STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
The Honorable William A. McKinnon, Circuit Court Judge

Appellate Case No. 2019-0001256

THE STATE, Respondent,

v.

KYLE MAURICE ROBINSON, Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in denying Appellant's motion for a directed verdict when the State produced evidence to establish all the required elements of assault and battery first degree, including direct evidence establishing Appellant injured Victim by touching her private parts without her consent?

STATEMENT OF THE CASE

In December 2017, the York County Grand Jury indicted Appellant for one count of criminal solicitation of a minor. (2017-GS-46-5084). In July 2019, Appellant was indicted by the York County Grand Jury for one count of assault and battery first degree. (2019-GS-46-4368). On July 22-24, 2019 a jury trial was held in the York County Court of General Sessions with the Honorable William A. McKinnon presiding. Appellant was represented by Melissa Inzerillo, Esq., and Jonathan Bonds, Esq. The State was represented by Assistant Solicitor Erin Joyner of the Sixteenth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant of both counts. Following the verdict, the trial judge sentenced Appellant to two concurrent terms of five years' imprisonment. Appellant timely filed a notice of appeal and an initial brief.

STATEMENT OF FACTS

In July 2017, Victim was sixteen years old. (Tr. 75-77). Victim lived in Rock Hill with her mother, sister, maternal grandparents, and cousin, Kylisha. (Tr. 76-77). Appellant is Kylisha's father. (Tr. 76). On July 27, 2017, Appellant came to Victim's house and asked if Kylisha was home. (Tr. 83). When Victim told Appellant that Kylisha was not at home, Appellant asked Victim if he could use the restroom. (Tr. 83). Victim agreed to let Appellant use the restroom and pointed in its direction. (Tr. 87). Appellant asked Victim to show him where the restroom was and Victim led Appellant to the door of the restroom. (Tr. 86-87). When Victim and Appellant reached the door, Appellant grabbed Victim by her shirt and pulled her into the restroom. (Tr. 88). Appellant placed his left hand on Victim's neck and backed her into the corner of the restroom. (Tr. 88-92). While holding Victim with his left hand, Appellant used his right hand to grab Victim's breasts. (Tr. 92). Appellant eventually let go of Victim's neck and began to tug on Victim's shorts. (Tr. 92-93). As he tugged on Victim's shorts, Appellant told Victim "I got $60 if you let me do it." (Tr. 93, lines 10-13). Victim observed that Appellant was sweating profusely and appeared to be under the influence of alcohol. (Tr. 94-95). Appellant eventually stopped his assault on Victim when he heard the footsteps of Victim's sister (Sister). (Tr. 96). Victim went to the living room window and witnessed the car that Appellant arrived in drive away. (Tr. 97).

At trial, Sister testified she saw Appellant arrive and ask Victim where the restroom was located. (Tr. 142). Sister heard Victim's voice coming from the bathroom saying "Stop. Stop." (Tr. 142, lines 20-23). After Sister heard Victim's voice, she ran to the kitchen which was located close to the bathroom. From the kitchen, Sister saw Appellant exit the bathroom and leave the house. (Tr. 143). Victim called her mother (Mother) and asked her to come home. (Tr.

155). When Mother arrived at the house, Victim disclosed to her that she had been assaulted. (Tr. 156). Mother called law enforcement. (Tr. 156-57). Appellant was arrested a short time later at a location near Victim's house. (Tr. 178). At the conclusion of trial, Appellant was convicted of both charges.

STANDARD OF REVIEW

"When ruling on a motion for a directed verdict, the trail court is concerned with the existence or nonexistence of evidence, not its weight." State v. Morgan, 352 S.C. 359, 364, 574 S.E.2d 203, 205 (Ct. App. 2002). "On an appeal from the trial court's denial of a motion for a directed verdict, the appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling." State v. Lindsey, 355 S.C. 15, 20, 583 S.E.2d 740, 742 (2003). When reviewing a denial of a directed verdict at the trial level, the appellate court "views the evidence and all reasonable inferences in the light most favorable to the State." State v. Bennett, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016).

ARGUMENT

The trial judge did not err in denying Appellant's motion for a directed verdict because the State produced evidence to establish all the required elements of assault and battery first degree, including direct evidence establishing Appellant injured Victim by touching her private parts without her consent.

Appellant argues the trial judge erred by denying Appellant's motion for a directed verdict on the charge of assault and battery first degree[1]. Specifically, Appellant argues the State failed to produce any evidence of Victim suffering a bodily injury. However, as the trial court observed, a legal injury as opposed to a bodily injury satisfies the "injures" element of assault and battery first degree. (Tr. 239). Furthermore, even if the State were required to prove a bodily injury, Appellant's act of grabbing Victim by the neck and pressing her against a wall satisfies the minimal requirement of a slight physical injury. Therefore, the trial judge did not err in denying Appellant's motion for a directed verdict on the charge of assault and battery first degree.

"The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." State v. Baucom, 340 S.C. 339, 342, 531 S.E.2d 922, 923 (2000). "The legislature's intent should be ascertained primarily from the plain language of the statute." State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004). "Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits

[1] Appellant does not challenge his conviction for criminal solicitation of a minor nor does he challenge the accompanying concurrent five year sentence that is identical to the sentence he received for assault and battery first degree. Therefore, Appellant's conviction for criminal solicitation of a minor is the law of the case. (Initial Brief of Appellant 1,4,15). See Shirley's Iron Works, Inc. v. City of Union, 403 S.C.560, 573, 743 S.E.2d 778, 785 (2013). ("An unappealed ruling is the law of the case and requires affirmance"). See also Rule 208(b)(1)(B)("Statement of Issues on Appeal. A statement of each of the issues presented for review. The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

or expands the statute's operation. When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning" Id.

In determining whether a directed verdict should be granted, "the trial judge shall consider only the existence or non-existence of the evidence and not its weight." Rule 19 SCRCrimP. When reviewing a denial of a directed verdict at the trial level, the appellate court "views the evidence and all reasonable inferences in the light most favorable to the State." Bennett, 415 S.C. at 235, 781 S.E.2d at 353. "On an appeal from the trial court's denial of a motion for a directed verdict, the appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling." Lindsey, 355 S.C. at 20, 583 S.E.2d at 742. When an appellate court reviews the sufficiency of the evidence to support a criminal conviction, "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). "[I]f there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998).

In 2010, the South Carolina General Assembly passed the Omnibus Crime Reduction and Sentencing Reform Act of 2010 (The Act). S.C. Code § 16-3-600. The Act "codified all assault and battery crimes into ABHAN, and first, second, and third degree assault and battery." State v. Hernandez, 428 S.C. 257, 260, 834 S.E.2d 462, 463 (2019). "Through the passage of the Act, the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses." State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014).

The Act defines each form of assault and battery as well as the terms "Great bodily injury" and "Moderate bodily injury." South Carolina Code section 16-3-600(C)(1) states, in relevant part, that a person commits the offense of assault and battery first degree if the person:

> (a) injures another person, and the act:
> (i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent

S.C. Code § 16-3-600(C)(1)(a)(i).

South Carolina Code section 16-3-600(E)(1) states that a person commits the offense of assault and battery in the third degree if the person "unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so." S.C. Code § 16-3-600(E)(1). South Carolina code sections 16-3-600(A)(1) and (A)(2) define the terms "Great bodily injury" and "Moderate bodily injury" respectively. S.C. Code § 16-3-600(A). Great bodily injury is one element of assault and battery of a high and aggravated nature. S.C. Code § 16-3-600(B)(1). Moderate bodily injury is an element of assault and battery second degree. S.C. Code § 16-3-600(D)(1). The term "injures" as used in S.C. Code § 16-3-600(C)(1) and S.C. Code § 16-3-600(E)(1) is not defined.

Prior to the adoption of The Act, the crime of assault was defined as "an unlawful attempt or offer to commit a violent injury upon the person of another, coupled with the present ability to complete the attempt or offer by a battery." In re McGee, 278 S.C. 506, 507, 299 S.E.2d 334, 334 (1983). The offense of simple assault and battery was defined as "an unlawful act of violent injury to another, *unaccompanied by any circumstances of aggravation.*" State v. White, 361 S.C. 407, 413, 605 S.E.2d 540, 543 (2004)(emphasis in original). "A simple assault and battery may be said to be violent. Violence does not necessarily import serious injury." State v. Germany, 211 S.C. 297, 300, 44 S.E.2d 840, 841 (1947).

However, our appellate courts have not defined the term "injures" in a criminal context either before or after the adoption of the Act. In the absence of such guidance, it is instructive to review the common law definitions of the torts of assault and battery. The tort of assault is defined as "an attempt or offer, with force or violence, to inflict bodily harm on another or engage in some offensive conduct." Mellen v. Lane, 377 S.C. 261, 276, 659 S.E.2d 236, 244 (Ct. App. 2008). A battery is defined as "the actual infliction of any unlawful, unauthorized violence on the person of another, irrespective of its degree; it is unnecessary that the contact be by a blow, as any forcible contact is sufficient." Gathers v. Harris Teeter Supermarket Inc., 282 S.C.220, 230, 317, S.E.2d 748, 754 (Ct. App. 1984). "Generally speaking, a *battery* is the unlawful touching or striking of another by the aggressor himself...done with the intention of bringing about a harmful or offensive contact which is not legally consented to by the other." Mellen 377 S.C. at 277, 659 S.E.2d at 244 (quoting Smith v. Smith, 194 S.C. 247, 259, 9 S.E.2d 584, 589 (1940))(emphasis in original).

On appeal, Appellant primarily argues the trial judge erred by denying his motion for a directed verdict, because the State did not produce any evidence that Appellant injured Victim. On the contrary, the State produced direct evidence of injury through the testimony of Victim. Victim testified that Appellant grabbed her neck and breasts without her consent. (Tr. 88-92). Consequently, evidence existed that Appellant injured Victim. Therefore, the trial judge correctly denied Appellant's motion for a directed verdict and allowed the jury to determine the weight of that evidence.

However, Appellant additionally argues that his grabbing of Victim's neck and his unwanted touching of Victim's breasts do not satisfy the requirement of S.C. Code § 16-3-600(C)(1)(a) that a person "injures" another person in addition to a nonconsensual touching with

lewd or lascivious intent. Thus, Appellant argues the legislature intended for the State to prove a specific level of bodily injury and that Appellant's grabbing of Victim's neck and breasts did not meet the legislature's intended requirement.

At trial, the following exchange occurred between Appellant's trial counsel and the trial judge when Appellant moved for a directed verdict:

> The Court: Unlawfully—unlawful touching, a touching without permission is a legal injury. It may not be a medical injury. My read of the statute is that this provision is basically using the injury standard from A and B third; are we correct on that? It's not bodily injury. It's not great bodily injury. It's just basic injury. And it doesn't even say bodily injury. That phrase doesn't show up.
>
> Mr. Bonds: Yes, Your Honor, and I respectfully disagree. I believe the statute does call for some sort of physical injury.
>
> ....
>
> The Court: Again, tradition (sic) legal principle that a push or a shove is an assault even though there is no bruising. It seems to me that's the same standard that we are looking at here.
>
> Mr. Bonds: Your Honor, I understand the unwanted touching is a battery and the threat itself is the assault.
>
> The Court: But I'm also saying people refer to a legal injury. To shove someone that's an injury, right? It's not just a tort. You can't—if someone shoves you then then (sic) you've been legally injured, right? It's an intention (sic) act causing if there's no injury you can't sue.
>
> Mr. Bonds: Well, Your Honor, again I think for the purposes of record preservation I respectfully disagree.

(Tr. 239, lines 3-13, 22-25; Tr. 240, lines 1-12).

To answer the question Appellant poses, it is instructive to examine each of the assault and battery crimes described in The Act. Assault and battery third degree is the lowest level of assault and battery and merely requires the State to prove that a defendant unlawfully injures another person or attempts to do so. See S.C. Code § 16-3-600(E)(1). The legislature added

additional requirements for every successive degree of assault and battery. For the offenses of assault and battery of a high and aggravated nature and assault and battery second degree, the legislature specified levels of *bodily* injury that the State must prove resulted or could have resulted to a victim. The legislature did not include a requirement that a specific type of bodily injury be proven in order for a person to be convicted of assault and battery first degree. Rather, the legislature required the State to prove that the act of injury involved an unwanted touching with lewd or lascivious intent or was committed during a robbery, burglary, kidnapping, or theft. If the legislature had intended to require the State to prove a specific type of bodily injury, they would have explicitly written that requirement in the statute as they did with the specific injury requirements of S.C. Code § 16-3-600(B)(1) and S.C. Code § 16-3-600(D)(1). By choosing to define two different types of bodily injury in S.C. Code § 16-3-600(B)(1) and S.C. Code § 16-3-600(D)(1), but not in S.C. Code § 16-3-600(C)(1)(a)(i), the legislature clearly contemplated a type of injury that was not bodily. Appellant is asking this Court to add the additional requirement of a specific bodily injury into the text of S.C. Code § 16-3-600(C)(1)(a)(i) when no such requirement exists in the plain language of the statute. The rules of statutory construction forbid such a result.

When faced with an undefined statutory term, a Court must interpret the term in accordance with its usual and ordinary meaning. See Landis, 362 S.C. at 102, 606 S.E.2d at 505. The American College Dictionary defines the word "injure" as follows: "1. To do or cause harm of any kind to; damage; hurt; impair...2. To do wrong or injustice to." THE AMERICAN COLLEGE DICTIONARY 626 (1960). The preceding broad definition is consistent with our State's common law definition of a battery. Furthermore, such a broad definition is consistent with the overall text of The Act. If the legislature had intended to require the State to prove a specific bodily

injury, surely they would have defined such an injury requirement as they did in S.C. Code § 16-3-600(A)(1) and (A)(2). Because the legislature did not define a specific bodily injury that is required, this Court should not impose such a requirement on appeal.

Appellant does not specify what level of bodily injury he thinks the State should be required to prove, but he does suggest that the legislature created a third category of injury by implication within the definition of moderate bodily injury found in S.C. Code § 16-3-600(A)(2). Appellant writes "And, the third category of injuries were those that were neither severe nor moderate. As the legislature explained, this third category included injuries that required one-time treatment or resulted in scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that do not ordinarily require extensive medical care." (Initial Brief of Appellant 12). Appellant does not make a specific argument regarding this distinction, but the implication of the aforementioned sentences is that Appellant believes the "third category" of injury applies to the term "injures" as it is used in S.C. Code § 16-3-600(C)(1) and S.C. Code § 16-3-600(E)(1).

To the extent Appellant argues the State was required to prove a bodily injury within Appellant's suggested "third category", the State succeeded in proving such an injury. The State proved that Appellant grabbed Victim by her neck through her testimony. Victim testified that, while Appellant was not choking her, the experience of having Appellant's hands around her neck was "uncomfortable" and that she struggled to keep her balance to avoid falling down from the force of Appellant pressing her against the wall. (Tr. 90, lines 24-25- Tr. 91, lines 1-10). Victim did not have any cuts or bruises from Appellant's assault nor did she require medical care. However, Appellant's proposed third category of injury includes "other minor injuries that do not ordinarily require extensive medical care." Thus, even by Appellant's suggested rationale, the trial judge correctly concluded that evidence of Victim suffering an injury existed and

therefore the case was properly submitted to the jury for them to determine the weight of that evidence.

While Appellant does not provide clarity on the specific type of bodily injury that he believes the State should be required to prove on appeal, Appellant's trial counsel was very specific when he was asked what constituted an injury under the statute in the following exchange with the trial judge:

> The Court: Now Mr. Bonds, let's talk about assault and battery third for a second.
>
> Mr. Bonds: Yes, Your Honor.
>
> The Court: does a slap qualify for assault and battery third?
>
> Mr. Bonds: I believe so, Your Honor.
>
> The Court: Why?
>
> Mr. Bonds: Because it's an unwanted touching and I believe a slap would cause, again, some minor physical—some redness. Some sort of injury.
>
> The Court: But is redness an injury?
>
> Mr. Bonds: I think if a person hurts then certainly. While it's a slight injury it would still be an injury.
>
> The Court: What's your definition of an injury?
>
> Mr. Bonds: I think an injury would be any physical harm or irritation or ailment even slight would be considered an injury. I don't think in this case I don't want to put words in the solicitor's mouth but I believe that we're talking about physic injury at this point.

(Tr. 238, lines 7-25- Tr. 239, lines 1-2).

As previously argued, the legislature did not intend to require the State to produce evidence of a bodily injury to prove the "injures" element of assault and battery first degree. However, if we assume for the sake of argument that a bodily injury is required, the State would only be required to prove "any physical harm or irritation or ailment even slight" as Appellant's

trial counsel suggested. Here, the State produced direct evidence of a slight physical harm or irritation through Victim's testimony that Appellant grabbed her by the neck and forced her against the wall. (Tr. 88-92). Therefore, the trial judge correctly denied Appellant's motion for a directed verdict. Appellant's convictions and sentences should be affirmed.

CONCLUSION

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

Respectfully submitted,

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July 6, 2020

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
The Honorable William A. McKinnon, Circuit Court Judge

Appellate Case No. 2019-001256

THE STATE, Respondent,

v.

KYLE MAURICE ROBINSON, Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by email to the address listed in AIS and with a copy of the same to be deposited in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
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I further certify that all parties required by Rule to be served have been served.
This sixth day of July, 2020.

Sally Ellison

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Subject:	Emailing: 2 attachments
Attachments:	Cover Letter to IBOR (02318033xD2C78).pdf; Robinson Kyle Maurice Initial Brief of Respondent & Designation of Matter Appellate Case No. 2019-001256 (02318038xD2C78).pdf

Dear Ms. Hackett:

Attached please find a copy of the Initial Brief of Respondent and Designation of Matter in the State v. Kyle Maurice Robinson (2019-001256), along with its cover letter. These documents will be submitted to the Court of Appeals through the AIS system. As indicted on the Certificate of Service, in addition to this email, a hard copy of these documents have been deposited in today's mail.

Please reply to email to confirm receipt of the attached documents.

Thank you.

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