Rule 221(a), SCACR, Appellant respectfully requests rehearing on this issue due to the significant points overlooked and/or misapprehended by this Court as explained in greater detail below.

The state charged Appellant with CSCM in the second degree related to Minor 1. Specifically, in the indictment, the state alleged that on July 17, 2015, Appellant "did commit a sexual battery upon a minor who was fourteen (14) years of age or less but who was at least eleven (11) years of age, to wit: digital penetration of victim, [Minor 1]'s, vagina." R. 235. The plain language of the indictment made clear that the state was required to prove digital penetration of Minor 1's vagina.

Based upon the evidence presented, Appellant requested the trial judge instruct the jury regarding two lesser-included offenses: assault and battery in the first degree and assault and battery in the second degree. R. 152, l. 23 – R. 153, l. 4. Appellant explained the request was based upon prior determinations by the South Carolina Supreme Court that common law ABHAN, which was the unlawful act of violent injury to the person of another accompanied by circumstances of aggravation, was a lesser included offense of criminal sexual conduct with a minor. R. 153, ll. 10-23. Appellant equated common law ABHAN with assault and battery in the first degree because both require unlawful injury and non-consensual touching. R. 155, ll. 1-4. Further, Appellant noted that statutory assault and battery in the first and second degree involved "non-consensual touching of the private parts of a person either under or above the clothing." R. 155, ll. 13-16; R. 155, ll. 19-21.

In denying the request, the judge noted he had "analyzed and reanalyzed and maybe over analyzed whether or not" the statutory assault and battery offenses were lesser-included offenses of criminal sexual conduct. R. 151, ll. 13-18. He found the offenses were not lesser-included offenses "based on the test – the elements test – the analysis of the elements test." R. 151, ll. 21-23. Specifically, he determined "they require proof of injury whereas the charges which are set forth in the indictment do not." R. 151, ll. 23-25. Further, the judge held that based upon the legislature

taking "great pains to explain" "which offenses are lesser of which higher offenses" in the statutory assault and battery scheme, the judge believed "that had the legislature desired to include these crimes these charges under the CSC []as lesser included of the new assault and batteries" "[t]hey could have included these offenses as lesser included offenses by statute." R. 156, l. 16 – R. 157, l. 2. As a result, the judge refused to charge the jury regarding any lesser-included offenses.

This Court affirmed the trial judge's decision. In reaching its conclusion, this Court utilized the "elements test." This Court reasoned as follows:

> CSCM in the second degree is the touching of a minor's private parts. CSCM in the second degree does not require an injury and must involve a minor under the age of fourteen. Assault and battery in the first degree requires an injury and nonconsensual touching of a person's private parts. Assault and battery in the second degree requires an injury or an attempted injury and nonconsensual touching of a person's private parts. Therefore, because assault and battery in the first degree requires an injury and in the second degree requires an injury or an attempted injury, and CSCM in the second degree does not, the elements test fails.

Additionally, this Court faulted Appellant for "not cit[ing] a case that has found assault and battery in the first or second degree to be the lesser-included offense of CSCM in the second degree." However, Appellant is not aware of any cases *at all* addressing the issue presented in this case. As this Court noted in its opinion, the statutory offenses of assault and battery were only recently codified in 2010. In the mere eight years since their codification, no South Carolina appellate court has addressed whether the assault and battery offenses are lesser-included offenses of CSC. Therefore, Appellant could not cite to any case – in support of or against his position– as none existed.

In referring to the recent codification of the assault and battery offenses, this Court declared that "had the Legislature intended for assault and battery in the first and second degrees to be lesser-included offenses of CSCM, it could have so provided." While it is true that the Legislature could have specifically stated that assault and battery is a lesser-included offense, it was unnecessary for

the Legislature to do so in light of existing case law declaring ABHAN a lesser-included offense of CSCM. The Legislature is presumed to be aware of the Supreme Court's rulings. State v. Sawyer, 409 S.C. 475, 481, 763 S.E.2d 183, 186 (2014); McLeod v. Starnes, 396 S.C. 647, 660, 723 S.E.2d 198, 205 (2012). Fully aware that the Supreme Court had ruled that ABHAN was a lesser-included offense of CSC, see State v. Primus, 349 S.C. 576, 581, 564 S.E.2d 103, 106 (2002) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), the Legislature did not provide that the assault and battery offenses *not* be treated as lesser-included offenses of CSC.[1] When the Legislature codified ABHAN and created the statutory scheme for assault and batteries, the Legislature was aware of South Carolina's longstanding jurisprudence of treating ABHAN as a lesser included of CSC. Had the legislature sought to change this, it could have done so easily.

An issue similar to the one presented sub judice arose after the codification of assault with intent to commit CSC (ACSC). In State v. Elliott, 346 S.C. 603, 607, 552 S.E.2d 727, 729 (2001), overruled on other grounds by Gentry, supra, the Supreme Court held its jurisprudence of consistently incorporating ABHAN into the CSC framework as a lesser-included offense of ACSC survived the codification of the CSC statutes. The Court explained that "the legislature, in enacting the CSC statutes, is presumed to know the common law and could have provided that ABHAN not be treated as a lesser offense of ACSC." Id. at 607 n.2, 552 S.E.2d at 729 n.2 (citing State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196 (1997)). Thus, the Court recognized the "anomaly in the

[1] South Carolina case law has consistently held that ABHAN is a lesser-included offense of CSC. Dempsey v. State, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005) abrogated on other grounds by State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004); State v. Forbes, 296 S.C. 344, 345, 372 S.E.2d 591, 592 (1988); State v. Pressley, 292 S.C. 9, 10, 354 S.E.2d 777, 777 (1987); State v. Mathis, 287 S.C. 589, 593, 340 S.E.2d 538, 541 (1986); State v. Drafts, 288 S.C. 30, 33, 340 S.E.2d 784, 785 (1986); State v. Lambright, 279 S.C. 535, 537, 309 S.E.2d 7, 8 (1983); State v. Gilmore, 396 S.C. 72, 76, 719 S.E.2d 688, 690 (Ct. App. 2011); State v. Fields, 356 S.C. 517, 522, 589 S.E.2d 792, 795 (Ct. App. 2003); State v. Murphy, 322 S.C. 321, 325, 471 S.E.2d 739, 741 (Ct. App. 1996).

law" created by recognizing ABHAN as a lesser included offense of ACSC due to the strict same elements test; however, the Court explained "[t]he common law does not always fit into the neat categories we might prefer." The Court found "compelling reasons not to abandon [its] longstanding inclusion of ABHAN as a lesser included offense of attempted sexual battery crimes." Id. at 607, 552 S.E.2d at 729.

In 2010, the South Carolina Legislature codified ABHAN and various degrees of assault and battery. Specifically, the General Assembly explained that ABHAN occurs when a "person unlawfully injures another person" and "great bodily injury results" or "the act is accomplished by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600(B)(1). Continuing with the statutory scheme, the legislature explained assault and battery in the first degree occurs if (1) a person unlawfully injures another person and (2) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent. S.C. Code Ann. § 16-3-600(C)(1)(a)(i). Similarly, assault and battery in the second degree occurs when a person (1) unlawfully injures another person, or (2) offers or attempts to injure another person with the present ability to do so, and (3) moderate bodily injury to another person could have resulted or (4) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing. S.C. Code Ann. § 16-3-655(D)(1)(b).

A person is guilty of CSCM in the second degree if the person "engages in a sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age." S.C. Code Ann. § 16-3-655(B)(1). Sexual battery is "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h).

The very language chosen by the legislature in the assault and battery statutory scheme reveals its intent that the assault and battery statutes be considered lesser-included offenses of the criminal sexual conduct offenses. Just as the assault and battery statutes reference private parts, which are defined as the genital area or the buttocks of a male or female or the breasts of a female, the CSC statute defines "intimate parts" as "the primary genital area, anus, groin, inner thighs, or buttocks of a male or female human being and the breasts of a female human being." Cf. S.C. Code Ann. § 16-3-600(A)(3) with S.C. Code Ann. § 16-3-651(d). Both reference "lewd and lascivious intent." Cf. S.C. Code Ann. § 16-3-600(C)(1)(i) with S.C. Code Ann. § 16-3-655(C). This language shows the Legislature's intent for assault and battery offenses to be lesser-included offenses of CSCM.

Following the codification and in light of the dearth of case law addressing the matter, most judges and practitioners relied upon McAninch's explanation that where common law ABHAN was a lesser-included offense of CSC in the first degree, "the same should be true when the statutory assault and battery crimes are charged." William S. McAninch, et al., The Criminal Law of South Carolina, 239-240 (6th ed. 2013).[2] McAninch explained that "[w]ith the new statutory offenses, it would appear that 1st and 2nd degree assault and battery would more appropriately be lesser-included crimes of CSC in the 1st degree as the definition of each of these crimes includes a nonconsensual sexual touching." Id. at 247. Further, McAninch, relying upon the analysis in

[2] It is undersigned counsel's belief that over the last eight years numerous criminal sexual conduct cases have been resolved through guilty pleas to statutory assault and battery offenses without the state re-indicting the defendants or the trial courts obtaining waivers of presentments of indictments to the grand juries based upon the belief that statutory assault and battery is a lesser-included offense of criminal sexual conduct. The same may be true for trials as judges may have charged assault and battery as lesser-included offenses to juries. If this Court's opinion remains the same, then those convictions would be void because the trial court lacked subject matter jurisdiction to convict the defendants of crimes that were not lesser-included offenses of the offenses charged in the indictment. See State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987).

Elliott, supra, noted that "[u]nder the new statutory scheme, it would be that 2nd degree assault and battery is the appropriate lesser-included crime for assault with intent to commit criminal sexual conduct" because "[f]irst degree assault and battery does not seem to cover an assault (or attempt) to touch another person's private parts, only the actual touching" whereas "[s]econd degree includes the act of touching or an offer or attempt to injure another person by touching them inappropriately." Id. at 249 (internal quotation omitted).

In rendering its decision, this Court overlooked or misapprehended the case law concerning the Legislature's assumed familiarity with the Court's precedents. This Court failed to address Appellant's argument that the language of the assault and battery statutes includes "sexual touching," evincing the Legislature's intent for those offenses to be lesser-included offenses of the criminal sexual conduct offenses.

Additionally, ample evidence in the record required the trial judge to instruct the jury on the lesser-included offenses of assault and battery in the first and second degrees. A jury charge to a lesser included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law mandates a jury instruction on a lesser included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), "[i]n order to justify a charge of a lesser included offense, the evidence

must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts."

"[I]n the context of a trial court's decision not to charge a requested lesser included offense, [the appellate court] review[s] the trial court's decision de novo." The appellate court must reverse and remand for a new trial "if the evidence in the record is such that the jury could have found the defendant guilty of the lesser offense instead of the crime charged." State v. Gilmore, 396 S.C. 72, 77, 719 S.E.2d 688, 690-691 (Ct. App. 2011). This Court recognized "three types of cases in which the evidence can support an inference," one of which occurred when "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." Id. at 77-78, 719 S.E.2d at 691 (citing State v. Lambright, 279 S.C. 535, 537, 309 S.E.2d 7, 8 (1983)).

The evidence presented clearly supported jury instructions on the lesser-included offenses of assault and battery in the first and second degrees. In order for the jury to convict Appellant of CSCM in the second degree, the jury was required to find an "intrusion" of Minor 1's vagina by Appellant's finger. However, the testimony regarding any "intrusion" was contradictory. Minor 1 testified there had been an intrusion, but she told the forensic interviewer that she did not understand the question when posed. Also, Minor 1's mother told the 911 operator there had been no penetration. Additionally, Appellant's testimony indicated a touching only – no intrusion, no penetration. Thus, the evidence before the jury was susceptible to more than one interpretation – a touching only or an intrusion. Thus, Appellant was entitled to an instruction on a lesser-included offense to cover the evidence presented – that he had only touched Minor 1.

Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter to address the significant points overlooked or misapprehended by this Court in reaching its conclusion.

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 6th day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENJAMIN CERVANTES HERNANDEZ,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Benjamin Cervantes Hernandez, #367274, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 6th day of August, 2018.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 6th day of August, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023