

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Alex Kinlaw, Jr. Circuit Court Judge

THE STATE,

ORIGINAL
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SC Court of Appeals

RESPONDENT,

V.

OLANDIO R. WORKMAN,

APPELLANT

APPELLATE CASE NO 2018-001769

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

When instructing the jury on the law, did the trial judge err by refusing to properly define the lesser included offense of domestic violence first degree?

STATEMENT OF THE CASE

In February of 2017, the Greenville County Grand Jury indicted Appellant, Olandio R. Workman, for domestic violence of a high and aggravated nature, kidnapping and possession of a weapon during the commission of a violent crime, indictments #2016-GS-2310112, 10113.¹ (R. pp. 563-566). On September 17, 2018, Mr. Workman proceeded to jury trial before the Honorable Alex Kinlaw, Jr. Frank L. Eppes represented Mr. Workman at trial. Derek R. Polsinello prosecuted the case. The jury found Mr. Workman guilty as charged. Judge Kinlaw sentenced Mr. Workman to twelve (12) years for domestic violence, fifteen (15) years concurrent for kidnapping and five (5) years concurrent for the weapon charge. A timely notice of intent to appeal was served on September 26, 2018. This appeal follows.

¹ The date below the witness name on the indictment is September 24, 2016. The received stamp from the clerk of court is dated November 10, 2016. The term year, typed as 2016, is scratched out and replaced with a hand written 2017. The indictment number begins with 2016.

STANDARD OF REVIEW

“In criminal cases an appellate court sits to review errors of law only.” State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). “An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion.” Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). “An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” Id.

ARGUMENT

When instructing the jury on the law, the trial judge erred by refusing to properly define the lesser included offense of domestic violence first degree.

Appellant was indicted for domestic violence of a high and aggravated nature. Prior to the judge instructing the jury on the law, Appellant requested a charge on the lesser included offense of domestic violence first degree. (R. pp. 425-437; pp. 447-449). The State did not oppose the charge on the lesser included offense. (R. p. 426, lines 21-23). Domestic violence first degree is defined by S.C. Code §16-25-20 as follows:

(A) It is unlawful to:

- (1) cause physical harm or injury to a person's own household member; or
- (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

(B) Except as otherwise provided in this section, a person commits the offense of domestic violence in the first degree if the person violates the provisions of subsection (A) and:

- (1) great bodily injury to the person's own household member results or the act is accomplished by means likely to result in great bodily injury to the person's own household member;
- (2) the person violates a protection order and in the process of violating the order commits domestic violence in the second degree;
- (3) has two or more prior convictions of domestic violence within ten years of the current offense;
- (4) the person uses a firearm in any manner while violating the provisions of subsection (A); or
- (5) **in the process of committing domestic violence in the second degree** one of the following also results:
 - (a) the offense is committed in the presence of, or while being perceived by a minor;

- (b) the offense is committed against a person known, or who reasonably should have been known, by the offender to be pregnant;
- (c) the offense is committed during the commission of a robbery, burglary, kidnapping, or theft;
- (d) the offense is committed by impeding the victim's breathing or air flow; or
- (e) the offense is committed using physical force or the threatened use of force against another to block that person's access to any cell phone, telephone, or electronic communication device with the purpose of preventing, obstructing, or interfering with:
 - i. the report of any criminal offense, bodily injury, or property damage to a law enforcement agency; or
 - ii. a request for an ambulance or emergency medical assistance to any law enforcement agency or emergency medical provider.

A person who violates this subsection is guilty of a felony and, upon conviction, must be imprisoned for not more than ten years. (emphasis added).

Pursuant to S.C. Code §16-25-20(B)(5), domestic violence first degree includes domestic violence second degree, with aggravating factors, as defined by the statute. Because domestic violence second degree becomes first degree when there are specific statutory aggravating factors, Appellant specifically requested that the judge define domestic violence second degree. (R. p. 426, lines 2-10; p. 427, lines 8-14; p. 428, line 21 – p. 429, 430, lines 1-2; p. 432, lines 7-22; p. 435, lines 14-20). Defense counsel told the judge:

I don't want the jury to think for some reason that choking somebody automatically rises to high and aggravated, or that blocking somebody from using the telephone automatically rises to high and aggravated. And – and so I think it's appropriate to fashion some way to say criminal domestic violence – and you can say it like this.

You can say criminal domestic violence in the first degree, also, may include **moderate injury** accompanied by choking, blocking somebody from the telephone, or being perceived by a minor. I – I think that would be an appropriate way to do it.

(R. p. 429, lines 12-23)(emphasis added). Appellant did not request domestic violence second degree as a lesser included offense. (R. p. 431, lines 17-24; p. 436, lines 8-21). Instead, Appellant requested a definition of domestic violence second degree when the judge instructed the jury on the lesser included offense of domestic violence first degree pursuant to subsection (B)(5).

The judge refused to initially define domestic violence second degree when instructing the jury on the law of domestic violence first degree. (R. p. 432, line 23 – pp. 433, lines 4-21). The judge, however, indicated that if the jury asked for a definition of domestic violence second degree, “. . . [W]e’ll cross that bridge when we get to it.” (R. p. 435, line 23 – p. 436, lines 1-6). Counsel for Appellant again requested an instruction on domestic violence first degree that included a definition of domestic violence second degree. (R. p. 447, line 24 – p. 448, lines 1-6). The judge again denied the request and the objection was noted for the record. (R. p. 448, line 7 – p. 449, lines 1-21).

During the instruction the judge defined great bodily injury pursuant to S.C. Code §16-25-10(2). The judge told the jury, “Great bodily injury is defined and means bodily injury which causes a substantial risk of death, or which causes serious permanent disfigurement, or protracted loss of impairment of the function of a bodily member or organ.” (R. p. 500, lines 13-16). The judge, however, did not define moderate bodily injury. The judge charged the jury with the law on domestic violence of a high and aggravated nature. (R. p. 500, line 17 – p. 501, lines 1-23).

The judge then charged the jury with the law on domestic violence first degree. (R. p. 501, line 24 – p. 502, 503, lines 1-22). The judge included the following language in the charge on domestic violence first degree:

Five, in the process of committing domestic – the violence in the second degree, one of the following, also, results, A, the offense is committed in the presence of

or while being perceived by a minor. B, the offense is committed against a person known, or reasonably known, or -- or should have been known by the Defendant to be pregnant.

And, C, the offense is committed during the commission of a robbery, burglary, kidnapping, or theft. D, the offense is committed by impeding the victim's breathing or air flow. E, the offense is committed using physical force or threatened use of force against another to block that person's access to any cell phone, telephone, or electronic communication device with the purpose of preventing, obstructing, or interfering with the report of a criminal offense, bodily injury, or property damage, a request for an ambulance or emergency medical assistance to any law enforcement officer.

Domestic violence in the first degree here, as I said earlier, is a lesser included offense of domestic violence of a high and aggravated nature as defined in the previous code section, the code section that I outlined

(R. p. 503, lines 1-22). The judge, however, did not define domestic violence second degree.

After the charge Appellant objected to the failure to explain domestic violence second degree and the failure to define moderate bodily injury. (R. p. 508, lines 5-16). The judge declined to instruct the jury on the definitions of domestic violence second degree and moderate bodily injury. The jury then had several questions. The jury first asked how the witness fled from the State and in what car. (R. p. 522, lines 16-25; Court's Exhibit #4, R. p. 570). The jury then asked the difference between domestic violence of a high and aggravated nature and domestic violence first degree. (R. p. 523, lines 1-3; Court's Exhibit #3, R. p. 570). The judge agreed to re-charge the jury and display the statutes on a screen so that the jury could follow along as the judge read the charge. (R. p. 523, line 4 – p. 524, lines 1-6). Counsel for Appellant asked that the judge explain domestic violence second degree. The judge denied the request. (R. p. 524, lines 7-11). After the re-charge counsel for Appellant stated, "I need to renew my objection as to not putting in the definition of moderate bodily injury or domestic violence second in the charge for domestic violence first degree." (R. p. 531, lines 14-19).

The jury then asked for a copy of the “laws.” (R. p. 532, lines 1-4; Court’s Exhibit #5, R. p. 571). Appellant objected to providing the jury with a written copy of the statutes and renewed the request to define domestic violence second degree and moderate bodily injury. (R. p. 535, lines 21-24). The judge decided, over objection by Appellant, to provide the jury with a written copy of the statutes addressing domestic violence of a high and aggravated nature and domestic violence first degree. (R. p. 537, lines 14-23). Before the judge could provide the written statutes the jury asked the judge to explain kidnapping and asked, “Can the judge read what is bodily harm? Can he state that fear of what?” (R. p. 539, lines 19-21; Court’s Exhibits #6 and #7, R. pp. 571-572). The judge provided the jury with written copies of the statutes addressing domestic violence of a high and aggravated nature, domestic violence first degree and kidnapping. (R. p. 544, lines 7-20; Court’s Exhibits #8, 10 and 11, R. pp. 574, 577-578). The judge also provided the jury with the written definition of great bodily harm, as he instructed earlier. (R. p. 544, lines 21-25; Court’s Exhibit #9, R. p. 576). Counsel for Appellant renewed the objection stating, “I renew my objection as far as second degree, the definition being a necessary part, and the moderate bodily injury definition, as well as I renew my objection about giving them the paper.” (R. p. 545, lines 17-20).

The jury then asked, “What is the difference between peril or fear of great bodily injury?” (R. p. 546, lines 3-4; Court’s Exhibit #12, R. p. 573). The judge answered:

And what I – what I will tell you is that you have to use your common sense, your judgment, your – your dissemination – your determination of what that means. Just use your common sense, your – your – what you—what you believe that those terms mean to you. And I know that’s not what you wanted to come out and hear. But that’s, basically, what I can tell you. So – and you remember at the outset, I said life experience, common sense, your judgment. You’re the judge of the facts. So that’s – that’s within your purview. So to the best of your ability, you – you have to make a determination to the applicability of these terms.

(R. p. 547, line 25 -p. 548, lines 1-11).

The jury returned with one final question, “Domestic violence high and aggravated, if one point is met, can you not look at domestic violence first degree?” (R. p. 549, lines 17-19; Court’s Exhibit #13, R. p. 573). The judge noted, “I think the answer is yes. Are both sides in agreement? Because I think what – the way I interpret this is since you’ve got domestic violence first degree as a lesser included – and that’s what they’re asking – can they consider it? I think the answer is yes.” (R. p. 550, lines 7-12). The judge then told the jury, “We’ve got another question from the jury panel. And it says – and I’m going to read it, it says, Domestic violence high and aggravated nature, if one point is met, can you not look at domestic violence first degree? And I’ve consulted with Counsel from both sides and the answer to that is yes.” (R. p. 551, lines 1-6).

After the jury returned for deliberations, counsel for Appellant said, “Well, Judge, now, I’m concerned. Can you not look – you couldn’t look – I think it was meant colloquial as, can we still look at it? But now that I’ve heard it, it confuses me.” (R. p. 551, lines 16-19). Seven minutes after the judge answered the final question with, “Yes” the jury returned with a verdict of guilty of domestic violence of a high and aggravated nature. (R. p. 551, line 9 – p. 552, lines 1-16). The jury’s numerous questions reflect that they did not understand the difference between domestic violence of a high and aggravated nature and domestic violence first degree. The judge’s charge on domestic violence first degree was incomplete without defining domestic violence second degree and moderate bodily injury. The trial judge erred.

Domestic violence second degree is defined by S.C. Code §16-25-20 as follows:

- (C) A person commits the offense of domestic violence in the second degree if the person violates subsection (A) and:

- (1) **moderate bodily injury** to the person's own household member results or the act is accomplished by means likely to result in **moderate bodily injury** to the person's own household member;
- (2) the person violates a protection order and in the process of violating the order commits domestic violence in the third degree;
- (3) the person has one prior conviction for domestic violence in the past ten years from the current offense; or
- (4) in the process of committing domestic violence in the third degree one of the following also results:
 - a. the offense is committed in the presence of, or while being perceived by, a minor;
 - b. the offense is committed against a person known, or who reasonably should have been known, by the offender to be pregnant;
 - c. the offense is committed during the commission of a robbery, burglary, kidnapping, or theft;
 - d. the offense is committed by impeding the victim's breathing or air flow; or
 - e. the offense is committed using physical force or the threatened use of force against another to block that person's access to any cell phone, telephone, or electronic communication device with the purpose of preventing, obstructing, or interfering with:
 - i. the report of any criminal offense, bodily injury, or property damage to a law enforcement agency; or
 - ii. a request for an ambulance or emergency medical assistance to any law enforcement agency or emergency medical provider.

A person who violates this subsection is guilty of a misdemeanor and, upon conviction, must be fined not less than two thousand five hundred dollars nor more than five thousand dollars or imprisoned for not more than three years, or both.

Domestic violence in the second degree is a lesser-included offense of domestic violence in the first degree, as defined in subsection (B), and domestic violence of a high and aggravated nature, as defined in Section 16-25-65.

(emphasis added).

Moderate bodily injury is defined by S.C. Code §16-25-10(4) as:

[P]hysical injury that involves prolonged loss of consciousness or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ or injury that requires medical treatment when the treatment requires the use of regional or general anesthesia or injury that results in a fracture or dislocation. Moderate bodily injury does not include one-time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that do not ordinarily require extensive medical care.

Domestic violence of a high and aggravated nature is defined by S.C. Code §16-25-65 as follows:

- (A) A person who violates Section 16-25-20(A) is guilty of the offense of domestic violence of a high and aggravated nature when one of the following occurs. The person:
 - (1) commits the offense under circumstances manifesting extreme indifference to the value of human life and great bodily injury to the victim results;
 - (2) commits the offense, with or without an accompanying battery and under circumstances manifesting extreme indifference to the value of human life, and would reasonably cause a person to fear imminent great bodily injury or death; or
 - (3) violates a protection order and, in the process of violating the order, commits domestic violence in the first degree.
- (B) A person who violates subsection (A) is guilty of a felony and, upon conviction, must be imprisoned for not more than twenty years.
- (C) The provisions of subsection (A) create a statutory offense of domestic violence of a high and aggravated nature and must not be construed to codify the common law crime of assault and battery of a high and aggravated nature.
- (D) Circumstances manifesting extreme indifference to the value of human life include, but are not limited to, the following:
 - (1) using a deadly weapon;
 - (2) knowingly and intentionally impeding the normal breathing or circulation of the blood of a household member by applying pressure to the throat or neck or by obstructing the nose or mouth of a household member and thereby causing stupor or loss of consciousness for any period of time;
 - (3) committing the offense in the presence of a minor;
 - (4) committing the offense against a person he knew, or should have known, to be pregnant;

- (5) committing the offense during the commission of a robbery, burglary, kidnapping, or theft; or
- (6) using physical force against another to block that person's access to any cell phone, telephone, or electronic communication device with the purpose of preventing, obstructing, or interfering with:
 - a. the report of any criminal offense, bodily injury, or property damage to a law enforcement agency; or
 - b. a request for an ambulance or emergency medical assistance to any law enforcement agency or emergency medical provider.

The judge's charge on domestic violence first degree was incomplete because it failed to explain domestic violence second degree and moderate bodily injury pursuant to section (B)(5) of the domestic violence first degree statute. As a result, and as evidenced by the numerous questions, the jury, under the facts of this particular case, understandably struggled with the difference between domestic violence of a high and aggravated nature and domestic violence first offense. The degree of injury was a critical determining factor in this case.

On August 29, 2016, officers with the Greenville County Sheriff's Office went to the home of Appellant, Olandio Workman, and his wife, Loretta Workman, for a welfare check on Loretta. The Sheriff's Office had received a call from an individual who was concerned because Loretta had not been at work for a few days. (R. p. 116, line 13 – p. 117, lines 1- 21; p. 121, lines 7-13). When the officers knocked on the door, Mr. Workman answered and told them that Loretta was not at home. (R. p. 122, lines 19-24). The officers did not believe Mr. Workman and eventually the SWAT team was called in. (R. pp. 124-129).

The SWAT team parked their armored vehicle in the drive way and began to announce over the public address system, "This is Greenville County Sheriff's Office SWAT team. We're not here to harm you. We just need to talk to you. Please come to the door or answer your

phone.” (R. p. 224, line 25 – p. 225, lines 1-3). This went on for over an hour before they broke down the door. (R. p. 225, line 3 – p. 226, line 1). Once inside the officers found Loretta and their two children but not Mr. Workman. (R. p. 226, lines 2-6). When asked about the condition of Loretta, an officer testified, “She was rough. She had bruises, like, all over her visible parts of her body that were visible. Her face was swollen and bruised. It was obvious that some type of altercation had occurred.” (R. p. 227, lines 19-22). That night Loretta told the officers the injuries came from a bar fight. (R. p. 228, lines 3-7). Loretta was not hospitalized. (R. p. 274, lines 15-17).

When asked why she did not come to the door, Loretta told the officer she was sleeping. (R. p. 229, lines 2-7). The officer questioned Loretta and testified at trial, “And I said, you know, I find it hard to believe that anybody could sleep through that. Why aren’t you coming out? Why didn’t you just come to the door? I think I said – she was very irritated at everything, and – and just seemed very angry.” (R. p. 230, lines 3-7). The officer also testified that he talked to one of the children who told the officer that he heard the SWAT team but his mother would not let him come out of the room. (R. p. 230, line 23 – p. 231, lines 1-17). The child also told the officer that he heard his parents fighting but did not see the fighting. (R. p. 231, line 18 – p. 232, line 1). Loretta and the two children spent the night with Mr. Workman’s sister, Tammy Green. (R. p. 234, line 16 – p. 235, lines 1-9). DSS was notified. (R. p. 235, line 10 – p. 236, line 1).

Before officers searched the house, Loretta told them that there was a gun under the bed in the master bedroom and a gun in the nightstand in the same bedroom. (R. p. 237, lines 13-20). Loretta had purchased both guns and had a concealed weapons permit. (R. p. 237, lines 7-12; p. 320, lines 14-15). The next morning Loretta took her two children and fled the State, without

speaking with DSS. (R. p. 241, lines 11 –19; p. 243, line 9 – p. 244, lines 1-16). On September 6, 2016, Loretta called the investigator and provided a recorded telephone statement that was very different from the statements she made on the evening the SWAT team was at her house. (R. p. 244, line 18 – p. 245, 246, 247).

At trial Loretta testified that on Saturday night, August 27, 2016, her husband, the Appellant Mr. Workman, came home, accused her of cheating and began hitting her. (R. p. 292, line 2 – p. 293, 294, lines 1-19). According to Loretta this continued into Sunday until Monday when Mr. Workman left for work. (R. pp. 295-296). Loretta testified that Mr. Workman had the gun and hit her once in the hand while holding the gun. (R. p. 299, lines 1-13). Loretta testified that Mr. Workman broke her phone on Sunday night. (R. p. 301, lines 16-24). Loretta claimed that she did not go to work on Monday because Mr. Workman told her if she opened the door, the trailer would explode. (R. p. 300, lines 3-4). She also claimed that Mr. Workman took the keys to the cars although she had a car key to flee the State. (R. p. 300, lines 4-5; p. 311, lines 21-25). Loretta told the investigator that Mr. Workman choked her but agreed that she never lost consciousness. (R. p. 320, lines 21-24). Loretta testified that when Mr. Workman returned from work on Monday, August 29, 2016, he continued to hit her. (R. p. 304, lines 15-25).

Domestic violence first degree includes domestic violence second degree with aggravating factors. S.C. Code §16-25-20(B)(5). The judge's refusal to define domestic violence second degree and moderate bodily injury effectively omitted section (B)(5) from the domestic violence first degree statute and prevented the jury from properly considering the lesser included offense of domestic violence first offense pursuant to S.C. Code §16-25-20(B)(5). The charge on domestic violence first degree was incomplete. The incomplete charge prevented the jury from deciding between great bodily injury and moderate bodily injury. When section (B)(5) is

omitted there is very little difference between domestic violence first degree and domestic violence of a high and aggravated nature, both require great bodily injury. The incomplete charge confused the jury, as evidenced by their questions about the difference between the two statutes. The trial judge abused his discretion in refusing to define domestic violence second degree and moderate bodily injury. The error is not harmless. The record supports a finding of moderate bodily injury with aggravating factors.


In State v. Williams, 367 S.C. 192, 195–96, 624 S.E.2d 443, 445 (Ct. App. 2005), the South Carolina Court of Appeals wrote:

“An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion.” Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). “It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge.” Id. at 390, 529 S.E.2d at 539. If there is any evidence to support a charge, the trial court should grant the request. State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). The requesting party must have been prejudiced by the trial court's failure to give the instruction in order to warrant reversal on appeal. Clark, 339 S.C. at 390, 529 S.E.2d at 539.

Defining domestic violence second degree and moderate bodily injury is a sound principle of law when instructing the jury on domestic violence first degree because first degree includes second degree with aggravating factors. The principle applies to the facts of this case where there was evidence that the bodily injury was moderate rather than great. Domestic violence and moderate bodily injury were not defined in other parts of the instruction. Appellant was prejudiced by the failure to define the terms as part of the lesser included offense. Appellant faced a maximum sentence of twenty years for domestic violence of a high and aggravated nature. The lesser included offense of domestic violence first degree, however, carries a maximum sentence of ten years. The judge erred in refusing to properly define the lesser included offense of domestic violence first degree.

CONCLUSION

Based on the above argument, this Court should reverse Appellant's conviction and sentence for criminal domestic violence of a high and aggravated nature and remand for a new trial.



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Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of February, 2020.

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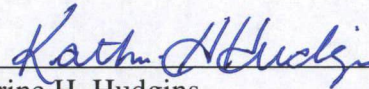
FEB 11 2020

SC Court of Appeals

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability 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."

Respectfully Submitted,



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This 11th day of February, 2020.