

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Spartanburg County  
J. Derham Cole, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JOSEPH COBB,

APPELLANT

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FINAL BRIEF OF APPELLANT

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**SC Court of Appeals**

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by refusing to instruct the jury regarding assault and battery of a high and aggravated nature in a trial for second degree criminal sexual conduct with a minor where testimonial evidence was present indicating Appellant was unable to have intercourse with the Complaining Witness?

## STATEMENT OF THE CASE

Appellant Joseph Gabriel Cobb was indicted on August 23, 2007, by the Spartanburg County Grand Jury for second degree criminal sexual conduct with a minor (CSCM 2nd). R. 9, ll. 15-25; R.216 (Indictment). Appellant's case proceeded to trial from March 9 through 10, 2011, before the Honorable J. Derham Cole, and a jury. Richard H. Welchel represented Appellant, while the State was represented by Jennifer A. J. Jordan. R. 1.

The jury found Appellant guilty as charged. R.208, ll. 12-16. Appellant was sentenced to life imprisonment without possibility of parole pursuant to Section 17-25-45 of the South Carolina Code. R. 213, ll. 9-16.

## ARGUMENT

**The trial court erred by refusing to instruct the jury regarding assault and battery of a high and aggravated nature in a trial for second degree criminal sexual conduct with a minor where testimonial evidence was present indicating Appellant was unable to have intercourse with the Complaining Witness.**

Evidence was produced at Appellant's trial through two State witnesses—Tammy Clawson (Clawson), and detective Nicki Cantrell (Cantrell)—indicating Appellant did not have intercourse with the Complaining Witness. If believed, the jury could have found that Appellant forced the Complaining Witness to the bathroom floor with his arm across her throat, as the Complaining Witness testified,<sup>1</sup> but that the Appellant was physically unable to carry out a sexual battery. As such, the trial court erred by refusing to give the requested jury instruction of assault and battery of a high and aggravated nature (ABHAN).<sup>2</sup>

ABHAN is a lesser-included offense of CSCM 2nd. See Magazine v. State, 361 S.C. 610, 618, 606 S.E.2d 761, 766 (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, 387 S.C. 589, 593, 340 S.E.2d 538, 541 (1986). “A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which the jury could infer that a defendant committed the lesser offense rather than the greater.” Pressley, 292 S.C. at 10, 354 S.E.2d at 777; see also Mathis, 387 S.C. at 594, 340 S.E.2d at 541.

Two of the three types of cases “in which the evidence can support an inference that the defendant is guilty of ABHAN instead of CSC” include the following: “(1) there is

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<sup>1</sup>R. 27, ln. 10—R. 28, ln. 10.

<sup>2</sup> Counsel for Appellant raised the issue on multiple occasions, including at the jury instruction conference, after the jury instructions were given, and after the verdict was rendered. R. 156, ll. 2-9; R. 159, ln. 11—R. 162, ln. 16; R. 207, ln. 3-4; R. 210, ll. 14-24.

evidence that 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,” and (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.” State v. Gilmore, 396 S.C. 72, 77-78, 719 S.E.2d 688, 691 (Ct. App. 2011). Therefore, if the evidence presented at trial complies with either of these scenarios, then the court must give a requested ABHAN jury instruction.

In the present case, two State witnesses provided the necessary evidence that Appellant committed ABHAN, but not a sexual battery. Clawson is the former sister-in-law of Appellant who was at his residence on July 10, 2007. Everyone, including herself, went outside after hearing an argument between Appellant and his wife in the front yard. R. 74, ln. 21—R. 75, ln. 25. Clawson testified that Appellant said “he tried to have sex with [Complaining Witness] but he couldn’t get it up to get into her.” R. 75, ll. 1-6.

The State also elicited testimony from Cantrell, which essentially corroborated the same information. Cantrell took three statements from Appellant: one oral, another written, and another on video. The substance of all three statements was relayed to the jury. Although Appellant’s statements included reasons why his DNA might be found in the State Law Enforcement Division sexual assault kit (SLED kit) performed on the Complaining Witness, he stated that he did not rape her, but did have sex with her. Specifically, Cantrell testified that Appellant stated “he tried to have sex with [Complaining Witness] but he had difficulty getting an erection . . . .” R. 143, ll. 5-6.

Finally, the DNA results from the SLED kit indicated the presence of Appellant's DNA on the neck and chest of the Complaining Witness. R. 110, ln. 10—R. 112, ln. 16. However, analysis of the vaginal and oral swabs from the Complaining Witness indicated that no semen was present. R. 109, 9-19; R. 119, ln. 23—R. 120, ln. 4; R. 154, ln. 18—R. 155, ln. 2. As such, the forensic evidence collected from the Complaining Witness and presented to the jury corroborates the evidence that Appellant was physically unable to carry out the sexual battery.<sup>3</sup>

Under the present circumstances, Appellant was entitled to a jury instruction on the lesser-included offense of ABHAN. Simply stated, there is evidence in the record indicating Appellant either (1) “committed ABHAN by an unlawful sexual touching in the course of attempting CSC, and there is conflicting evidence as to whether the [Appellant] accomplished sexual battery,” or (2) “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.” State v. Gilmore, 396 S.C. at 77-78, 719 S.E.2d at 691. The testimony of the Complaining

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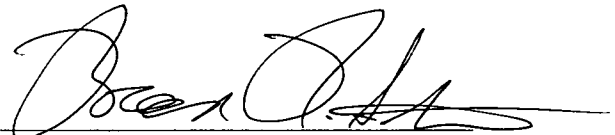
<sup>3</sup> The State's theory throughout trial supporting the single CSCM 2nd charge against Appellant was that of sexual intercourse in Appellant's bathroom in the early morning hours of July 10, 2007. R. 13, ll. 19-25; R. 168, ln. 23—R. 169, ln. 4. Although the Complaining Witness also testified to another incident later that day, that purported event was one of digital penetration, and was separate and apart from the incident comprising the offense for which Appellant was tried. R. 29, ll. 22-24. Accordingly, testimony regarding the later event should properly be considered character evidence of other bad acts under an exception to Rule 404(b) of the South Carolina Rules of Evidence rather than evidence of the indicted offense. See Rule 404(b), SCRE. To hold Appellant accountable for both incidents under one charge would violate the principles of double jeopardy. See U.S. Const. amend. V; S.C. Const. art. I, § 3; see also State v. Means, 367 S.C. 374, 383, 626 S.E.2d 348, 353 (2006) (“[A] sufficient indictment prevents later retrials for the same offense in contravention of the constitutional prohibition against double jeopardy and prevents the prosecutor from usurping the power of the grand jury by ensuring a defendant is tried for the crime for which he was indicted.”) (citing State v. Tabory, 262 S.C. 136, 139, 202 S.E.2d 852, 853 (1974)).

Witness readily indicates Appellant forced her to the ground and put his arm across her throat. Additionally, testimony of Clawson and Cantrell show Appellant was physically unable to complete the sexual battery. This version of events is further supported by the forensic evidence: Appellant's DNA was present on the Complaining Witness' neck and chest, but not in or around her vaginal area. Accordingly, evidence is present to support the jury instruction of ABHAN. Appellant therefore requests reversal of his conviction, and remand of his case for a new trial. See Pressley, 292 S.C. at 10, 354 S.E.2d at 778; Mathis, 287 S.C. at 594, 340 S.E.2d at 541.

CONCLUSION

For the foregoing reasons, Appellant Joseph G. Cobb respectfully requests reversal of his conviction, and remand of his case for new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen Richard Stevens", written over a horizontal line.

Breen Richard Stevens  
Appellate Defender


ATTORNEY FOR APPELLANT

This 17th day of September, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 17, 2012

A handwritten signature in black ink, appearing to read "Breen R. Stevens", with a long horizontal flourish extending to the right.

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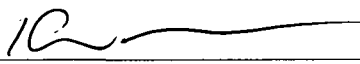
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 2920, this 17th day of September, 2012.

  
Breen Richard Stevens  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 17th day of September, 2012.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina

My Commission Expires: October 2, 2013