STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2013-001924

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

RANDALL DEAN MATHENY,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge properly denied Appellant's request for jury charges regarding assault and battery of a high and aggravated nature and assault and battery in the first degree because there was no evidence Appellant was guilty of these offenses rather than criminal sexual conduct with a minor in the first degree where Appellant admitted the conduct constituting a "sexual battery" against the eighteen-month-old victim.

STATEMENT OF THE CASE

Appellant was indicted in Spartanburg County in August 2013 for criminal sexual conduct ("CSC") with a minor in the first degree and two counts of unlawful conduct toward a child. On August 27, 2013, Appellant proceeded to trial before the Honorable Roger L. Couch and a jury. The jury found Appellant guilty as indicted, and Judge Couch sentenced Appellant to twenty-five years for CSC with a minor and ten years, concurrent, for each count of unlawful conduct toward a child. A timely notice of appeal was served and filed.

ARGUMENT

The trial judge properly denied Appellant's request for jury charges regarding assault and battery of a high and aggravated nature and assault and battery in the first degree because there was no evidence Appellant was guilty of these offenses rather than criminal sexual conduct with a minor in the first degree where Appellant admitted the conduct constituting a "sexual battery" against the eighteen-month-old victim.

The evidence presented at trial established that Appellant repeatedly beat his girlfriend's eighteen-month-old twins until they had bruises all over their bodies and that Appellant shook the male child so hard that he sustained a subdural hematoma. (R. p. 12-24; p. 29-33; p. 37-40; p. 44; p. 50-51; p. 60-63; p. 113-19; p. 146-54; p. 245, line 4 – p. 246, line 12). Appellant also admitted, at trial and in statements to police, that he penetrated the female child's vagina. (R. p. 113-40; p. 221-25; p. 265). Appellant claimed at trial that he penetrated the victim's vagina with a wipe over his finger when he was trying to clean out diarrhea. (R. p. 221-25; p. 265, lines 7-14). He claimed he was angry at the victim's mother and "wipe[d] her too hard and . . . penetrated [her vagina]." (R. p. 224, lines 10-14). A pediatric forensic examiner testified about the extent of the victim's vaginal tear and internal injuries and the force required to cause them, and opined that the extensive injuries were caused by an object larger than a finger. (R. p. 175-96; p. 187, lines 16-19).

Issue Preservation

Initially, it is questionable whether or not the jury charge issues raised on appeal are preserved for review. At the close of the State's case, Appellant requested assault and battery of a high and aggravated nature ("ABHAN") and assault and battery in the first degree ("AB 1st") as lesser included offenses, and the judge denied the request after a discussion. (R. p. 202-07). Counsel then presented the defense case, which was followed

by closing arguments. (R. p. 211-317). After the jury charge was given, the trial judge asked whether or not there were "any objections to the charge" and defense counsel responded that "you gave a great charge" but inquired if the judge had given a criminal intent charge. (R. p. 338, lines 18-23). After further discussion, the judge decided to provide a brief instruction on criminal intent. (See R. p. 338-45). Following that charge and some instructions regarding the verdict form, the trial judge again asked if there were "[a]ny objections to [the] final instructions" and defense counsel specifically said "[n]o, sir" without reserving his prior request that the lesser offenses be charged. (R. p. 345, lines 14-18).

While counsel was not required to renew his request at the conclusion of the jury instructions in order to preserve the issue for review, see State v. Johnson, 333 S.C. 62, 64, 508 S.E.2d 29, 30 (1998), counsel waived his prior complaint about the trial judge's failure to charge ABHAN and AB 1st as lesser included offenses by affirmatively telling the judge he gave a "great charge" and that there were no objections following the final jury charge. See State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) (holding that Brown's issue with a jury instruction was not preserved for appellate review where Brown explicitly stated to the trial judge that he had no objection to the instruction); State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) ("Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, 'None.' By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal."); see also State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct induced."); Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (a party cannot acquiesce to an issue at trial and then complain on appeal); 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."); 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."); State v. McKinney, 258 S.C. 570, 571, 190 S.E.2d 30, 30 (1972) ("During the course of the trial certain testimony was admitted over the objection of [appellant's] counsel. Thereafter, counsel for the appellant cross-examined the witness thereabout *without reserving the objection previously made*. The objection was thereby lost and if any error had been committed in the admission of the testimony it was cured.") (emphasis added); cf. Keaton ex rel. Foster v. Greenville Hosp. System, 334 S.C. 488, 491-95, 514 S.E.2d 570, 572-74 (1999) (jury charge issue was preserved for appellate review where the party made an objection following the initial jury charge and the judge ruled upon the objection, and following the re-charge, the party told the judge that there were no ***further*** objections to the charge). Therefore, the jury charge issues raised on appeal are not preserved for appellate review.

Discussion

Appellant argues on appeal that ABHAN and AB 1st should be considered lesser-included offenses of CSC with a minor in the first degree even though these offenses were codified in 2010. He further asserts that the evidence presented in his case

supported charging these lesser offenses to the jury. This Court need not decide the issue of whether or not ABHAN and AB 1st are in fact lesser offenses of CSC with a minor because, even assuming they are lesser-included offenses,[1] there is no evidence that Appellant was guilty of ABHAN or AB 1st rather than CSC with a minor in the first degree.

The law to be charged is determined by the evidence presented at trial. State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004). It is only appropriate to give a charge on a lesser offense if there is evidence supporting that the defendant is guilty of the lesser offense instead of the greater offense. 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

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[1] In 2010, the Omnibus Crime Reduction and Sentencing Reform Act, "which substantially overhauled the state's criminal law," became effective State v Middleton, 407 S C 312, 315, 755 S E 2d 432, 434 (2014) "Through the passage of the Act, the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses " Id In place of these offenses, the Act codifies attempted murder, ABHAN, and three degrees of assault and battery See id Under the common law, ABHAN was defined as an unlawful act of violent injury accompanied by circumstances of aggravation; "circumstances of aggravation" included the use of a deadly weapon, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority State v Primus, 349 S C 576, 580-81, 564 S.E 2d 103, 105-106 (2002) (citations omitted) Although "serious bodily injury" was one of several circumstances of aggravation, great bodily injury was not a required element of common law ABHAN In 2010, the Legislature not only codified the offense of ABHAN, but also raised the maximum penalty from ten to twenty years and changed the elements of the offense The new ABHAN statute provides that "[a] person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and (a) great bodily injury to another person results, or (b) the act is accomplished by means likely to produce death or great bodily injury S C. Code § 16-3-600(B)(1) Thus, the new offense of ABHAN revolves around the concept of "great bodily injury," which is specifically defined in subsection (A) of the statute

Regarding AB 1st, assault and battery in the first, second, and third degrees are totally new offenses created by the same statute that codified ABHAN in 2010 Therefore, these offenses have not been traditionally considered lesser-included offenses of CSC Note also that all of the assault offenses created by S C Code § 16-3-600 specifically set forth lesser-included offenses, significantly, the statute does not mention CSC See S.C. Code § 16-3-600 (B)(3), (C)(3), & (D)(3) See City of Rock Hill v Harris, 391 S C. 149, 154, 705 S E 2d 53, 55 (2011) (the canon of statutory construction "*expressio unius est exclusio alterius*" or "*inclusio unius exclusio alterius*" holds that to express or include one thing implies the exclusion of another) (citations omitted)

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."). In a CSC case, the mere existence of evidence of ABHAN is not sufficient to require the jury charge; a charge on ABHAN is only required where there is "evidence the defendant committed ABHAN *instead of* CSC." State v. Gilmore, 396 S.C. 72, 77, 719 S.E.2d 688, 691 (Ct. App. 2011) (emphasis in original); see also State v. Forbes, 296 S.C. 344, 345, 372 S.E.2d 591, 592 (1988) ("ABHAN may be a lesser included offense of first degree CSC with a minor when there is evidence the defendant committed only the lesser rather than the greater offense.").

A defendant is guilty of CSC with a minor in the first degree where the defendant engages in sexual battery with a victim under eleven years of age. S.C. Code § 16-3-655(A). "Sexual battery" is specifically defined by statute 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).

In Appellant's case, there was no evidence whatsoever indicating Appellant was guilty of only ABHAN or AB 1st. Cf. State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986) (it was error not to charge ABHAN as a lesser offense of CSC with a minor where the child victim testified she could not remember if the defendant put his penis inside of her and the defendant denied having sex with the victim); State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986) (error not to charge ABHAN as a lesser offense of assault with intent to commit CSC where the jury could have concluded that there was no attempted

sexual battery based upon the defendant's testimony indicating he did not want to have sex with the victim but admitting that he took indecent liberties with the victim); State v. White, 361 S.C. at 413, 605 S.E.2d at 543 (error not to charge ABHAN as a lesser offense of CSC where there was evidence from which the jury could have concluded the sex was consensual and that the battery occurred immediately after the sexual encounter). Instead, the evidence conclusively established that Appellant was guilty of CSC with a minor in the first degree because he admitted the conduct constituting a "sexual battery;" specifically, he admitted he penetrated the eighteen-month-old victim's vagina.[2] (R. p. 221-25; p. 265, lines 7-14). Absent jury nullification, Appellant could not be found guilty of anything less than CSC with a minor in the first degree.[3] Accordingly, the trial

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[2] Contrary to Appellant's contentions on page 14 of his Brief, Appellant did **not** deny committing a "sexual battery." Instead, Appellant admitted the conduct constituting a "sexual battery" as defined by the statute but disputed his intent or motivation (See R p 223-25) However, as the solicitor pointed out below, sexual intent or purpose is not an element of the offense of CSC (R. p 200-01) Under the plain language of the statute, a defendant's motivation for committing a sexual battery is irrelevant as long as the defendant intentionally commits the sexual battery In this case, even under Appellant's version of events, a sexual battery necessarily occurred because Appellant penetrated the victim's vagina

[3] Further, there was no evidence supporting Appellant was guilty of ABHAN under the new statute. Prior to the 2010 statutory changes, our appellate courts identified three types of cases in which the evidence could support an inference that the defendant is guilty of ABHAN instead of CSC "(1) there is evidence the 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, (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, and (3) there is evidence the defendant committed a nonsexual ABHAN contemporaneous with CSC, but there is evidence that instead of CSC the two had consensual sex " (citations omitted) State v Gilmore, 396 S C at 77-78, 719 S E 2d at 691 After 2010, a person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person and "great bodily injury" to another person results or the act is accomplished by means likely to produce death or great bodily injury S C Code § 16-3-600(B)(1) Great bodily injury is defined as "bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ." S.C Code § 16-3-600(A)(1) Appellant asserts that the evidence in his case supported a charge of ABHAN because the State "presented evidence that Appellant caused great bodily injury to [the victim]", specifically, the "vaginal tear and other vaginal injuries " (See Brief of Appellant, p 11). Contrary to Appellant's contentions, there was no evidence supporting ABHAN under the pre-amendment theories or under the new ABHAN statute There was no "nonsexual ABHAN" contemporaneous with the CSC here; there was only the sexual battery which occurred when Appellant penetrated the victim's vagina Further, there was no evidence the vaginal injuries sustained by the victim constituted "great bodily injury" as defined by statute since there was no testimony indicating these injuries caused a "substantial risk of death" or caused "serious, permanent disfigurement or protracted loss or impairment " S C. Code § 16-3-600(A)(1). In fact,

judge did not err by refusing to charge ABHAN or AB 1st because there was no evidence Appellant was guilty of those offenses but not guilty of CSC. Appellant's conviction for CSC with a minor in the first degree should be upheld.

CONCLUSION

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

Respectfully submitted,

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September 8, 2014

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the pediatric forensic examiner testified that injuries to the vaginal area heal very rapidly (R p 194, lines 10-18)

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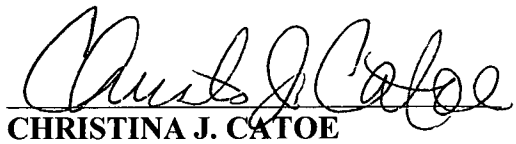
CERTIFICATE OF COUNSEL

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 most recent **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.



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