THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions

Eugene C. Griffith, Jr., Circuit Judge

Appellate Case No. 2015-002254
General Sessions Case No. 2013-CR-30-0256 & 0257

STATE OF SOUTH CAROLINA

Respondent,

v.

BRAD BERNARD DAWKINS

Appellant.

FINAL BRIEF OF APPELLANT

Miller W. Shealy. Jr.
81 Mary Street
Charleston, S.C. 29403
www.MillerShealy.com
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUE ON APPEAL 3

STATEMENT OF THE CASE 4

STATEMENT OF THE FACTS 5

ARGUMENTS .....

1. The trial judge erred in refusing to charge the lesser offense of ABHAN 7

2. The trial judge erred in refusing to grant the Appellant's motion for directed verdict because the state failed to established the county in which the offenses occurred 9

3. The prosecutor's comments during closing argument alleging that defense counsel did not have a duty to tell the truth violated due process and denied the Appellant a fair trial 10

CONCLUSION 11

TABLE OF AUTHORITIES

CASES:

Brightman v. State, 520 S.E.2d 614 (1999).....7

State v. Crocker, 621 S.E.2d 890 (S.C. Ct. App. 2005).....9

State v. Elliott, 552 S.E.2d 727 (S.C. 2001).....7

State v. Evans, 415 S.E2d 816 (S.C. 1992).....9

State v. Gentry, 610 S.E.2d 494 (2005).....7, 9

State v. Linder, 278 S.E.2d 335 (1981).....10

State v. McFadden, 458 S.E.2d 61 (S.C. Ct. App 1995).....11

State v. Northcutt, 641 S.E.2d 873 (2007) 10

State v. Primus, 564 S.E.2d 103 (S.C. 2002).....7

State v. Todd, 349 S.E.2d 339 (S.C. 1986).....7

Vasquez v. State, 698 S.E.2d 561(S.C. 2010).....10

Cummings v. Tweed, 10 S.E.2d 322 (S.C. 1940.....11

State v. White, 605 S.E.2d 540 (S.C. 2004).....7

State v. Williams, 468 S.E.2d 626 (S.C. 1996).....9

STATEMENT OF ISSUES ON APPEAL

Did the trial court err in denying the Appellant's request to charge the lesser offense of ABHAN?

Did the trial court err in denying Appellant's motion for a directed verdict because the state failed to establish the county in which the offense occurred?

Did the prosecutor's comments during closing suggesting that the Appellant's trial counsel did not have duty to be truthful to the jury constitute a violation of due process and deny the Appellant a fair trial?

STATEMENT OF THE CASE

On February 19, 2010, the Laurens County Grand Jury indicted Brad Bernard Dawkins for Criminal Sexual Conduct with a Minor and Lewd Act Upon a Child Under 16. (R. pp. 3-8)

On October 13, 2016, Dawkins proceeded to trial before the Honorable Eugene C. Griffith, Jr. and a jury. (R. p. 9) Dawkins was represented by Michael D. Brown. The state was represented by Lance Sheek. *Id.*

On October 14, 2015, the jury returned with a verdict of guilty on both indictments. (R. p. 238, line 14 - p. 239, line 13) The sentencing was held on October 16, 2013. The court imposed a sentence of 7 years for criminal sexual conduct and 10 years suspended on the service of 48 months probation for lewd act. The lewd act sentence was consecutive to the criminal sexual conduct sentence. (R. p. 253, line 15 – p. 254, line 5) The Notice of Appeal was timely filed.

This appeal follows.

STATEMENT OF FACTS

This case involves an alleged sexual assault and lewd act upon a victim[1] who was age 13 at the time of the incident and who was 19 at the time of the trial. (R. p. 54, lines 1 - 24) The victim was the daughter of Appellant's girlfriend (common law wife), Patricia Whitmire, with whom Appellant lived at the time of this incident. (R. p. 42, line 12 – p. 44, line 16; p. 48, lines 1 – 25; p. 54, line 1 – p. 56, line 10; p. 156, line 24 – p. 157, line 18) The Appellant and Patricia Whitmire had lived together for 10 years. *Id.*

The victim testified that she lived with her mother, Patricia Whitmire, and the Appellant at the time of the incident. (R. p. 55, line 2, - p. 56, line 8) She testified that on or about November 30, 2009, she was sexually assaulted by the Appellant. (R. p. 60, line 4 – p. 65, line 25) The alleged incident took place late in the evening after the Appellant drove the victim some distance from her home and attempted to sexually assault her in a vehicle. (Id. and video tape of victim) The victim confirmed at trial that the Appellant was never "able to penetrate [her] vagina with anything." (R. p. 65, lines 5-7) She testified further that on occasions the Appellant would give her sex toys and instruct her on how to use them. (R. p. 57, line 20 – p. 58, line 24; p. 66, lines 11-21)

Captain J. D. Morgan of the Camden Police Department assisted Laurens County with this investigation. (R. p. 132, lines 5-24) He had occasion to take a statement from the Appellant concerning the lewd act allegation. Morgan alleged that Appellant related to him

[1] In an abundance of caution, the victim's name will not be used. Although she had attained her majority at the time of trial, she was a juvenile at the time of this offense. See this Court's "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings" (Appellate Case No.: 2013-002681) dated April 15, 2014.

an occasion when Appellant walked in the bedroom and caught the victim masturbating with a vibrator that the Appellant supposedly provided to her. According to Morgan, Appellant said that the victim asked him if she was doing it properly and if Appellant would show her how to do it. (R. p. 133, line 11 – p. 134, line 18) Morgan when on to say that about two weeks after the vibrator incident the Appellant told him he asked the victim is she had learned how to properly use the vibrator and she said she had. *Id.*

The Appellant completely denied that the incidents in question ever occurred. (R. p. 159, line 3 – p. 163, line 25) He denied telling Captain Morgan that he encouraged the victim to use a vibrator. (R. p. 159, line 24 – p. 161, line 4) Appellant testified that he was in charge of disciplining the victim. He spanked her. (R. p. 166, line 15 – p. 168, line 25; p. 102, line 2 – p. 103, line 12) He also testified that he caught the victim masturbating with a vibrator, but that he reprimanded her about it. (R. p. 167, line 2 – p. 168, line 24) According to Appellant, the victim told him she wanted to "be with a young man." (R. p. 167, line 25) However, Appellant told her that "this is not the time to be with a young man." (R. p. 168, lines 1-2) Appellant testified that the victim became angry with him about reprimanding her concerning the use of the vibrator. (R. p. 167, line 16 – p. 168, line 25) Appellant also testified that the victim was angry with him because her father was going to get married and would not be reuniting with her mother. (R. p. 164, line 17 – p. 165, line 18)

In addition, the victim seems to have made up a story about the Appellant's brother, Stanley Dawkins, having touched her inappropriately. She told Appellant it had happened but this does not seem to have borne out. The victim seems to have abandoned this claim. (R. p. 169, line 5 – p. 170, line 18; p. 68, line 23 – p. 72, line 4; p. 93, line 8 – p. 96, line 24; p. 151, line 2 – p. 154, line 25)

ARGUMENT 1

The trial judge erred in refusing to charge the lesser offense of ABHAN

It is incumbent on a trial court to charge a lesser included offense if there is any evidence whatsoever that supports it.

> ABHAN is a lesser included offense of first degree CSC. *State v. Primus,* 349 S.C. 576, 581, 564 S.E.2d 103, 106 (2002). The law to be charged is determined by the evidence presented at trial. *State v. Todd,* 290 S.C. 212, 349 S.E.2d 339 (1986). A trial judge must charge a lesser included offense if there is **any evidence** from which the jury could infer the defendant committed the lesser rather than the greater offense. *Brightman v. State,* 336 S.C. 348, 350-351, 520 S.E.2d 614, 615 (1999).

State v. White, 605 S.E.2d 540, 542 (S.C. 2004) (emphasis added). Thus, the "any evidence" standard applies when reviewing evidence to determine if a lesser included offense should be charged. In addition, there is little doubt that ABHAN would be a lesser offense here under prior legal precedent. The appellate courts of this state have not followed a strict elements test to determine lesser offenses. Rather, considerations of legal policy and common law precedent prevail in determining whether a crime is a lesser offense. *State v. Elliott*, 552 S.E.2d 727 (S.C. 2001), *rev'd on other grounds*, *State v. Gentry*, 610 S.E.2d 494 (2005).

There was evidence from which the jury could have found ABHAN. The victim's credibility as to the incident was challenged in many ways. First, she claimed that she had been molested by Stanley Dawkins, and this does not appear to have occurred. (R. p. 169, line 5 – p. 170, line 18; p. 68, line 23 – p. 72, line 4; p. 93, line 8 – p. 96, line 24; p. 151, line 2 – p. 154, line 25) Second, the Appellant routinely spanked her, and this made her angry with him. (R. p. 166, line 15 – 168, line 25; p. 102, line 3 – 103, line 12) Third, the victim

was angry with Appellant for reprimanding her regarding her masturbation and her disposition toward other boys. (R. p. 167, line 2 – p. 168, line 25; p. 101, line 2 – p. 103, line 12) The jury could have inferred that there was inappropriate physical contact between the victim and the Appellant, but that it did not amount to criminal sexual conduct. Rather, it was ABHAN.

The trial court should have charged ABHAN as there was some evidence that would have supported a jury verdict of this crime. The jury should have been given the choice to infer that the crime was ABHAN, rather than criminal sexual conduct.

ARGUMENT 2

The trial judge erred in refusing to grant the Appellant's motion for directed verdict because the state failed to established the county in which the offenses occurred.

This Court has long recognized the right of a defendant to be tried in the county alleged in the indictment. *State v. Evans*, 415 S.E2d 816, 818 (S.C. 1992) (A criminal defendant is entitled "to a directed verdict when the State fails to present evidence that the offense was committed in the county alleged in the indictment."), *rev'd on other grounds*, *State v. Gentry*, supra. See also *State v. Williams,* 468 S.E.2d 626, 630 (S.C. 1996) and *State v. Crocker*, 621 S.E.2d 890, 895 (S.C. Ct. App. 2005).

At best, there was substantial confusion about whether the alleged act of criminal sexual conduct occurred in Greenville or Laurens County. (R. p. 45, line 5 – p. 46, line 2; p. 57, line 5 - line 13; p. 59, line 3 – p. 61, line 5; p. 82, line 2 – 83, line 25; p. 87, lines 18 – 24; p. 97, line 9 – p. 99, line 24; p. 139, line 16 – p. 143, line 1) The record in the case reflects that no one, not even law enforcement made any effort to determine where the alleged act of criminal sexual conduct occurred. No one attempted to locate the scene of the sexual assault. They had six years to do so.

The impact of this on the Appellant was enormous, as indicated in the above Statement of Facts the victim's credibility was the paramount issue in the case from the Appellant's perspective. The bald assertions that the crime occurred in Laurens County are just that, mere assertions, guesses.

The trial court's failure to hold the state to its burden in this instance allowed the Appellant to be convicted when he should not have been.

ARGUMENT 3

The prosecutor's comments during closing argument alleging that defense counsel did not have a duty to tell the truth violated due process and denied the Appellant a fair trial.

During closing argument, the prosecutor made the following statement:

> I appreciate the fact that Mr. Brown comes in here and puts a vigorous defense up for his client, because that's the way our justice system works. **But the only one here that's part of this court system that doesn't have an oath binding him to seek justice is the defense attorney**. The Judge has that job. I have an ethical obligation as a prosecutor to seek justice. **Mr. Brown has an ethical obligation to seek beneficial for his client** and I respect that. I don't have a problem with it. **But don't think for a second his job is to simply shine a light on the truth for your benefit, because it's not. Otherwise, he wouldn't have asked questions about what does provide mean when his client says it didn't happen. He wouldn't wave every red flag over here to the left hoping you don't keep your sights on the one issue that matters.**

(R. p. 204, lines 10 - 25) This is a violation of due process. The prosecutor basically told the jury that Appellant's defense counsel had no ethical obligation to be truthful. He even went as far as to suggest that defense counsel was deliberately unethical in his conduct of the case. It is hard to imagine a more prejudicial statement in closing.

In *Vasquez v. State*, 698 S.E.2d 561, 567 (S.C. 2010) this Court once again set forth the rule as to the propriety of closing argument:

> While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice. *State v. Northcutt,* 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting *State v. Linder,* 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)).

Id. See also *State v. McFadden*, 458 S.E.2d 61, 67 (S.C. Ct. App 1995) ("The supreme court has noted its disapproval of counsel intimating that opposing counsel is trying to conceal something from the jury by objecting to the introduction of evidence." Citing *Cummings v. Tweed,* 10 S.E.2d 322 (S.C. 1940)).

This Court has admonished prosecutors to avoid comments such as these. This type of argument is and was extremely prejudicial.

CONCLUSION

Based on the above, the convictions and sentences should be reversed and the case remanded for a new trial.

Respectfully submitted,

MILLER SHEALY LAW FIRM

Miller W. Shealy. Jr. (S.C. Bar No.: 5045)
81 Mary Street
Charleston, South Carolina 29403
(843) 437-9925
MillerShealyLawFirm@gmail.com
www.MillerShealy.com

Attorney for Appellant

August 7, 2016

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CERTIFICATION OF COMPLIANCE

I hereby certify that this Final Brief of Appellant is submitted in accordance with Rule 211 of the South Carolina Appellate Court Rules.

Miller W. Shealy. Jr. (S.C. Bar No.: 5045)
81 Mary Street
Charleston, South Carolina 29403
(843) 437-9925
MillerShealyLawFirm@gmail.com
www.MillerShealy.com

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Attorney for Appellant