ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2013-001440

THE STATE,

Respondent,

vs.

NATHANIEL WITHERSPOON,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

In March of 2012, Appellant Nathaniel Witherspoon was arrested following an investigation into a violent home invasion and sexual assault that occurred on October 24, 2011. In June of 2012, Appellant was indicted by the Charleston County Grand Jury for one count of first-degree criminal sexual conduct and one count of first-degree burglary. On June 19, 2013, a jury trial was commenced in the Charleston County Court of General Sessions with the Honorable Deadra L. Jefferson, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of eighteen years for each of the convictions. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

In the early morning hours of October 24, 2011, Sharon Rosenbaum ("Victim"), a sixty-four-year-old woman who lived alone in North Charleston, South Carolina, began resting on her couch and watching television after "New York," a friend she had been smoking crack cocaine with earlier, left her apartment. (R. p. 26; pp. 29-30). A little while later, Victim heard what she believed to be the sounds of her pet cat at the door to the apartment, and she went to the door to let the cat inside. (R. pp. 31-32). Upon opening the door, Victim was unexpectedly greeted by an unfamiliar man, who informed her his car had broken down and asked to use her phone. (R. p. 32). In response, Victim told the man she would get him her phone, turned around, and started to retrieve her phone from inside her residence. (R. p. 32; pp. 35-36). At that point, the man suddenly rushed into Victim's apartment, grabbed Victim around the throat, and began to drag her towards her bedroom. (R. p. 32). Alarmed, Victim began struggling to break free from the man, and he responded by pulling her to the floor by her hair, repeatedly striking her in the face, and threatening her with a knife. (R. pp. 32-33). He then proceeded to rape her.[1] (R. pp. 32-33).

After the rape, the man left Victim's home, and Victim unsuccessfully tried to find her phone to call for help. (R. p. 34). When she could not do so, Victim put on some pants, ran to the home of one of her neighbors, and advised her neighbor she had just been assaulted and raped in her apartment. (R. pp. 32-34; pp. 56-57; pp. 60-61). In response, Victim's neighbor immediately called the police, and officers with the North Charleston Police Department quickly responded to their location. (R. p. 33; pp. 56-59). Upon arriving, they spoke with Victim about the incident, and she told them what had

[1] After the man finished raping Victim, he informed her "that's all [he] wanted." (R. p. 34).

occurred. (R. pp. 35-36). However, she was only able to provide a vague description of her assailant as she did not know him, did not see his face, and was not wearing her glasses at the time of the assault. (R. p. 35; p. 39; pp. 44-46). Victim was then taken to the hospital to receive treatment for her injuries. (R. p. 36; p. 38).

At the hospital, Victim was examined by Janet Ward, a sexual assault nurse examiner. (R. p. 38; p. 129). During the examination, Ward observed Victim had scratches and bruising on her neck, bruising on her forehead, scratches and bruising on her face and cheeks, redness and bruising on her chest, bruising on the bridge of her nose, darkening of her eyes, carpet burns to her back, and injuries to her arm and shoulder. (R. pp. 140-141). However, Ward did not see any injuries to Victim's vaginal area.[2] (R. p. 146). Ward then collected evidence from Victim's body, including external swabs from Victim's genital area and internal swabs from Victim's vagina, and sealed that evidence so it could subsequently be analyzed. (R. pp. 142-143; pp. 150-151).

A few days later, an officer with the North Charleston Police Department responded to a report of shots fired at a location not far from Victim's residence and located a phone on the ground while searching for evidence of the shooting. (R. pp. 77-79). Upon making that discovery, the officer collected the phone as evidence and observed Appellant Nathaniel Witherspoon's name displayed on the phone's screen. (R. pp. 78-79). Subsequently, the officer learned the phone, which actually belonged to Victim, was connected to the investigation into the sexual assault of Victim, and he turned it over to Investigator Jill Farman, a detective with the North Charleston Police Department involved in that investigation. (R. p. 80; pp. 86-87; pp. 97-98). Thereafter,

[2] During trial, Ward explained a sexual assault does not always result in injuries to the vaginal area of a victim while noting hormones related to child-birth cause elasticity in a vagina. (R. p. 149). Notably, Victim had previously given birth to three children prior to the incident. (R. pp. 26-27).

Investigator Farman examined the phone and discovered numerous calls had been made to and received from numbers Victim was not familiar with shortly after the sexual assault had occurred. (R. pp. 98-99). In response, Investigator Farman obtained records for one of the numbers frequently called from Victim's phone after the incident, spoke with the person associated with the number, and learned Appellant was involved with the calls from Victim's phone. (R. pp. 99-100).

Subsequently, Investigator Farman provided Appellant's name to S.L.E.D. as a possible suspect in the sexual assault of Victim, and an analyst with S.L.E.D. determined Appellant's D.N.A. profile, which was maintained in South Carolina's D.N.A. database, matched the D.N.A. profile developed from the evidence collected during the sexual assault examination of Victim. (R. pp. 100-102). As a result, Appellant was arrested, and his D.N.A. was submitted to S.L.E.D. for further analysis. (R. pp. 102-103; p. 109). Upon analysis, a S.L.E.D. analyst confirmed the semen recovered from Victim's body following the sexual assault was Appellant's. (R. pp. 103-104; State's Ex. # 19 – D.N.A. Report). Appellant was then indicted for first-degree criminal sexual conduct and first-degree burglary, and he proceeded to trial. (R. p. 2; pp. 347-348; pp. 350-351).

During trial, Victim testified about the home invasion and sexual assault and indicated she could not remember the specific details of what occurred after her assailant threatened her with the knife.[3] (R. p. 32). However, she specifically testified she was raped by her assailant during the incident. (R. p. 33). Furthermore, Victim's neighbor confirmed Victim reported she had been raped after the incident, the officers involved in

[3] Prior to the beginning of the evidentiary phase of trial, the trial judge presented preliminary instructions to the jury. (R. pp. 5-14). Through those instructions, the trial judge explained to the jurors the State had the burden of proving Appellant's guilt beyond a reasonable doubt and instructed the jurors they were the sole judges of the facts and should disregard any remarks she made that could be construed as comments on the facts of the case. (R. p. 7).

the investigation into the incident testified about the results of their investigation, and Ward testified about Victim's injuries and condition following the crimes, which Ward characterized as "consistent" with what Victim reported had transpired. (R. pp. 56-59; pp. 63-67; pp. 78-80; pp. 86-104; pp. 133-144).

Following that testimony, Catherine Leisy, a forensic analyst with S.L.E.D. and an expert in the field of D.N.A. analysis, testified about her analysis of the evidence collected during the investigation. (R. p. 153; pp. 155-157; pp. 159-161). Specifically, Leisy confirmed she compared a D.N.A. profile developed from Appellant's D.N.A. to the D.N.A. profiles developed from the swabs collected during the sexual assault examination of Victim. (R. pp. 159-161). Based on that comparison, Leisy testified Appellant's D.N.A. profile conclusively matched the D.N.A. profile developed from the sperm found on the external genital swabs taken from Victim and the D.N.A. profiles developed from the sperm and semen found on the internal vaginal swab taken from Victim. (R. p. 160; pp. 192-193). However, Leisy indicated she also found a small amount of D.N.A. on one of the swabs collected during the sexual assault examination that could not have come from Appellant or Victim, but she noted the non-matching D.N.A. could have resulted from a "technical artifact" or "stutter" that occurred during the analysis. (R. pp. 160-161; pp. 164-166).

Subsequently, the State rested its case, and Appellant elected not to testify in his own defense. (R. p. 195; p. 197). However, several witnesses offered testimony on Appellant's behalf. (R. p. 200; p. 215; p. 225; p. 232). Initially, Clary Samuels, Appellant's brother-in-law, testified he had never seen Appellant use drugs, did not know Victim, and never saw Appellant in Victim's company. (R. pp. 203-205). Samuels further opined Appellant was not a violent person and indicated Appellant had only

committed "small" crimes in the past.[4] (R. pp. 206-208). Next, Tammy Stiles, who was incarcerated for trespassing at the time of Appellant's trial, testified she had been to Victim's apartment regularly in the past, almost always saw Appellant there, and believed Appellant and Victim were involved in a sexual relationship because Victim told her she was having sexual intercourse with Appellant. (R. pp. 215-219). However, Stiles acknowledged she had not been to Victim's apartment in roughly three years. (R. p. 221). Similarly, Derrick Felder, who was incarcerated for burglary at the time of Appellant's trial and who had previously been convicted of providing false information to the police, testified he knew Appellant and Victim and had seen Appellant at Victim's apartment a few times in the past. (R. pp. 225-229). Finally, Joseph Mazyck testified he was a long-time friend of Appellant's, had been to Victim's apartment before to have his palms read, saw Appellant there once or twice, and believed Appellant was an acquaintance of Victim's.[5] (R. pp. 232-234).

Thereafter, at the close of the evidentiary phase of trial, the trial judge conducted a charge conference with the solicitor and defense counsel. (R. p. 241). During the charge conference, defense counsel asked the trial judge not to instruct the jury on the statutory language indicating a victim's testimony need not be corroborated because he alleged it would constitute an improper comment on the facts. (R. p. 251). However, the trial judge indicated she intended to present the non-corroboration charge to the jury because it constituted a proper statement of law in South Carolina. (R. pp. 251-254). As the charge conference continued, defense counsel asked the trial judge to instruct the jury

[4] During the sentencing proceedings at the end of Appellant's trial, the trial judge noted Appellant had previously been convicted of criminal offenses over forty times, including for criminal domestic violence, possession of crack cocaine, pointing and presenting a firearm, and grand larceny. (R. p. 336).

[5] During his cross-examination of Victim, defense counsel asked her if she knew Stiles, Felder, and Mazyck, and she denied that she did. (R. p. 49).

on first-degree assault and battery as a lesser-included offense of first-degree criminal sexual conduct while expressly conceding it would not be a proper lesser-included offense of the indicted offense if the elements of the offenses were compared to one another. (R. pp. 254-257). Once again, the trial judge declined Appellant's request after determining first-degree assault and battery was not a lesser-included offense of first-degree criminal sexual conduct based on its elements and was not factually supported as a lesser-included offense in Appellant's case based on the evidence presented during trial. (R. pp. 272-273; p. 275).

Following the charge conference, the solicitor and defense counsel presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (R. pp. 277-331). During the jury charge, the trial judge instructed the jurors:

> In every case tried in this Court before a jury, the jury becomes the sole and exclusive judges of the facts in a case. You, the jury, are the judges of the facts in this case. This Court is the judge of the law. The constitution of our state has declared that a trial judge shall not intimate, state, comment upon, or make any statement to a trial jury about the facts in a case. Since you, the jury, are the sole judges of the facts in this case, you are not to infer anything that I've said during the progress of this trial, in ruling upon the admissibility of evidence or otherwise, or anything that I now state to you during the course of this instruction, that I have any opinion about the facts in this case. The law does not allow me to have an opinion about the facts in this case. This is a matter solely for you, the jury, to determine.

(R. p. 317). Additionally, the trial judge explained to the jurors the State had the burden of proving Appellant's guilt beyond a reasonable doubt, thoroughly defined reasonable doubt for the jurors, instructed the jurors on evaluating the credibility of the witnesses, and advised the jurors they could accept the testimony of a single witness over several

witnesses or the testimony of several witnesses over a single witness.[6] (R. pp. 317-318; pp. 321-324). Furthermore, the trial judge explained the elements of the indicted offenses to the jurors and instructed "code section . . . 16-3-657 . . . provides that the testimony of the victim need not be corroborated." (R. pp. 325-328).

Subsequently, at the conclusion of trial, the jury convicted Appellant as indicted. (R. p. 334). Following the verdict, the trial judge sentenced Appellant to concurrent eighteen-year terms of imprisonment for the first-degree burglary and first-degree criminal sexual conduct convictions. (R. pp. 345-346).

[6] Specifically, regarding witness credibility, the trial judge instructed the jury: "Necessarily, you must assess the credibility of witnesses who have testified. Credibility is simply a legalistic term meaning believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine that evidence which convinces you of its truth. Some of the things you may consider as you decide whether or not to believe a witness' testimony about a particular matter include: what was the manner and appearance of the witness who testified; was he or [she] straightforward or hesitant in answering; was the testimony of the witness consistent or inconsistent; how did the witness come to know the facts that he or she testified to or what was her or his ability to know these facts; is there some reason a witness would want to give testimony which would help or hurt one side [or] the other, in other words, was the witness biased or prejudiced; and was the testimony of a witness strengthened or weakened by other testimony or evidence. Also, in evaluating the testimony of the witnesses, you may believe one witness as against several witnesses or several witnesses as against one witness. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. If you have a good and sound reason, you may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety. You may consider the demeanor of a witness from the witness stand. You can believe as much or as little of each witness' testimony as you think proper. Throughout this process, ladies and gentlemen, you have but one objective: to seek the truth, regardless of its source." (R. pp. 317-318).

ARGUMENT

I.

The trial judge committed no reversible error in instructing the jury on S.C. Code Ann. § 16-3-657, which states the testimony of the victim does not need to be corroborated, because that statutory language constituted a correct statement of law in South Carolina, that language was not unduly emphasized during the trial judge's jury instructions, and those jury instructions as a whole correctly conveyed the relevant and applicable law to the jury.

Appellant contends the trial judge committed reversible error by instructing the jury on the statutory non-corroboration language of S.C. Code Ann. § 16-3-657. In support of that contention, Appellant maintains the giving of an instruction based on Section 16-3-657 constitutes an impermissible comment on the facts. To the contrary, the trial judge's presentation of the statutory non-corroboration language, which was only referenced a single time during the jury instructions, did not constitute a comment on the facts and, instead, was a proper statement of the applicable South Carolina law relevant to Appellant's case. Furthermore, the trial judge properly and completely instructed the jurors on the State's burden of proof, their duties in evaluating the credibility of the witnesses, and their duties to act as the sole judges of the facts while specifically cautioning the jurors they should not interpret any of her remarks as a comment on the facts of the case. Under those circumstances, the trial judge's decision to instruct the jury on Section 16-3-657, which provides the testimony of the victim does not need to be corroborated, was not improper and did not constitute reversible error in Appellant's case. Appellant's convictions should be affirmed.

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. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003). In doing so, a trial judge is only required to instruct the jury on the substance of the law and does not have to use any particular verbiage. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). A trial judge's jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.").

In reviewing a trial judge's jury instructions for error, the appellate court must view the jury 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 the trial judge's jury instructions, 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.").

One particular provision of law enacted by the legislature in South Carolina is Section 16-3-657, which states "[t]he testimony of the victim need not be corroborated in

prosecutions under [Sections] 16-3-652 through 16-3-658." S.C. Code Ann. § 16-3-657. In enacting that provision, the legislature recognized "crimes involving criminal sexual conduct fall within a unique category of offenses against the person" in which the only evidence that can frequently be presented due to the lack of eyewitnesses or other evidence is the uncorroborated testimony of the victim or the assailant. State v. Rayfield, 369 S.C. 106, 117, 631 S.E.2d 244, 250 (2006). For that reason, the legislature "decided it is reasonable and appropriate in criminal sexual conduct cases to make abundantly clear – not only to the judge **but also to the jury** – that a defendant may be convicted solely on the basis of a victim's testimony." Id. (emphasis added).

In the case sub judice, the trial judge committed no error in instructing the jury on the non-corroboration language from Section 16-3-657, which unquestionably constituted a correct statement of the law in South Carolina, because that instruction was not unduly emphasized during the trial judge's jury charge and the jury charge as a whole correctly relayed the relevant and applicable law to the jury. See id. at 117-118, 631 S.E.2d at 250 ("A trial judge is not required to charge § 16-3-657, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law."); see also Sheppard, 357 S.C. at 665, 594 S.E.2d at 472-473 ("A jury charge is correct if it contains the correct definition of the law when read as a whole."). Critically, in instructing the jury on the law in Appellant's case, the trial judge only instructed the jury on the statutory non-corroboration language a single time during the course of the entire jury charge. See State v. Orozco, 392 S.C. 212, 224, 708 S.E.2d 227, 233 (Ct. App. 2011) ("[T]he *only* charge given by the trial court in regard to the corroboration of the victims' testimony was that 'in South Carolina the testimony of a victim need not be corroborated

for prosecution in a criminal sexual conduct case.' Thus, this single instruction was not unduly emphasized." (italics in original)). Furthermore, the trial judge correctly explained the State's burden of proof to the jurors, thoroughly identified the factors relevant to the assessment of a witness' credibility to the jurors, specifically informed the jurors they could accept a single witness' testimony over the testimony of multiple witnesses or the testimony of multiple witnesses over a single witness' testimony, and directly cautioned the jurors she had no opinion on the facts of the case and they should not consider anything she said as a comment on the facts. Cf. State v. Schumpert, 312 S.C. 502, 509, 435 S.E.2d 859, 863 (1993) (finding the trial judge committed no reversible error in instructing the jury on the non-corroboration language when "[t]he trial judge properly charged the jury it could believe any single witness over several, it was the sole judge of the facts, he had no opinion about those facts, and the State had the burden of proving the offense charged beyond a reasonable doubt"). Under those circumstances, the trial judge's jury instructions provided the jury with the correct legal basis upon which to render a decision in Appellant's case and did not constitute reversible error. See Burkhart, 350 S.C. at 263, 565 S.E.2d at 304 (instructing there is no reversible error when the jury instructions given "afford the proper test for determining the issues")

In arguing the trial judge's jury instructions warrant the reversal of his convictions, Appellant contends the trial judge's presentation of the non-corroboration language to the jury constituted an impermissible comment on the facts of his case and improperly "favor[ed] the testimony of a single witness over all others."[7] (App. Br. pp.

[7] In seeking a reversal of his conviction on appeal, Appellant also contends: "The purpose of the [non-corroboration] statute is to change the law that a rape charge need to be corroborated **when the trial judge** is determining whether to grant a directed verdict. It is **not a jury charge**." (App. Br. p. 10) (emphasis in

9-10). However, in instructing the jury on the non-corroboration language, the trial judge prefaced her remarks by specifically stating the non-corroboration language was derived from Section 16-3-657, which clearly conveyed to the jury the non-corroboration language was a legal principle taken from a statute and was not a personal statement of the trial judge's views on the facts or the weight of the evidence. See generally State v. Bell, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991) ("The test to determine the propriety of the trial judge's charge is what a reasonable juror would have understood the charge to mean."). Thus, contrary to Appellant's contentions, the trial judge did not impermissibly comment on the facts by instructing the jury on Section 16-3-657, which correctly states the testimony of the victim does not need to be corroborated. However, even assuming that instruction could have somehow been misconstrued as a statement of the trial judge's beliefs on the facts of Appellant's case, the trial judge's instructions both at the beginning of trial and during the jury charge clearly dispelled any such misconception because the trial judge specifically explained to the jurors she had no opinion on the facts and any statement she made that could be construed as a comment on the facts had to be disregarded. See Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) ("A jury is presumed to follow instructions."); State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them.");

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original). However, as our Supreme Court has previously explained, the legislature intended for the non-corroboration language of Section 16-3-657 to do "much more" than prevent trial courts or appellate courts from finding the testimony of a sexual assault victim to be insufficient to support a conviction simply because the testimony was not corroborated. See Rayfield, 369 S.C. at 117, 631 S.E.2d at 250 ("Section 16-3-657 prevents trial or appellate courts from finding a lack of sufficient evidence to support a conviction simply because the alleged victim's testimony is not corroborated. However, § 16-3-657 **does much more**. In enacting this statute, the Legislature recognized that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical or forensic evidence identifying a particular perpetrator. The Legislature has decided it is reasonable and appropriate in criminal sexual conduct cases to make abundantly clear – not only to the judge but also to the jury – that a defendant may be convicted solely on the basis of a victim's testimony." (emphasis added))

State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) ("It is the duty of jurors to take the law from the court in the particular case on trial. It must be presumed that they do so."). Because the trial judge's jury instructions constituted a correct and complete statement of the law in South Carolina without impermissibly commenting on the facts of Appellant's case or unduly emphasizing the statutory non-corroboration language, the trial judge committed no reversible error in instructing the jury on the law. Cf. State v. Hill, 394 S.C. 280, 299, 715 S.E.2d 368, 379 (Ct. App. 2011) ("[T]he single instruction on 'no corroboration,' was not unduly emphasized, and the charge as a whole comported with the law, such that there was no reversible error in the 'no corroboration' charge."); Orozco, 392 S.C. at 224, 708 S.E.2d at 233 (holding the trial judge committed no reversible error in instructing the jury on the non-corroboration language where that language was not unduly emphasized and the trial judge's jury charge as a whole properly instructed the jury on the law). Accordingly, Appellant's convictions should be affirmed.

II.

The trial judge properly declined to instruct the jury on the statutory offense of first-degree assault and battery because that offense is not a lesser-included offense of first-degree criminal sexual conduct and, even if it somehow was, was not supported by the facts and evidence presented during trial.

Appellant contends the trial judge erred in declining to instruct the jury on the statutory offense of first-degree assault and battery. In support of that contention, Appellant maintains first-degree assault and battery should be considered to be a lesser-included offense of first-degree criminal sexual conduct 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 first-degree criminal sexual conduct. Furthermore, Appellant maintains the facts of his case justified a charge on first-degree assault and battery as a lesser-included offense. Contrary to Appellant's contentions, first-degree assault and battery is not a lesser-included offense in light of the fact first-degree criminal sexual conduct does **not** include all of the elements of first-degree assault and battery. Moreover, first-degree assault and battery is not a lesser-included offense of first-degree criminal sexual conduct in light of the fact the legislature elected not to recognize it as such. Therefore, the trial judge properly declined to instruct the jury on first-degree assault and battery in Appellant's case. However, even assuming first-degree assault and battery was a lesser-included offense of first-degree criminal sexual conduct, the trial judge still nonetheless properly declined to instruct the jury on first-degree assault and battery because the testimony and evidence presented during trial did not support such a charge. Appellant's convictions should be affirmed.

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). "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." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). The trial court only commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 838, 849 (1993).

In 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 elements test, an offense is a lesser-included offense of a greater offense if the greater offense includes all of 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). 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.").

Importantly though, even if an offense is a lesser-included offense of another offense, the trial judge is only required to instruct the jury on the lesser-included offense

when the evidence could support an inference the defendant is guilty of **only** the lesser-included offense and not the greater offense. State v. Lambright, 279 S.C. 535, 537, 309 S.E.2d 7, 8 (1983). "It is well settled that a jury instruction on a lesser included offense is required only when the evidence warrants such an instruction." State v. Coleman, 342 S.C. 172, 175, 536 S.E.2d 387, 389 (Ct. App. 2000). "The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty only of the lesser offense." State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006).

In the case at bar, the trial judge committed no error in declining to instruct the jury on the offense of first-degree assault and battery because that crime was not a lesser-included offense of first-degree criminal sexual conduct. Furthermore, even if first-degree assault and battery somehow was a lesser-included offense of first-degree criminal sexual conduct, the trial judge still committed no error in declining to instruct the jury on that offense because the evidence presented during trial would not have supported a conclusion Appellant was guilty of only the lesser-included offense and not the greater offense.

Initially, looking to the elements of the offenses, first-degree criminal sexual conduct does **not** include all of the elements of first-degree assault and battery. Compare S.C. Code Ann. § 16-3-652(1) (defining first-degree criminal sexual conduct, which requires proof the actor committed a sexual battery along with proof of one or more of the following circumstances: (1) the actor used aggravated force; (2) the victim submitted to the sexual battery under circumstances where the victim is also the victim of forcible confinement, kidnapping, trafficking in persons, robbery, extortion, burglary, housebreaking, or any other similar offense or act; or (3) the actor caused the victim to

become mentally incapacitated or physically helpless through the use of a controlled substance, controlled substance analogue, or intoxicating substance); with S.C. Code Ann. § 16-3-600(C)(1) (defining 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). As a result, first-degree assault and battery is not a lesser-included offense of first-degree criminal sexual conduct under the elements test. 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." (italics in original)), overruled on other grounds by State v. Gentry, 563 S.C. 93, 610 S.E.2d 494 (2005).

Recognizing that fact, defense counsel conceded during trial first-degree assault and battery was not a lesser-included offense pursuant to the elements test while arguing it should nonetheless be considered as one due to the fact it was similar to the common law offense of assault and battery of a high and aggravated nature, which – prior to its abolition though the passage of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 – had traditionally been considered to be a lesser-included offense of first-degree criminal sexual conduct. 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." (citations omitted)); 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."). However, in abolishing the common law assault and battery offenses, the legislature in South Carolina specifically identified the different offenses to which the new statutory assault and battery offenses could be considered lesser-included offenses. See State v. Elliott, 346 S.C. 603, 607, n. 2, 552 S.E.2d 727, 729 (2001) ("[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)), overruled on other grounds by State v. Gentry, 563 S.C. 93, 610 S.E.2d 494 (2005). Tellingly, the legislature elected **not** to recognize first-degree assault and battery – or any of the other new statutory assault and battery offenses – as a lesser-included offense of first-degree criminal sexual conduct. See S.C. Code Ann. § 16-3-600(C)(2) ("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."). Because the legislature specifically chose to identify first-degree assault and battery as a lesser-included offense of certain specified offenses while choosing not to identify it as a lesser-included offense of first-degree criminal sexual conduct, the statutory offense of first-degree assault and battery is **not** a lesser-included offense of first-degree criminal sexual conduct, and the trial judge properly declined to instruct the jury on first-degree assault and battery in Appellant's case. 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 early release).

However, even assuming first-degree assault and battery was somehow a lesser-included offense of first-degree criminal sexual conduct, the trial judge's decision not to charge the jury on first-degree assault and battery was proper and justified in Appellant's case because the evidence presented during trial did not support an instruction on that particular offense. Critically, looking to the evidence presented, there was no testimony or evidence establishing Appellant was guilty of first-degree assault and battery **instead of** first-degree criminal sexual conduct. See State v. Murphy, 322 S.C. 321, 325, 471 S.E.2d 739, 741 (Ct. App. 1996) ("[A] lesser included offense instruction is required only when the evidence warrants such an instruction, and it is not error to refuse to charge the lesser included offense unless there is evidence tending to show that the defendant was guilty **only of the lesser offense.**" (emphasis added)). Specifically, during trial, Victim testified a stranger entered her residence without permission, grabbed her, and dragged her towards her bedroom before beating **and** raping her. Furthermore, in addition to Victim's testimony in regard to the beating and rape, several other witnesses confirmed

Appellant reported she was raped, a sexual assault nurse examiner testified about Victim's injuries while noting they were consistent with what Victim had reported, and a D.N.A. analyst confirmed Appellant's sperm and semen were discovered **inside** of Victim's vagina after the sexual assault. Under those circumstances, the evidence and testimony supported a conclusion Appellant was either guilty of first-degree criminal sexual conduct or not guilty of any offense. See State v. Gilmore, 396 S.C. 72, 77, 719 S.E.2d 688, 691 (Ct. App. 2011) ("The mere existence of evidence of ABHAN . . . is not sufficient to require the jury charge. Rather, there must be evidence the defendant committed ABHAN *instead of* CSC." (italics in original)); see also Magazine v. State, 361 S.C. 610, 619-620, 606 S.E.2d 761, 766 (2004) (reversing a grant of post-conviction relief after determining Magazine was not entitled to a charge on the lesser-included offense of assault and battery of a high and aggravated nature during his criminal sexual conduct trial where the evidence presented did not suggest anything other than a rape occurred and where Magazine contended he was not present at the time of the crimes instead of contending he simply assaulted the victim without raping her); State v. Forbes, 296 S.C. 344, 345, 372 S.E.2d 591, 592 (1988) ("Here the evidence shows appellant committed a sexual battery as defined by § 16-3-651(h) or no battery at all. He was therefore not entitled to a charge of ABHAN."); State v. Fields, 356 S.C. 517, 523-524, 589 S.E.2d 792, 795 (Ct. App. 2003) ("Field's mere assertion that the jury might have disbelieved the State's evidence that the sex was not consensual and on the remaining evidence found him guilty of ABHAN does not entitle him to have the lesser offense submitted to the jury."). As a result, notwithstanding the fact first-degree assault and battery is not a lesser-included offense of criminal sexual conduct, the trial judge properly declined to instruct the jury on first-degree assault and battery in Appellant's case in light

of the fact the offense was not supported by the evidence presented during trial. See Dempsey v. State, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005) ("[W]here there is no evidence from which it could be inferred than ABHAN **rather than CSC** was committed, an ABHAN charge is not warranted."). Appellant's convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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January 26, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2013-001440

THE STATE,

Respondent,

vs.

NATHANIEL WITHERSPOON,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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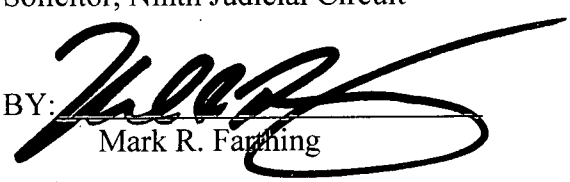
BY: 
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