STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Beaufort County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2019-000023

THE STATE,

Respondent,

vs.

BENJAMIN CERVANTES HERNANDEZ,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

Any issue with the trial judge's refusal to instruct the jury on first-degree and second-degree assault and battery as purported lesser-included offenses of second-degree criminal sexual conduct with a minor was not properly preserved for appellate review because defense counsel waived any such issue during trial by directly indicating to the trial judge she had no objections to the jury instructions as presented after the trial judge finished instructing the jury on the applicable law. However, regardless of any issue preservation concerns, the Court of Appeals correctly found the trial judge committed no error by declining to instruct the jury on the statutory offenses of first-degree and second-degree assault and battery because those offenses were not and are not lesser-included offenses of second-degree criminal sexual conduct with a minor.

STATEMENT OF THE CASE

Procedural History

In July of 2015, Petitioner Benjamin Cervantes Hernandez was arrested following an investigation into allegations he sexually abused several young girls. In October of 2015, the Beaufort County Grand Jury indicted Hernandez for one count of second-degree criminal sexual conduct with a minor along with two counts of third-degree criminal sexual conduct with a minor. On February 22, 2016, a jury trial was commenced in the Beaufort County Court of General Sessions with the Honorable John C. Hayes, III, circuit court judge, presiding. At the conclusion of trial, the jury convicted Hernandez of second-degree criminal sexual conduct with a minor and acquitted him of the other two charges. Following the verdict, the trial judge sentenced Hernandez to a fifteen-year term of imprisonment. Thereafter, Hernandez filed motions seeking a new trial and reconsideration of his sentence, and the trial judge denied both motions through a written order. Hernandez then timely filed and perfected an appeal.

Subsequently, on appeal, the Court of Appeals issued an unpublished opinion in which it unanimously affirmed Hernandez's conviction. State v. Hernandez, Op. No. 2018-UP-343 (S.C. Ct. App. filed Aug. 1, 2018). Thereafter, both the State and Hernandez petitioned the Court of Appeals for rehearing, and the petitions were denied. However, in addition to denying the petitions, the Court of Appeals issued a new unpublished opinion in place of the original one that omitted a previously-included footnote. State v. Hernandez, Op. No. 2018-UP-343 (S.C. Ct. App. refiled Sept. 26, 2018). At that point, Hernandez again petitioned the Court of Appeals for rehearing, and, once again, his petition was denied. Hernandez then filed a petition for a writ of certiorari in the Supreme Court.

Factual History

On July 17, 2015, Maria Pizana-Covos ("Mother") was at her residence in Bluffton, South Carolina, when her eleven-year-old daughter ("Victim 1") disclosed she had been sexually abused by Hernandez, a thirty-six-year-old family friend and construction worker that was visiting with them at the time. (R. pp. 13-15; p. 17; p. 45; p. 53; p. 61; State's Ex. # 6 (Recording of Hernandez's Interview)). In addition to Victim 1's disclosure, Mother's nine-year-old daughter ("Victim 2") along with an eleven-year-old girl ("Victim 3") visiting with Mother and her family also disclosed they were sexually abused by Hernandez. (R. p. 14; p. 20; pp. 80-81; p. 86; p. 88; pp. 90-91; p. 94). In response, Mother immediately confronted Hernandez about the allegations before quickly alerting the authorities of what had been disclosed, and law enforcement officers were dispatched to Mother's home. (R. pp. 17-20; pp. 39-40; pp. 44-45; pp. 106-107; p. 115).

Shortly thereafter, Detective Baker Odom, Officer William Ferrelli, Officer Lindsey Gibson, and Officer Bonifacio Perez from the Bluffton Police Department arrived at Mother's home and spoke with Mother, her family, and the other people present at the scene. (R. pp. 39-40; pp. 44-45; pp. 106-107; pp. 114-115). During the officers' conversations with the girls at the residence, Victim 1, Victim 2, and Victim 3 all disclosed they had been sexually abused at that location earlier that night. (R. pp. 40-42; p. 45). Meanwhile, Hernandez, who was still present at the scene, approached Officer Ferrelli, pulled him away from the others, and indicated he needed to speak with him. (R. pp. 42-43; pp. 45-46; p. 49; p. 107). Officer Ferrelli then engaged in a conversation with Hernandez with the assistance of Officer Perez, who served as a translator, and Hernandez was arrested as a result of what he revealed during that conversation. (R. p. 46; p. 107; p. 113; pp. 115-116; State's Ex. # 1 (Recording from Officer's Body Camera)).

Following his arrest, Hernandez was transported to the police department and, with Officer Perez again translating, was interviewed by Detective Odom. (R. pp. 107-108; p. 110). During the interview, Hernandez acknowledged several different events occurred on the night of the incident that involved Victim 1, Victim 2, and Victim 3. (State's Ex. # 6). Regarding Victim 2 and Victim 3, Hernandez claimed he was kissed by Victim 2 and pushed in the back by Victim 3. (R. p. 113; State's Ex. # 6). Regarding Victim 1, Hernandez claimed he allowed something "sinful" to happen for which he was very remorseful. (R. p. 110; State's Ex. # 6). Specifically, Hernandez asserted he went to check on Mother's infant son while he was visiting the home, Victim 1 kissed him between his cheek and lips when he went into the baby's room to do so, and he responded by putting his hands up. (State's Ex. # 6). When he put his hands up, Hernandez alleged Victim 1, whom he contended was very strong, grabbed one of his hands, pulled it underneath her underwear onto her vagina, and firmly pressed it into her body, which led to him feeling "moisture." (R. p. 110; State's Ex. # 6). At that point, Hernandez insisted he stopped touching Victim 1, and he stated he admonished her before going to the bathroom to wash his hands. (State's Ex. # 6). After that, Hernandez indicated he resumed interacting with the family but did not reveal what had occurred to Mother at that time. (State's Ex. # 6). Hernandez further asserted he was not sure whether he actually penetrated Victim 1's vagina during the incident, and he insisted he was physically overpowered by his eleven-year-old victim despite how impossible such a feat would seem. (State's Ex. # 6).

Thereafter, on August 5, 2015, Kendra Twitty, a forensic interviewer and therapist at a children's advocacy center, individually conducted forensic interviews of Victim 1, Victim 2, and Victim 3. (R. pp. 98-99). During the interviews, each of the girls again disclosed they were

sexually abused by Hernandez.[1] (State's Ex. # 2 (Recording of Victim 1's Forensic Interview); State's Ex. # 3 (Recording of Victim 3's Forensic Interview); State's Ex. # 4 (Recording of Victim 2's Forensic Interview)).

Subsequently, Hernandez was indicted for one count of second-degree criminal sexual conduct with a minor in regard to the allegations involving Victim 1 along with two counts of third-degree criminal sexual conduct with a minor in regard to the allegations involving Victim 2 and Victim 3, and he proceeded forward to trial. (R. pp. 2-3; pp. 234-239). During trial, Mother testified about the events that led her to alert law enforcement of the reported sexual abuse, and the officers involved in the investigation testified about their responses to the allegations along with the details of their conversations with Hernandez about the sexual abuse. (R. pp. 13-24; pp. 39-43; pp. 44-49; pp. 106-120). Furthermore, the forensic interviews of the victims were played for the jury along with recordings of Hernandez's statements about the incident. (R. p. 47; pp. 100-105; pp. 117-120).

In addition to that testimony and evidence, each of Hernande'z victims testified about their experiences on the date of the incident. (R. pp. 51-95). Specifically, Victim 1 testified Hernandez visited her home on that date, touched her "private part" while she was on a couch, prevented her from leaving and touched her breasts while she was in her baby brother's room, put his hand in her underwear at a later point when she was in her baby brother's room, digitally penetrated her vagina, warned her it would "get worse" if she said anything about what had occurred, and told her he wanted to kiss her. (R. p. 53; pp. 55-59; pp. 61-62; p. 66; p. 68). Victim 1 further acknowledged she told Twitty during a forensic interview she was not sure if

[1] Specifically, during her interview, Victim 1 recounted Hernandez came into her baby brother's room and began touching her body on the night of the incident. (State's Ex. # 2). Furthermore, Victim 1 indicated it hurt when Hernandez touched her vagina, but she stated she was not sure if anything went inside of her vagina when he did so. (State's Ex. # 2).

any penetration occurred during the incident, but she asserted she made that statement because she did not understand Twitty's question at the time. (R. p. 73; p. 79). Similarly, Victim 2 stated Hernandez attempted to kiss her on the mouth after she jumped on him on the date of the incident and later touched her "private part" while she was sitting on his lap. (R. pp. 91-94). Likewise, Victim 3 stated Hernandez touched her "private part" underneath the kitchen table on the date of the incident and attempted to put his hand down her pants when she was alone with him in one of the home's bedrooms. (R. p. 81; pp. 83-86).

Thereafter, Hernandez testified in his own defense and offered a somewhat contradictory account of the events that occurred on the date of the incident. (R. pp. 133-147). Regarding those events, Hernandez flatly denied inappropriately touching Victim 2 and Victim 3, but he asserted Victim 2 did kiss him near his lips at some point on the date of the incident. (R. pp. 139-143). Furthermore, regarding Victim 1, Hernandez claimed he went into Mother's baby's bedroom, moved the baby away from the edge of the bed, and was grabbed and kissed by Victim 1 at that time. (R. pp. 133-134). After he was kissed, Hernandez stated he pushed Victim 1 away, but she responded by grabbing his hand, putting it inside of her pajamas, and using her hand to make "pressure between her legs" with his hand. (R. p. 134). When that occurred, Hernandez acknowledged his hand touched Victim 1's genital area underneath her underwear, and he stated he felt moisture when it did so. (R. p. 147). However, aside from that, Hernandez denied he touched Victim 1's breasts, denied he forced Victim 1 to stay in a room with him, and denied he made any inappropriate comments to Victim 1. (R. pp. 136-139).

Subsequently, at the conclusion of the evidentiary phase of trial, defense counsel requested the trial judge instruct the jury on first-degree and second-degree assault and battery as lesser-included offenses of second-degree criminal sexual conduct with a minor and on second-

degree and third-degree assault and battery as lesser-included offenses of third-degree criminal sexual conduct with a minor. (R. pp. 152-153). In support of those requests, defense counsel contended first-degree assault and battery was the "equivalent" of the former common-law offense of assault and battery of high and aggravated nature, which had previously been found to be a lesser-included offense of some criminal sexual conduct offenses, while contending there was evidence presented that could support the elements of that offense. (R. pp. 153-155). Furthermore, defense counsel argued second-degree assault and battery is a lesser-included offense of third-degree criminal sexual conduct with a minor in light of the fact that offense required proof of lewd and lascivious intent while second-degree assault and battery did not. (R. pp. 155-156).

After considering the arguments of counsel, the trial judge denied defense counsel's requests. (R. pp. 156-157). In doing so, the trial judge explained the legislature replaced the prior common-law assault and battery offenses with a tiered assault and battery statutory scheme, specifically delineated the offenses to which those new statutory offenses would be considered to be lesser-included offenses, and could have indicated those new offenses be treated as lesser-included offenses of criminal sexual conduct if such a result had been desired. (R. pp. 156-157).

Thereafter, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (R. pp. 158-188). During his jury charge, the trial judge instructed the jury on the elements of the indicted offenses of second-degree and third-degree criminal sexual conduct with a minor but did not present instructions on any other offenses.[2] (R. pp. 184-185). Following those instructions, the trial judge inquired of the parties

[2] As part of his jury charges, the trial judge presented an instruction to the jury that improperly singled out the testimony of juvenile witnesses and appeared to incorrectly suggest the testimony of such witnesses warranted more scrutiny than the testimony of other witnesses for a variety of

whether they had any issues with the jury charge as presented, and defense counsel expressly responded, "No, Your Honor." (R. p. 189).

Subsequently, at the conclusion of trial, the jury convicted Hernandez of second-degree criminal sexual conduct with a minor in regard to Victim 1 and acquitted him of the remaining charges related to his other victims.[3] (R. p. 195). Following the verdict, the trial judge sentenced Hernandez to a fifteen-year term of incarceration. (R. p. 209). Defense counsel then filed post-trial motions seeking reconsideration of Hernandez's sentence along with a new trial for several different reasons, including the trial judge's refusal to instruct the jury on any lesser-included offenses, and the trial judge promptly denied those motions. (R. p. 230; pp. 231-232; p. 233).

Thereafter, Hernandez timely appealed his conviction on the basis the trial judge allegedly erred by failing to instruct the jury on the offenses of first-degree and second-degree assault and battery as purported lesser-included offenses of second-degree criminal sexual conduct with a minor. (App'x pp. 44-45). However, on appeal, the Court of Appeals unanimously affirmed Hernandez's conviction after finding those offenses were not, in fact, lesser-included offenses of second-degree criminal sexual conduct with a minor. (App'x p. 48).

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reasons that are applicable to all witnesses regardless of age. (R. pp. 183-184). Specifically, the trial judge instructed the jury: "During the trial, you've heard testimony from children. Where a witness is a child you must determine, as with any witness, whether the testimony is believable. In deciding believability, you may consider not only matters that I have already discussed with you about all witnesses, but you may also consider the age of the child, the child's ability to observe and remember facts, and the child's ability to understand and answer questions. Because young children may not fully understand what is happening, here, it is up to you to decide whether the child understood the seriousness of appearing as a witness at this trial; whether the child understood the questions; whether the child has a good memory; and whether the child understands the difference between lying and telling the truth. In addition, young children may be influenced by the way the questions are asked. It is up to you to decide whether the child understood the questions asked." (R. pp. 183-184).

[3] Notably, the jurors determined the testimony of Victim 2 and Victim 3 was not sufficient to satisfy the State's burden of proof despite the fact the trial judge had instructed them—prior to the issuance of the decision in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016)— "the testimony of victims need not be corroborated" in criminal sexual conduct cases. (R. p. 185).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal, an appellate court reviewing a trial judge's jury charge must view the 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); see Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation in analyzing whether the defendant's due process rights have been violated."). When reviewing a jury charge, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal."); see also State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied."). Moreover, an appellate court will only reverse a trial judge's decision regarding jury instructions when that decision constitutes an abuse of discretion resulting in actual prejudice. See Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion."); Rauch v. Zayas, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985) ("[A]n alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial.").

ARGUMENT

Any issue with the trial judge's refusal to instruct the jury on first-degree and second-degree assault and battery as purported lesser-included offenses of second-degree criminal sexual conduct with a minor was not properly preserved for appellate review because defense counsel waived any such issue during trial by directly indicating to the trial judge she had no objections to the jury instructions as presented after the trial judge finished instructing the jury on the applicable law. However, regardless of any issue preservation concerns, the Court of Appeals correctly found the trial judge committed no error by declining to instruct the jury on the statutory offenses of first-degree and second-degree assault and battery because those offenses were not and are not lesser-included offenses of second-degree criminal sexual conduct with a minor.

Hernandez contends the Court of Appeals erred by affirming the trial judge's decision not to instruct the jury on the statutory offenses of first-degree and second-degree assault and battery. In support of that contention, Hernandez maintains first-degree and second-degree assault and battery were and are lesser-included offenses of second-degree criminal sexual conduct with a minor in light of the fact the common-law offense of assault and battery of a high and aggravated nature has previously been found to be a lesser-included offense of some criminal sexual conduct offenses. Furthermore, Hernandez maintains the facts of his case justified charges on first-degree and second-degree assault and battery as lesser-included offenses. Initially, any issue with the trial judge's jury instructions was not properly preserved for appellate review in Hernandez's case because defense counsel waived any issue she may have had by specifically indicating to the trial judge she had no objections to the jury charge after it was presented. However, notwithstanding any issue preservation concerns, first-degree and second-degree assault and battery were not and are not lesser-included offenses of second-degree criminal sexual conduct with a minor in light of the fact second-degree criminal sexual conduct with a minor does *not* include all the elements of either first-degree or second-degree assault and battery. Moreover, first-degree and second-degree assault and battery are not lesser-included offenses of second-degree criminal sexual conduct with a minor in light of the fact the

legislature elected not to recognize them as such. Therefore, the trial judge properly declined to instruct the jury on first-degree and second-degree assault and battery in Hernandez's case, and the Court of Appeals correctly affirmed the trial judge's charging decision on appeal. Hernandez's petition for a writ of certiorari should be denied.

A. Waiver of Any Issue Regarding the Trial Judge's Jury Instructions

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). In order for an issue to properly be preserved for appellate review, the issue must be: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). Importantly, "[i]f a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

Moreover, even if a party properly raises an objection during trial, a party may still waive his right to argue error in regard to that objection on appeal under certain circumstances. See State v. O'Neal, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) (recognizing a previously-raised objection can be waived). Significantly, one of the ways a party can waive an objection is by indicating to the trial judge the party does not have an objection to an issue to which the party previously raised an objection. See State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) (holding Brown's issue with a jury instruction was not preserved for appellate review where Brown explicitly stated to the trial judge he had no objection to the instruction); State v.

Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) (holding Rios waived his right to allege error with a jury charge on appeal where the trial court specifically asked if there were any objections to the instructions given and Rios responded there were none); State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) ("Dicapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue Dicapua had with the videotape."); cf. Commonwealth v. Moury, 992 A.2d 162, 178 (Pa. Super. Ct. 2010) ("Generally, a defendant waives subsequent challenges to the propriety of the jury charge on appeal if he responds in the negative when the court asks whether additions or corrections to a jury charge are necessary.").

In the case sub judice, any issue in regard to the trial judge's instructions to the jury was not properly preserved for appellate review. That is true because, even though defense counsel initially requested the trial judge instruct the jury on first-degree and second-degree assault and battery as purported lesser-included offenses of second-degree criminal sexual conduct with a minor and the trial judge denied those requests after explaining why he did not believe the requested charges were appropriate, defense counsel subsequently expressly waived any issue regarding the trial judge's jury instructions by directly and unreservedly affirming to the trial judge she had no issues with or objections to the jury charge as presented, which, significantly, did *not* include any instruction on lesser-included offenses. See Brown, 402 S.C. at 125, 740 S.E.2d at 496 ("[Brown]'s trial counsel stated explicitly that he 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."); see also Burke v. AnMed Health, 393 S.C. 48, 55, 710

S.E.2d 84, 88 (Ct. App. 2011) ("When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review."). Accordingly, in light of the fact defense counsel directly affirmed she had no issues with or objections to the jury instructions after they were given, any issue Hernandez may have had in regard to the trial judge's jury instructions was expressly waived, and no issue regarding the trial judge's failure to instruct the jury on first-degree and second-degree assault and battery can properly be raised or addressed on appeal. See State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court "cannot address unpreserved errors"). Hernandez's petition for a writ of certiorari should be denied.

B. Propriety of the Trial Judge's Jury Instructions

The purpose of a trial judge's jury instructions is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). When instructing a jury on the law, a trial judge is required to charge only the current and correct law of South Carolina, and the law to be charged 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); see State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003) ("In general, the trial judge is required to charge only the current and correct law of South Carolina, . . . and the law to be charged to the jury is determined by the evidence at trial." (citations omitted)). Ordinarily, a trial court has a duty to give a requested instruction when it correctly states the law applicable to the issues and is supported by the evidence, but a trial judge should decline to give a requested instruction when it tenders an issue that is not presented or supported by the evidence. State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996); see State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d

31, 34 (1975) ("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.").

When 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). Generally, pursuant to the accepted test for determining whether an offense is a lesser-included offense of another, an offense is considered to be a lesser-included offense of a greater offense if the greater offense includes all the elements of the lesser-included offense. State v. Primus, 349 S.C. 576, 579-580, 564 S.E.2d 103, 105 (2002), overruled on other grounds by State v. Gentry, 563 S.C. 93, 610 S.E.2d 494 (2005). However, "[i]f the lesser offense includes an element which is not included in the greater offense, then the lesser offense is *not* included in the greater offense." Id. at 580, 564 S.E.2d at 105 (emphasis added). Significantly, in determining whether an offense is a lesser-included offense of another, courts in South Carolina typically apply the elements test to make that determination with few exceptions. See id. ("While the Court recognizes the existence of a few anomalies, it generally adheres to the use of the traditional elements test.").

In the case at bar, the trial judge committed no error in declining to instruct the jury on the offenses of first-degree and second-degree assault and battery because—just as the Court of Appeals recognized—those crimes were not and are not lesser-included offenses of second-degree criminal sexual conduct with a minor. That is true because, looking to the elements of the offenses, second-degree criminal sexual conduct with a minor does *not* include all the elements of either first-degree or second-degree assault and battery. Compare S.C. Code Ann. § 16-3-655(B) (defining the offense of second-degree criminal sexual conduct with a minor, which

requires proof: (1) the actor engaged in a sexual battery with a victim who was between eleven and fourteen years old; or (2) the actor engaged in a sexual battery with a victim who was at least fourteen years old but less than sixteen years old and the actor was in a "position of familial, custodial, or official authority to coerce the victim to submit" or was older than the victim); and S.C. Code Ann. § 16-3-651 (defining sexual battery for purposes of criminal sexual conduct offenses as "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 where such intrusion is accomplished for medically recognized treatment or diagnostic purposes"); with S.C. Code Ann. § 16-3-600(C)(1) (defining the offense of first-degree assault and battery, which requires proof: (1) the actor injured another through nonconsensual touching of the private parts with lewd and lascivious intent or during the course of a robbery, burglary, kidnapping, or theft; or (2) the actor offered or attempted to injure another person with the present ability to do so by a means likely to produce death or great bodily injury or during the commission of a robbery, burglary, kidnapping, or theft); and S.C. Code Ann. § 16-3-600(D)(1) (defining the offense of second-degree assault and battery, which requires proof the actor injured another person or offered or attempted to injure another person with the present ability to do so and: (1) moderate bodily injury resulted or could have resulted; or (2) the act involved the nonconsensual touching of the private parts of a person above or underneath the person's clothing). Specifically, second-degree criminal sexual conduct with a minor does *not* include any elements requiring proof of an injury or an offer or attempt to injure, proof of nonconsensual touching of a person's private parts, proof of lewd and lascivious intent, proof establishing another crime like a robbery or a burglary was committed, proof establishing death or great bodily injury could have resulted, or proof establishing moderate bodily injury was

inflicted or could have been inflicted. S.C. Code Ann. § 16-3-655(B). As a result, first-degree and second-degree assault and battery are not lesser-included offenses of second-degree criminal sexual conduct with a minor under the recognized and accepted test for determining whether offenses are lesser-included offenses of another. 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).

Recognizing that fact, Hernandez has consistently conceded on appeal first-degree and second-degree assault and battery are not lesser-included offenses of second-degree criminal sexual conduct with a minor pursuant to the traditional elements test while contending they should nonetheless be treated as such based on "[t]radition, justice, and fairness[.]" In support of that contention, Hernandez relies primarily on the fact the common-law offense of assault and battery of a high and aggravated nature—prior to its *abolition* though the passage of the Omnibus Crime Reduction and Sentencing Reform Act of 2010—had historically been considered to be a lesser-included offense of first-degree criminal sexual conduct purely as a matter of common-law tradition. See Primus, 349 S.C. at 581, 564 S.E.2d at 106 ("[E]mploying the traditional elements test, ABHAN is not a lesser-included offense of first degree CSC. Nevertheless, the Court most recently determined that *because it had consistently held ABHAN is a lesser included offense* of assault with intent to commit CSC, it would continue this ruling even though the two offenses failed the traditional elements test. In order to have a uniform approach to CSC and ABHAN offenses, we likewise hold ABHAN is a lesser included offense of first degree CSC." (emphasis added and citations omitted)); State v. Elliott, 346 S.C. 603, 607, 552 S.E.2d 727, 729 (2001) (finding common-law assault and battery of a high and aggravated nature

to be a lesser-included offense of assault with intent to commit criminal sexual conduct in light of the fact common-law assault and battery had been considered to a lesser-included offense of assault with intent to ravish, a predecessor to assault with intent to commit criminal sexual conduct), overruled on other grounds by State v. Gentry, 563 S.C. 93, 610 S.E.2d 494 (2005); see also 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.").

Importantly though, in *abolishing* the former assault and battery offenses along with any common-law traditions related to those offenses, the legislature in South Carolina specifically identified the different offenses to which the new statutory assault and battery offenses could be considered to be lesser-included offenses. See Elliott, 346 S.C. at 607, n. 2, 552 S.E.2d at 729 ("[T]he 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, as it was of AIR." (emphasis added)); 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."). Tellingly, the legislature elected *not* to recognize first-degree assault and battery, second-degree assault and battery, or any of the other new statutory assault and battery offenses as lesser-included offenses of any criminal sexual conduct offenses, including second-degree criminal sexual conduct with a minor. See 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."). Because the legislature specifically chose to identify first-degree and second-degree assault and battery as lesser-included offenses of certain specified offenses while choosing not to identify them as lesser-included offenses of any criminal sexual conduct offenses, the statutory offenses of first-degree and second-degree assault and battery are *not* lesser-included offenses of second-degree criminal sexual conduct with a minor.[4] See Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' "); see also State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. *We cannot under our power of construction supply an omission in the statute*." (emphasis added)); cf. Nelson v. Ozmint, 390 S.C. 432, 436, 702 S.E.2d 369, 371 (2010) (finding the legislature's inclusion of language allowing for early release in one statute but omitting it in another evidenced the legislature intent for a defendant convicted of the offense delineated in the statute not containing the early release language to be ineligible for it).

Additionally, as support of his contention first-degree and second-degree assault and battery should be found to be lesser-included offenses of criminal sexual conduct with a minor offenses, Hernandez maintains the "very language" employed by the legislature in the statutory

[4] Perhaps tellingly, Hernandez has made no references to the "inclusio unius est exclusio alterius" canon of statutory construction or to the fact common law assault and battery of a high and aggravated nature was expressly abolished at any point in his petition for a writ of certiorari. (Pet. for Cert. pp. 1-20).

assault and battery offenses demonstrates the legislature's intention for those offenses to be lesser-included offenses of criminal sexual conduct with a minor since language such as "private parts" and "lewd and lascivious intent" was included in the provisions defining first-degree and second-degree assault and battery. See S.C. Code Ann. § 16-3-600(C)(1) (defining the offense of first-degree assault and battery, which requires proof the actor injured another through nonconsensual touching of the "private parts" with "lewd and lascivious intent" in order to prove the offense in one of multiple ways); S.C. Code Ann. § 16-3-600(D)(1) (defining the offense of second-degree assault and battery, which requires proof the actor injured another person or offered or attempted to injure another person with the present ability to do so and the act involved the nonconsensual touching of the private parts of a person above or underneath the person's clothing in order to prove the offense in one of multiple ways). Critically though, the former offense of committing a lewd act on a minor was not and has not historically been recognized by our appellate courts as being a lesser-included offense of any criminal sexual conduct with a minor offenses despite the fact it involved "lewd and lascivious" conduct directed at a minor victim, such as the inappropriate touching of a child's "private parts." See State v. Norton, 286 S.C. 95, 96, 332 S.E.2d 531, 532 (1985) (instructing "the offense of committing a lewd act upon a minor is not a lesser included offense of first degree criminal sexual conduct on a minor" while further recognizing the statute defining the offense of committing a lewd act upon a minor made it unlawful "for any person over the age of fourteen years to wilfully and lewdly commit or attempt any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child"). Therefore, since the language employed by the legislature in the new statutory assault and

battery offenses was highly similar in many ways to the language used to define an offense that historically has *not* been recognized as a lesser-included offense of criminal sexual conduct with a minor, the legislature's use of that language in no way demonstrates an intent for those statutory offenses to be considered as lesser-included offenses of criminal sexual conduct with a minor offenses and, instead, more logically demonstrates an intent *to the contrary* in light of the fact the legislature was presumed to be aware of how our courts have previously interpreted such language in the context of lesser-included offenses.[5] See State v. Bridgers, 329 S.C. 11, 14, 495

[5] In making his appellate argument that purportedly seeks justice and fairness, Hernandez appears to suggest this Court should agree with his position regardless of whether it is right or wrong because a decision contrary to his position will allegedly have an adverse impact in "numerous" unidentified cases in which defendants supposedly pled guilty to various statutory assault and battery offenses after initially being charged with criminal sexual conduct offenses without being re-indicted or waiving presentment. Significantly though, even if Hernandez's unsupported claim about "numerous" other cases was correct, the fact a correct legal ruling on appeal would have an adverse impact in other cases in which incorrect rulings and decisions were made should not have—and has not historically had—an impact on the outcome of an appeal in South Carolina. For example, this Court in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), recently found error in the presentation of a jury instruction our appellate courts *had directly and consistently authorized* in the past. Compare Stukes, 416 S.C. at 500, 787 S.E.2d at 483 ("[W]e overrule our precedent to the extent it condones the use of section 16-3-657 as a jury charge."); with State v. Rayfield, 369 S.C. 106, 115, 631 S.E.2d 244, 249 (2006) ("We . . . conclude the Court of Appeals properly relied on [a prior Supreme Court decision] in holding the trial judge did not err in charging the jury that the victim's testimony need not be corroborated by other testimony or evidence."). Undoubtedly, in doing so, this Court fully recognized its decision would result in adverse consequences in criminal cases in which a trial judge had done nothing more than faithfully follow its own prior directives. See Stukes, 416 S.C. at 500, n. 5, 787 S.E.2d at 483("[O]ur ruling is effective in this case and those which are pending on direct review or are not yet final, but not in post-conviction relief."); see also State v. Witherspoon, 418 S.C. 641, 642-643, 795 S.E.2d 685, 686 (2016) (reversing a conviction based on the decision in Stukes, which had not been issued until after the time of trial and after this Court had affirmed Witherspoon's conviction on direct appeal). Nevertheless, this Court reached the decision in Stukes regardless of the widespread consequences that decision would have in other cases because its decision was the one it believed was correct and mandated by the law. See Stukes, 416 S.C. at 499, 787 S.E.2d at 483 ("We are persuaded by the dissent in Rayfield and conclude this charge is confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case."). Accordingly, the fact a legally-correct determination first-degree and second-degree assault and battery are not lesser-included offenses of criminal sexual conduct with a minor offenses could have potential consequences in some

S.E.2d 196, 197-198 (1997) ("The General Assembly is presumed to be aware of the common law[.]"); King, 412 S.C. at 409, 772 S.E.2d at 192 (instructing the legislature is "presumed to know how the terms and phrases it uses in a statute have been interpreted in the past").

Finally, in seeking a reversal of his conviction, Hernandez maintains the evidence presented during his trial warranted the submission of instructions on first-degree and second-degree assault and battery to the jury because there was some confusion based on the testimony as to whether he actually penetrated his eleven-year-old victim's vagina or merely unlawfully touched it. Notwithstanding the fact first-degree and second-degree assault and battery were properly not presented to the jury since they are *not* lesser-included offenses of second-degree criminal sexual conduct with a minor, Hernandez's fact-based arguments demonstrate the erroneous and illogical nature of his appellate contentions. Critically, assuming Hernandez had only lewdly touched his minor victim's vagina without committing an act of penetration, the jury would have been required to acquit him of second-degree criminal sexual conduct with a minor based on the instructions presented by the trial judge, and the jury in Hernandez's case showed no reluctance to acquit when it believed the evidence was insufficient to prove a charge beyond a reasonable doubt, which was best demonstrated by the fact it acquitted Hernandez of two of the three indicted offenses. Likewise, if Hernandez had lewdly touched his victim's vagina without penetrating it, such an act would have constituted the "most serious" offense of third-degree criminal sexual conduct with a minor as opposed to some form of assault and battery that was not enacted to address the heightened seriousness of a criminal sexual act committed upon a juvenile victim. See S.C. Code Ann. § 16-3-655(C) ("A person is guilty of criminal sexual conduct with a minor in the third degree if the actor is over fourteen years of age and the actor

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other unidentified cases in which the law was not properly followed and applied would in no way warrant a different outcome from the one so far reached in Hernandez's case.

wilfully and lewdly commits or attempts to commit a lewd or lascivious act upon or with the body, or its parts, of a child under sixteen years of age, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child."); see also S.C. Code Ann. § 17-25-45(C)(1) (identifying any form of criminal sexual conduct with minor as prohibited by Section 16-3-655 as a whole as constituting a "most serious" offense for recidivist sentencing purposes); S.C. Code Ann. § 17-25-45(C)(2) (identifying offenses that qualify as "serious" offenses for recidivist sentencing purposes and not including either first-degree or second-degree assault and battery in that list). In fact, since third-degree criminal sexual conduct with a minor is *not* a lesser-included offense of second-degree criminal sexual conduct with a minor pursuant to the elements test, Hernandez could have been—and still could be—charged with the distinct offense of third-degree criminal sexual conduct with a minor for the touching that occurred separate and apart from the penetration of his victim's vagina *in addition to* being charged with second-degree criminal sexual conduct with a minor for the penetration that occurred. See State v. Moyd, 321 S.C. 256, 258, 468 S.E.2d 7, 9 (1996) ("A defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy where a single act consists of two 'distinct' offenses."); State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989) ("Under South Carolina law, distinct criminal offenses may arise from a single act."). Under those circumstances, first-degree and second-degree assault and battery could not logically be considered as lesser-included offenses of second-degree criminal sexual conduct with a minor since any act of inappropriate touching of a minor's private parts without penetration would constitute a "most serious" offense prohibited by an entirely different provision of law from the provision prohibiting the offense for which Hernandez was indicted,

which strongly demonstrates why the trial judge committed no error by declining to instruct the jury on the uncharged offenses of first-degree and second-degree assault and battery.[6]

For all the foregoing reasons, first-degree and second-degree assault and battery are not—just as the trial judge and the Court of Appeals correctly and logically found—lesser-included offenses of second-degree criminal sexual conduct with a minor and, thus, were properly not presented to the jury in Hernandez's case. See Elliott, 346 S.C. at 606, 552 S.E.2d at 728 ("The test for determining when an offense is a lesser included offense of another is whether the greater of the two offenses includes all the elements of the lesser offense."); see also State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002) ("Only law applicable to the case should be charged to the jury."). Accordingly, the trial judge committed no error by declining to instruct the jury on those unindicted offenses, and the Court of Appeals correctly affirmed the trial judge's charging decision on appeal. See Rye, 375 S.C. at 123, 651 S.E.2d at 323 ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied."). Hernandez's petition for a writ of certiorari should be denied.

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[6] Notably, the illogical and inconsistent nature of the common law tradition that treated common law assault and battery of a high and aggravated nature as a lesser-included offense of criminal sexual conduct offenses very well might have been the precise reason why the legislature elected *not* to treat the new statutory assault and battery offenses as lesser-included offenses of any criminal sexual conduct offenses when it enacted them. See Elliott, 346 S.C. at 607, 552 S.E.2d at 729 ("[W]e recognize this situation presents an anomaly in the law, akin to manslaughter and murder. The common law does not always fit into the neat categories we might prefer.").

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

January 10, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Beaufort County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2019-000023

THE STATE,

Respondent,

vs.

BENJAMIN CERVANTES HERNANDEZ,

Petitioner.

PROOF OF SERVICE

I, Mark R. Farthing, certify I have served the within Return to Petition for Writ of Certiorari on Petitioner by sending two copies of the same to:

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

I further certify all parties required by Rule to be served have been served.
This 10th day of January, 2019.

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ALAN WILSON
ATTORNEY GENERAL

January 10, 2019

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

RE: State v. Benjamin Cervantez Hernandez – Appellate Case No. 2019-000023

Dear Ms. Hackett:

I am enclosing two copies of the Return to Petition for Writ of Certiorari, along with proof of service, in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Honorable Daniel E. Shearouse (original and six enclosed)
Honorable Jenny A. Kitchings
Victim Services