

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2011-188247

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JOSEPH COBB,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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S.C. Code Ann. § 16-3-655 5, 6

STATEMENT OF ISSUE ON APPEAL

The trial judge properly denied Appellant's request for a jury charge on the lesser offense of assault and battery of a high and aggravated nature where, although there was evidence that Appellant did not have sexual intercourse with the victim, there was no evidence that Appellant did not commit a sexual battery. Furthermore, Appellant suffered no prejudice from the judge's failure to charge assault and battery of a high and aggravated nature where the jury was charged with and expressly rejected the lesser offense of attempted criminal sexual conduct with a minor in the second degree, thereby concluding beyond a reasonable doubt that Appellant did complete a sexual battery.

STATEMENT OF THE CASE

Appellant was indicted in Spartanburg County in August 2007 for criminal sexual conduct with a minor in the second degree. On March 9-11, 2011, he proceeded to trial before the Honorable J. Derham Cole and a jury. The jury found Appellant guilty as indicted, and Judge Cole imposed a sentence of life without parole pursuant to S.C. Code Ann. § 17-25-45. A timely notice of appeal was served and filed.

ARGUMENT

The trial judge properly denied Appellant's request for a jury charge on the lesser offense of assault and battery of a high and aggravated nature where, although there was evidence that Appellant did not have sexual intercourse with the victim, there was no evidence that Appellant did not commit a sexual battery. Furthermore, Appellant suffered no prejudice from the judge's failure to charge assault and battery of a high and aggravated nature where the jury was charged with and expressly rejected the lesser offense of attempted criminal sexual conduct with a minor in the second degree, thereby concluding beyond a reasonable doubt that Appellant did complete a sexual battery.

A defendant is guilty of criminal sexual conduct ("CSC") with a minor in the second degree if the defendant engages in "sexual battery" with a victim who is at least fourteen years of age but who is less than sixteen years of age and the defendant is older than the victim. S.C. Code Ann. § 16-3-655(B) (2). "Sexual battery" is defined 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 when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h) (emphasis added). Thus, "sexual battery" does not require that the defendant have an erection, that he emit semen, or that he penetrate the hymen inside the vagina. Importantly, contrary to the suggestion in Appellant's issue statement, engaging in sexual intercourse - although it is one of the enumerated ways to carry out a sexual battery - is not a required component of a sexual battery. Instead, for a sexual battery to occur, all that is required is that there be "any intrusion, however slight," of the defendant's body part into the genital or anal openings of the victim's body. See S.C. Code Ann. § 16-3-651(h).

Appellant argues that he was entitled to a jury charge on the lesser offense of assault and battery of a high and aggravated nature ("ABHAN") because the State

presented evidence that he “did not have intercourse” with the victim and that this evidence indicated that Appellant was unable to carry out a sexual battery. (See Brief of Appellant, page 5). It is indeed true that there is evidence in the record suggesting that Appellant could not complete an act of sexual intercourse, i.e., that he had difficulty maintaining an erection and did not ejaculate. (See R. p. 75, lines 1-5; p. 143, lines 4-7; State’s Exhibit # 12, video, on file with this Court). However, as discussed above, sexual intercourse is not required in order for Appellant to be guilty of engaging in a sexual battery. See S.C. Code Ann. § 16-3-655(B)(2) & § 16-3-651(H). All that is required is that there be “any intrusion, however slight” of Appellant’s penis into the victim’s genital opening. See S.C. Code Ann. § 16-3-651(h).

Here, Appellant admitted in his videotaped statement to Detective Cantrell that he had consensual sexual relations with the victim after she “came on to him” and that, although he had difficulty maintaining an erection, he was on top of the victim repeatedly “trying” to put his penis into the victim in order to have sexual intercourse with her. (See State’s Exhibit # 12, video, on file with this Court). Thus, what necessarily occurred during this time is that Appellant pressed his naked penis into the victim’s vaginal opening and made his best efforts to fully insert it. These actions by Appellant clearly constituted “any intrusion, however slight,” into the victim’s genital opening, as required by S.C. Code Ann. § 16-3-651(h). See South Carolina Dept. of Social Services v. Forrester, 282 S.C. 512, 320 S.E.2d 39 (1984) (despite the fact that the victim’s hymen was still intact and a doctor testified that he did not believe “penetration” occurred, any slight insertion of the defendant’s finger into the victim’s genital opening constituted an “intrusion” under the statute such that a sexual battery occurred); see also State v.

Worthy, 239 S.C. 449, 462, 123 S.E.2d 835, 842 (1962) (“In order to constitute the crime of rape there must be some degree of penetration of the female genital organ by the male genital organ, but any penetration, however slight, is all that is necessary. It is not necessary for the State to prove emission.”), *overruled in part on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Morgan, 352 S.C. 359, 371-72, 574 S.E.2d 203, 209 (Ct. App. 2002) (citing People v. Legg, 197 Mich.App. 131, 494 N.W.2d 797 (1992)) (the labia are included in the “genital openings” of the female). Thus, regardless of whether Appellant was able to maintain an erection that would have allowed him to engage in sexual intercourse, a sexual battery necessarily occurred even under Appellant’s own version of the facts.

Accordingly, since there was no evidence that Appellant was guilty of *only* the lesser offense of ABHAN, the trial judge properly denied Appellant’s request for the charge. *See, e.g., State v. Tucker*, 324 S.C. 155, 170, 478 S.E.2d 260, 268 (1996) (citation omitted) (“The trial court should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser rather than the greater offense.”); State v. Geiger, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (Ct. App. 2006) (citations omitted) (“[I]t is not error to refuse to charge the lesser included offense unless there is evidence tending to show the defendant was guilty only of the lesser offense.”); State v. Forbes, 296 S.C. 344, 345, 372 S.E.2d 591, 592 (1988) (if the evidence shows appellant committed a sexual battery as defined by § 16-3-651(h) or no battery at all, appellate is not entitled to a charge of ABHAN).

In any event, even assuming the judge erred in refusing to charge the lesser offense of ABHAN, Appellant suffered no prejudice. At defense counsel’s request, the

trial judge charged the jury regarding attempted CSC with a minor in the second degree. (R. p. 162-65; p. 202-203). The jury rejected the attempt offense in favor of the principal offense, thereby rejecting the contention that Appellant attempted but was unable to complete a sexual battery, and concluding beyond a reasonable doubt that Appellant did, in fact, complete a sexual battery. (R. p. 208, lines 12-22). Therefore, even if the judge erred in failing to give the lesser included charge of ABHAN, Appellant suffered no prejudice. See, e.g., State v. Brandt, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011) (citation omitted) (“To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.”).

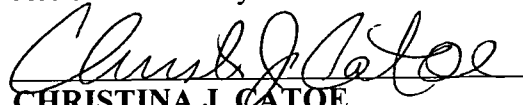
CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

September 14, 2012

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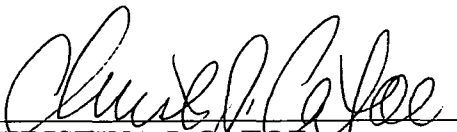
v.

JOSEPH COBB,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.



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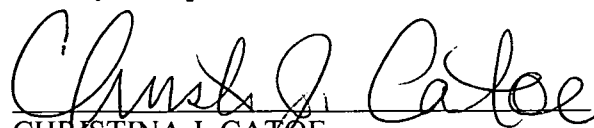
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AFFIDAVIT OF SERVICE

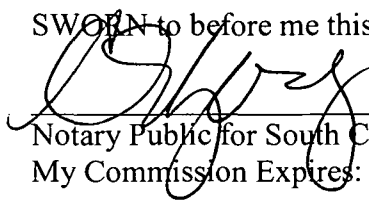
The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **Breen R. Stevens**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this 14th day of **September, 2012**.



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SWORN to before me this 14th day of September, 2012.



Notary Public for South Carolina.
My Commission Expires: 4/28/2014