STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

John C. Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENJAMIN CERVANTES HERNANDEZ,

APPELLANT

APPELLATE CASE NO 2016-000612

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to instruct the jury regarding the lesser-included offenses of assault and battery in the first and second degrees where the offenses are lesser-included offenses of criminal sexual conduct with a minor in the second degree and the evidence supported the instructions?

STATEMENT OF THE CASE

On October 29, 2015, a Beaufort County grand jury indicted Benjamin Cervantes Hernandez for two counts of criminal sexual conduct with a minor (CSCM) in the third degree (2015-GS-07-1296 & 2015-GS-07-1297) and CSCM in the second degree (2015-GS-07-1205). R. 2, l. 21 – R. 3, l. 1; R. 234 – 239. The state, represented by Julie Kate Kenney, called all three cases to trial on February 22-25, 2016, before the Honorable John C. Hayes, III, and a jury. R. 1. Helen Dovell represented Appellant. R. 1. The jury acquitted Appellant of two counts of CSCM in the third degree, but found Appellant guilty of CSCM in the second degree. R. 195, ll. 9-12. Judge Hayes sentenced Appellant to fifteen years' imprisonment. R. 209, ll. 17-22; R. 240.

On March 3, 2010, Appellant filed a motion for new trial pursuant to Rule 29, SCRCrimP. R. 230. On that same date, Appellant filed a motion for reconsideration of sentence. R. 231. On March 10, 2016, Judge Hayes denied both motions in a written order. R. 233. On March 16, 2016, Appellant filed and served his notice of appeal. This brief follows.

ARGUMENT

The trial judge erred in failing to instruct the jury regarding the lesser-included offenses of assault and battery in the first and second degrees where the offenses are lesser-included offenses of criminal sexual conduct with a minor in the second degree and the evidence supported the instructions.

Relevant facts

The state charged Appellant with CSCM in the second degree related to Minor 1. Specifically, in the indictment, the state alleged that on July 17, 2015, Appellant "did commit a sexual battery upon a minor who was fourteen (14) years of age or less but who was at least eleven (11) years of age, to wit: digital penetration of victim, [Minor 1]'s, vagina." R. 235. The plain language of the indictment made clear that the state was required to prove digital penetration of Minor 1's vagina.

In July 2015, Maria Pizana was the mother of six children. R. 13, ll. 22-25; R. 62, ll. 19-24. One of Maria's daughters was turning fifteen on July 18, 2015. R. 15, ll. 18-23. On Friday, July 17, 2015, Maria, two of her daughters, and a friend of one of the daughters went dress shopping to celebrate the upcoming birthday. R. 15, ll. 19-25; R. 54, ll. 1-5; R. 63, ll. 4-5. Minor 1 stayed home with her two brothers, one of whom was eight months old at the time, and an older boy who was friends with the older brother. R. 15, l. 25 – R. 16, l. 1; R. 54, ll. 5-8; R. 63, ll. 6-7. Maria and her husband were friends with Appellant and his longtime girlfriend, Veronica Barrios. R. 14, ll. 17-23; R. 15, ll. 15-17. While Maria was out shopping with the girls, Barrios called Maria to say she was stopping by her house with a gift. R. 16, ll. 4-6. Thirty minutes later, Maria and the girls returned home to find Appellant and Barrios waiting for her. R. 16, ll. 6-7; R. 54, ll. 13-20; R. 55, l. 2.

At trial, Minor 1 claimed that Appellant and Barrios sat on the couch beside her while they waited for Maria to return. R. 55, ll. 23-25; R. 57, ll. 9-13. She claimed that Appellant touched her private part while the three sat on the couch. R. 57, ll. 12-15; R. 63, ll. 16-21. This testimony was markedly different from what Minor 1 told the police and the forensic interviewer because she told both of them that nothing happened on the couch. R. 64, ll. 1-11; R. 65, ll. 2-5; R. 78, ll. 16-22.

According to Minor 1, when Minor 1 went to a different room to tend to her eight month old brother, Appellant followed her into the room and touched her breasts. R. 58, ll. 2-14. She claimed that Appellant pushed her and tried to prevent her from leaving the room. R. 66, ll. 1-17. This was decidedly different from what Minor 1 told the police and the forensic interviewer as well because she told the responding officer and the forensic interviewer that nothing happened when Appellant entered the bedroom the first time. R. 67, ll. 1-21; R. 79, ll. 2-9.

When Minor 1 returned to the baby's room a second time, she locked the door, but somehow, Appellant still entered. R. 58, ll. 17-22; R. 68, ll. 2-16. This time, she claimed, Appellant put his hand on her private part underneath her clothes. R. 59, ll. 1-4; R. 68, ll. 17-19. In response to the solicitor's leading question, Minor 1 claimed Appellant's fingers went inside her private part. R. 62, ll. 3-5. When Minor 1 was questioned about anything going inside of her vagina by the forensic interviewer, she stated she did not understand and that she did not know. R. 73, ll. 2-19; R. 79, ll. 11-19. Minor 1 took her baby brother into the living room. R. 59, ll. 24-25. She claimed Appellant followed her around the living room as she sat in different spots. R. 60, ll. 1-5.

Maria, Barrios, and Appellant sat at the dining room table. R. 16, ll. 9-10. They wanted to listen to music, and Appellant looked for a cable that would allow them to listen to music from a specific device. R. 16, ll. 17-21; R. 23, ll. 5-9. According to Maria, Appellant returned to the

dining room, and then went outside with the children. R. 16, l. 21 – R. 17, l. 1. Minor 1 re-entered the home and approached her mother, still sitting in the dining room. R. 17, ll. 1-3. Minor 1 made "a disclosure" to Maria. R. 17, ll. 10-12; R. 61, ll. 19-23. Maria confronted Appellant, and then called the police. R. 17, ll. 19-24.

Minor 1 claimed that she went outside at her mother's suggestion because the baby was crying and Maria believed he would be soothed by going outside. R. 60, ll. 19-24; R. 70, ll. 20-24. Minor 1's sister and friend were outside as well, but they went inside to get away from the mosquitos. R. 61, ll. 1-2; R. 71, ll. 1-2. The girls asked for bug spray, which Appellant retrieved from his car. R. 61, ll. 3-5; R. 71, ll. 1-5. Minor 1 claimed that while she was using Appellant's bug spray, he said he wanted to kiss her. R. 61, ll. 9-17; R. 72, ll. 16-18.

While on the phone with the 911 operator, Maria explained there had been no penetration. R. 19, l. 23 – R. 20, l. 4. When the police arrived at Maria's home, Appellant was still there. R. 42, ll. 21-23; R. 45, ll. 20-25; R. 49, ll. 8-10. Appellant indicated he wanted to speak to law enforcement, and did so once a translator arrived. R. 43, ll. 14-21; R. 46, ll. 1-14; R. 107, ll. 7-19; R. 115, ll. 9-13. The police arrested Appellant, transported him to the police department, and continued to interrogate him. R. 107, ll. 15-23; R. 115, l. 17 – R. 116, l. 1.

Nurse Karen Drozd examined Minor 1 the following day, July 18, 2015. R. 28, ll. 17-25. Drozd found "no bleeding, no obvious trauma." R. 29, ll. 20-24. She found some redness in an area before the entrance of the vagina and where some skin had sloughed off. R. 29, l. 25 – R. 30, l. 11.

Appellant's testimony provided the jurors with a very different view of July 17, 2015. While Appellant admitting to sitting on the couch with Minor 1 and Barrios when he first arrived at

the home, he denied touching her vagina. R. 138, l. 14 – R. 139, l. 3. He also admitted to looking for a charger to assist with listening to music. R. 141, ll. 14-22.

After Maria returned home, Appellant went into the bedroom to see the baby while Minor 1 was tending to the baby. R. 134, ll. 23-24. Appellant noted the baby was at the edge of the bed. R. 133, ll. 11-14. Worried the baby would fall, Appellant leaned down to move the baby to a safer location. R. 133, ll. 16-17. While he was leaning down, Minor 1 kissed him between his cheek and lips. R. 134, ll. 1-4. Appellant pushed her away. R. 134, ll. 4-6. Minor 1 took his hand and put it inside her pants. R. 134, ll. 6-7. With her other hand, she applied pressure. R. 134, ll. 7-9. Appellant slid the baby closer to the middle of the bed, pushed Minor 1 away, and removed his hand. R. 134, ll. 9-13.

Appellant admitted getting bug repellant for the girls outside. R. 135, ll. 19-23. While outside, Appellant explained that Minor 1's sister expressed her love for him, which he interpreted as friendly love and expressed his mutual love for her. R. 136, ll. 8-9. When Minor 1 heard the exchange, she grew jealous and accused Appellant of only loving the sister. R. 136, ll. 10-11. Appellant told Minor 1 that he loved her too, especially for how well she cared for her infant brother. R. 136, ll. 11-13. Appellant adamantly denied telling Minor 1 that he wanted to go to bed with her as she had told the forensic interviewer. R. 136, ll. 23-24. He also denied saying he wanted to kiss her. R. 137, ll. 1-2.

Charge conference

Appellant requested the trial judge instruct the jury regarding two lesser-included offenses of assault and battery in the first degree and assault and battery in the second degree. R. 152, l. 23 – R. 153, l. 4. Appellant explained the request was based upon prior determinations by the South Carolina Supreme Court that common law ABHAN, which was the unlawful act of violent injury to

the person of another accompanied by circumstances of aggravation, was a lesser included offense of criminal sexual conduct with a minor. R. 153, ll. 10-23. Appellant equated common law ABHAN with assault and battery in the first degree because both require unlawful injury and non-consensual touching. R. 155, ll. 1-4. Further, Appellant noted that statutory assault and battery in the first and second degree involved "non-consensual touching of the private parts of a person either under or above the clothing." R. 155, ll. 13-16; R. 155, ll. 19-21.

In denying the request, the judge noted he had "analyzed and reanalyzed and maybe over analyzed whether or not" the statutory assault and battery offenses were lesser-included offenses of criminal sexual conduct. R. 151, ll. 13-18. He found the offenses were not lesser-included offenses "based on the test – the elements test – the analysis of the elements test." R. 151, ll. 21-23. Specifically, he determined "they require proof of injury whereas the charges which are set forth in the indictment do not." R. 151, ll. 23-25. Further, the judge held that based upon the legislature taking "great pains to explain" "which offenses are lesser of which higher offenses" in the statutory assault and battery scheme, the judge believed "that had the legislature desired to include these crimes these charges under the CSC []as lesser included of the new assault and batteries" "[t]hey could have included these offenses as lesser included offenses by statute." R. 156, l. 16 – R. 157, l. 2. As a result, the judge refused to charge the jury regarding any lesser-included offenses.

Closing argument

During closing argument, defense counsel noted the many inconsistencies with Minor 1's stories, including the issue of penetration. As defense counsel explained, Minor 1 claimed that Appellant's fingers went inside of her during the trial, but when she was questioned on this point by the forensic interviewer, she said she did not know. R. 160, ll. 21-23. Further, when Minor 1's mother called the police, she too denied any penetration occurred. R. 160, l. 25 - R. 161, l. 1.

Defense counsel also noted that Appellant told the police that it was possible his fingers went inside of Minor 1 because of the pressure she applied when holding his hand there. R. 161, ll. 5-9.

In response, the state relied upon Minor 1's emotions during her testimony to convince the jury that Minor 1 was telling the truth. R. 163, l. 25 – R. 164, l. 8; R. 168, ll. 1-8. The state seized upon Minor 1's testimony claiming Appellant "made contact with her skin" and that "his fingers went inside of her." R. 168, ll. 9-11. According to the state, during the forensic interview, Kendra Twitty asked Minor 1 about penetration and Minor 1 responded with "what do you mean?" and stated she did not know. R. 168, ll. 11-14. The state argued that it made sense that Minor 1 would not understand because she was eleven years old and she was "not used to someone touching her private parts in that way." R. 168, ll. 15-18. The state further argued that Appellant had penetrated Minor 1 because Minor 1 told the forensic interviewer that it hurt. The solicitor reasoned, "If it's not penetration, then why would it hurt." R. 168, ll. 15-22.

When going through the state's theory of how the facts supported the elements of the offense, the solicitor told the jurors:

> And I have to prove to you that the defendant engaged in a sexual battery with the victim, who is at least eleven, between eleven and fourteen. We know [Minor 1] was eleven, no doubt about that. So, sexual battery. That could be proven by any intrusion, however slight, of any part of a person's body, or of any object into the genital openings of a person's body. Remember the intrusion, however slight, when you're deliberating, because when we're talking about the penetration here, we've got [Minor 1] that told you that his fingers went inside of her. And then, we've got the defendant that said, yeah, possibly my fingers did go inside of her. And we've got the defendant saying he felt moisture. And we also have [Minor 1] saying that it hurt. It doesn't have to be full-blown penetration. It's however slight.

R. 171, l. 12 – R. 172, l. 4.

Shortly thereafter, the solicitor noted that the judge would instruct them that "in cases such as these, criminal sexual conduct cases, the victims' testimony does not have to be corroborated. So

that means that, if you believe these girls, then you can find him guilty of these crimes." R. 173, ll. 15-19.

Jury instructions

> The judge instructed the jury regarding CSCM in the second degree as follows:
>
> The first charge I'm going to go over is the indictment that charges [Appellant] with criminal sexual conduct with a minor. In that one the victim alleged is [Minor 1]. Here, the state must prove beyond a reasonable doubt that the defendant engaged in sexual battery with the alleged victim. A sexual battery is sexual intercourse, cunnilingus, fellatio, anal intercourse, intercourse, or any intrusion, however slight, of any part of a person's body, or any object into the genital or anal openings of another person's body, except for when the intrusion is accomplished for medically-recognized treatment or diagnostic purposes.

R. 184, ll. 4-15. Thereafter, the judge instructed the jurors regarding CSCM in the third degree. R. 184, l. 23 – R. 185, l. 14. Immediately following this instruction, the judge told the jurors that "[i]n criminal [sexual] conduct cases, the testimony of victims need not be corroborated." R. 185, ll. 14-15.[1] The judge provided the jury with a written copy of the instructions, which included the "no corroboration required" instruction alone on a separate page. R. 186, ll. 13-22; R. 210 – 228.

Jury deliberations & verdict

During deliberations, the jury asked, "Do we need to agree on penetration to convict on second degree?" R. 191, ll. 13-16; R. 229. In response to the jury's question, the judge re-charged the jury with the law on CSCM in the second degree and reminded the jury that its verdict must be unanimous. R. 191, l. 17 – R. 194, l. 8. Almost an hour and a half later, the jury returned with its

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[1] In State v. Stukes, 416 S.C. 493, 499, 787 S.E.2d 480, 483 (2016), the South Carolina Supreme Court held that such a charge was "confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of the case." The Court explained that "[b]y addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak." Id. Trial counsel failed to object to the instruction.

verdicts – acquitting Appellant of two counts of CSCM in the third degree, but finding Appellant guilty of CSCM in the second degree. R. 194, l. 15 – R. 195, l. 12.

Discussion

To resolve the issue presented, this Court must determine first whether statutory assault and battery in the first and second degrees are lesser-included offenses of criminal sexual conduct with a minor in the second degree, and if so, then this Court must determine whether any evidence in the record supported a jury charge on statutory assault and battery.

Typically, "[t]he test for determining when an offense is a lesser included offense of another is whether the greater of the two offenses includes all the elements of the lesser offense." State v. Primus, 349 S.C. 576, 579-580, 564 S.E.2d 103, 105 (2002) (citing State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000)). "If 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 (citing Hope v. State, 328 S.C. 78, 492 S.E.2d 76 (1997)). Nevertheless, the Court recognizes exceptions to this general rule, such as the anomaly of assault and battery of a high and aggravated nature (ABHAN) and criminal sexual conduct (CSC). Id. (citing State v. Elliott, 346 S.C. 603, 552 S.E.2d 727 (2001)).

As recently as 2002, the Supreme Court reaffirmed its longstanding recognition of common law ABHAN as a lesser-included offense of CSC. In Primus, 349 S.C. at 581, 564 S.E.2d at 106 (2002), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 106, 610 S.E.2d 494, 501 (2005), the Court held ABHAN is a lesser included offense of first degree CSC. The Court acknowledged that because ABHAN had an element not included in first degree CSC, it failed the strict elements test usually used to determine whether an offense is a lesser included of a greater offense. However, the Court recognized this situation presented an exception to the traditional

elements test. The Court had repeatedly held ABHAN was a lesser included offense of first degree CSC; therefore, the Court continued to recognize ABHAN as a lesser included offense to sustain a uniform approach to the offenses. Id. Indeed, South Carolina has recognized this exception to the traditional elements test repeatedly. See State v. Frazier, 302 S.C. 500, 397 S.E.2d 93 (1990); State v. Pressley, 292 S.C. 9, 354 S.E.2d 777 (1987); State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986); State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986); State v. Lambright, 279 S.C. 535, 309 S.E.2d 7 (1983).

In State v. Elliott, 346 S.C. 603, 607, 552 S.E.2d 727, 729 (2001), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 106, 610 S.E.2d 494, 501 (2005), the Supreme Court held its jurisprudence of consistently incorporating ABHAN into the CSC framework as a lesser-included offense of assault with intent to commit CSC (ACSC) survived the codification of the CSC statutes. The Court explained that "the 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." Id. at 607 n.2, 552 S.E.2d at 729 n.2 (citing State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196 (1997)). Thus, the Court recognized the "anomaly in the law" created by recognizing ABHAN as a lesser included offense of ACSC due to the strict elements test; however, the Court explained "[t]he common law does not always fit into the neat categories we might prefer." The court found "compelling reasons not to abandon [its] longstanding inclusion of ABHAN as a lesser included offense of attempted sexual battery crimes." Id. at 607, 552 S.E.2d at 729.

In 2010, the South Carolina Legislature codified ABHAN and various degrees of assault and battery. Specifically, the General Assembly explained that ABHAN occurs when a "person unlawfully injures another person" and "great bodily injury results" or "the act is accomplished by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600(B)(1).

Continuing with the statutory scheme, the legislature explained assault and battery in the first degree occurs if (1) a person unlawfully injures another person and (2) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent. S.C. Code Ann. § 16-3-600(C)(1)(a)(i). Similarly, assault and battery in the second degree occurs when a person (1) unlawfully injures another person, or (2) offers or attempts to injure another person with the present ability to do so, and (3) moderate bodily injury to another person could have resulted or (4) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing. S.C. Code Ann. § 16-3-655(D)(1)(b).

A person is guilty of CSCM in the second degree if the person "engages in a sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age." S.C. Code Ann. § 16-3-655(B)(1). Sexual battery is "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).

The question is whether the tradition of ABHAN, and by extension the various degrees of assault and battery, as a lesser included offense of CSC survived the codification of ABHAN and the various degrees of assault and battery. The answer is yes. An application of the strict elements test demonstrates statutory assault and battery in the first and second degrees are not lesser-included offenses of CSCM. Nevertheless, the analysis does not end there. Tradition, justice, and fairness demand that assault and battery in the first and second degrees be treated as lesser-included offenses of CSCM. Further, when the legislature codified ABHAN and created the statutory scheme for assault and batteries, the legislature was aware of South Carolina's longstanding jurisprudence of treating ABHAN as a lesser included of CSC. Had the legislature sought to change this, it could

have done so easily. The very language chosen by the legislature in the assault and battery statutes reveals its intent that the assault and battery statutes be considered lesser-included offenses of the criminal sexual conduct offenses. Just as the assault and battery statutes reference private parts, which are defined as the genital area or the buttocks of a male or female or the breasts of a female, the CSC statute defines "intimate parts" as "the primary genital area, anus, groin, inner thighs, or buttocks of a male or female human being and the breasts of a female human being." Cf. S.C. Code Ann. § 16-3-600(A)(3) with S.C. Code Ann. § 16-3-651(d). Both reference "lewd and lascivious intent." Cf. S.C. Code Ann. § 16-3-600(C)(1)(i) with S.C. Code Ann. § 16-3-655(C).

Turning to the second question presented, this Court must determine whether there was evidence in the record to support a jury charge on assault and battery in the first degree and/or second degree. A jury charge to a lesser included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law mandates a jury instruction on a lesser included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), "[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts."

"[I]n the context of a trial court's decision not to charge a requested lesser included offense, [the appellate court] review[s] the trial court's decision de novo." The appellate court must reverse and remand for a new trial "if the evidence in the record is such that the jury could have found the defendant guilty of the lesser offense instead of the crime charged." State v. Gilmore, 396 S.C. 72, 77, 719 S.E.2d 688, 690-691 (Ct. App. 2011). This Court recognized "three types of cases in which the evidence can support an inference," one of which occurred when "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." Id. at 77-78, 719 S.E.2d at 691 (citing State v. Lambright, 279 S.C. 535, 537, 309 S.E.2d 7, 8 (1983)).

The evidence presented clearly supported jury instructions on the lesser-included offenses of assault and battery in the first and second degrees. In order for the jury to convict Appellant of CSCM in the second degree, the jury was required to find an "intrusion" of Minor 1's vagina by Appellant's finger. However, the testimony regarding any "intrusion" was contradictory. Minor 1 testified there had been an intrusion, but she told the forensic interviewer that she did not understand the question when posed. Also, Minor 1's mother told the 911 operator there had been no penetration. Additionally, Appellant's testimony indicated a touching only – no intrusion, no penetration. Thus, the evidence before the jury was susceptible to more than one interpretation – a touching only or an intrusion. Thus, Appellant was entitled to an instruction on a lesser-included offense to cover the evidence presented – that he had only touched Minor 1.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and remand for a new trial.

Susan B. Hackett
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ATTORNEY FOR APPELLANT

This 6th day of June, 2017.