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Feb 11 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WALTER A. PALACIOS,

APPELLANT

APPELLATE CASE NO. 2021-000620

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in refusing to instruct the jury on the definition of “cohabitation” where Appellant was charged with Domestic Violence of a High and Aggravated Nature which required the state to prove that he and the alleged victim “cohabited” together and this term was never defined for the jury?

STATEMENT OF THE CASE

Appellant was indicted by the Colleton County Grand Jury for burglary in the first degree, domestic violence of a high and aggravated nature (“DVHAN”), and assault with intent to commit criminal sexual conduct in the first degree. R. 297-298; 300-301; 303-304. Appellant’s trial was held before the Honorable DeAndrea G. Benjamin and a jury from June 1 – 3, 2021. Appellant was represented by David S. Mathews and the state was represented by Julie Kate Keeney. R. 1.

The jury found Appellant guilty as charged on each count. R. 289, ll. 5 – 18. The judge sentenced Appellant to concurrent terms of eighteen-years-imprisonment on each offense. R. 293, ll. 2 – 9.

This appeal follows.

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.

“The law to be charged is determined from the facts presented at trial.” State v. Lewis, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997). The appellate courts “will not reverse a circuit court's decision to deny a specific request to charge unless the circuit court committed an error of law.” State v. Curry, 410 S.C. 46, 52, 762 S.E.2d 721, 724 (Ct. App. 2014).

When determining whether a trial court erred in its jury instruction, appellate courts should consider the charge given “as a whole and in light of the evidence and issues presented at trial.” State v. Logan, 405 S.C. 83, 90–91, 747 S.E.2d 444, 448 (2013) (citing State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011)). If the jury charge adequately covers the law and is substantially correct, then it does not require reversal. Logan, 405 S.C. at 90-91, 747 SE.2d at 448.

STATEMENT OF FACTS

Appellant and Maria Del Carmen Peraza Flores (“Flores”) met at a restaurant in Hardeeville and started dating. R. 124, l. 17 – 128, l. 1. According to Flores¹, she and Appellant dated for “about eight months.” Flores claimed that she and Appellant lived together but further explained: “He would come and go. One week he was in the house; one week he wasn’t.” . 128, ll. 2 – 15. Flores also stated that Appellant would “sometimes” leave his clothes at her house. R. 128, ll. 16 – 20. Flores said that she ended her relationship with Appellant and “got together with a guy that was from Miami.” R. 130, ll. 4 – 25. Flores then moved to a different house with her new boyfriend. R. 131, l. 1 – 132, l. 5.

On the morning of November 6, 2019, Flores claimed that Appellant came into her home where she lived with her new boyfriend and attacked her.² Flores said that she had gotten up at 4:00 a.m. to cook for her new boyfriend and to get her daughter ready for school. Flores said that after her daughter left for school, she went back to bed but left the door unlocked. That is when she says she was attacked by Appellant. R. 132, l. 10 – 133, l. 8.

Flores claimed that Appellant “jumped on her” with a knife or some kind of blade and was trying to take her clothes off and “abuse” her. R. 132, l. 24 – 133, l. 8. Flores further claimed that Appellant was jealous that she was with another man and that during the attack Appellant had his zipper down. R. 134, ll. 5 – 25. Flores had a bruise on her arm and marks on her leg, which she said were caused by Appellant punching her and cutting her clothes with a knife. R. 136, l. 13 – 137, l. 11.

¹ Flores, who spoke Spanish, testified through an interpreter. R. 123, l. 21 – 124, l. 4.

² According to Flores, she and Appellant had been separated for six months at the time of the incident. R. 130, ll. 3 – 7.

Demetrius Gilyard with the Walterboro Police Department responded to Flores' house and was met by Flores and her current boyfriend. R. 70, l. 3 – 71, l. 24. Gilyard recalled that Flores appeared distraught but there was a “very large language barrier” so he was not sure what Flores was saying. R. 71, l. 25 – 72, l. 11. Flores showed Gilyard that she had scrapes on her side and a bruise on her arm. R. 73, ll. 6 – 11.

Flores was initially transported to Colleton Medical Center ER, but was discharged from Colleton Medical and transported to the Medical University of South Carolina (“MUSC”) so that she could be seen by a sexual assault nurse. R. 82, l. 17 – 85, l. 12. However, the sexual assault nurse that treated Flores at MUSC testified that Flores “did not disclose that she had been sexually assaulted.” R. 187, ll. 12 – 19. After Flores was discharged from MUSC she was transported to her sister's home. R. 109, ll. 15 – 22.

ARGUMENT

The trial judge erred in refusing to instruct the jury on the definition of “cohabitation” because Appellant was charged with Domestic Violence of a High and Aggravated Nature which required the state to prove that he and the alleged victim “cohabited” together and this term was never defined for the jury.

Relevant Facts

Before closing arguments, trial counsel requested that the judge instruct the jury on the definition of “cohabitation.” R. 217, ll. 6 – 7. Counsel requested that the Black’s Law Dictionary definition be used. However, counsel acknowledged that the word was not defined in the Domestic Violence section of the South Carolina Code. R. 217, ll. 8 – 18; S.C. Code § 16-25-10. The trial judge voiced her concern that the Black’s Law definition of cohabitation included the word “spouse” which would be a contradiction in the statute since the statute listed spouse and former spouse separately from cohabitation. R. 217, ll. 19 – 25.

The state objected to counsel’s request arguing that the Black’s Law definition was too narrow. The state then pointed to the New Oxford American Dictionary which defined cohabit as living together and having a sexual relationship but not being married. R. 218, ll. 6 – 15. The trial judge denied counsel’s request saying, “I think the way that it is written in the statute, should be explanatory, because it doesn’t have a definition of cohabitation.” The trial judge said she did not want to “get into quoting a dictionary.” R. 220, ll. 19 – 22.

Counsel’s request to charge was marked as Court’s Exhibit 1. The definition that counsel requested the trial judge to charge read: “Cohabitation means to live together as spouses. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations.” R. 295-296.

The solicitor contended in her closing argument that the state's position was that Appellant and Flores were "household members" because they formerly cohabited:

The first requirement that I have to prove is that [Appellant] caused physical harm or injury to his own household member. So household member is something that our legislature has defined. And one of the ways that you can prove it is if a male or female, who are cohabitating or formerly cohabited. *And that's what we're dealing with here, they were together in a romantic relationship, sexual relationship. That's what we're dealing with here.*

R. 240, ll. 16 – 23 (emphasis added). The judge did not define the term "cohabitation" in her instructions to the jury. R. 278, ll. 2 – 4.

Discussion

The primary rule of statutory construction is to give effect to the intention of the legislature. State v. Hercheck, 403 S.C. 597, 602, 743 S.E.2d 798, 800 (2013). The text of the statute itself is the best evidence of what the legislature intended. Id. "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." State v. Brannon, 379 S.C. 487, 495, 666 S.E.2d 272, 276 (Ct. App. 2008), aff'd, 388 S.C. 498, 697 S.E.2d 593 (2010).

"Where the terms of the statute are clear, the court must apply those terms according to their literal meaning." City of Columbia v. Am. C.L. Union of S.C., Inc., 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996). Appellate courts "cannot construe a statute without regard to its plain and ordinary meaning, and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope." Id. at 388, 475 S.E.2d at 749.

"If there is any ambiguity in the statute, however, that ambiguity 'should be resolved in favor of a just, equitable, and beneficial operation of the law.'" Est. of Nicholson ex rel. Nicholson v. S.C. Dep't of Health & Hum. Servs., 377 S.C. 590, 595, 660 S.E.2d 303, 305 (Ct.

App. 2008) (quoting Stephen v. Avins Constr. Co., 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct. App. 1996)). “The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose.” Cox v. BellSouth Telecommunications, 356 S.C. 468, 472, 589 S.E.2d 766, 768 (Ct. App. 2003).

“Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning.” Lee v. Thermal Eng'g Corp., 352 S.C. 81, 91–92, 572 S.E.2d 298, 303 (Ct. App. 2002). “Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.” State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991).

Section 16-25-20 of the South Carolina Code provides that 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.” The term “household member” is defined as: “(a) a spouse; (b) a former spouse; (c) persons who have a child in common; or (d) a male and female who are cohabiting or formerly have cohabited.” S.C. Code § 16-25-10. The term “cohabitation” is not defined in the statutes dealing with domestic violence.

In Doe v. State, 421 S.C. 490, 808 S.E.2d 807 (2017), the Supreme Court considered whether the definition of “household member” in section 16-25-10 was unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution as applied to same-sex couples. Doe and her ex-fiancé were a same-sex couple who had a domestic dispute where Doe alleged that her ex-fiancé assaulted her and followed her to work which made Doe feel threatened. Doe, 421 S.C. at 496, 808 S.E.2d at 810.

Doe sought an order of protection from the Family Court which was denied because of the statute's definition of household member as being a "male and female" who are cohabiting or have formerly cohabited. Id. at 496-97, 808 S.E.2d at 810. The Court ultimately concluded that the definition of household member was unconstitutional as applied to Doe. Specifically, the Court found that there was no rational basis for the term to be defined in such a way as to exclude a male and a male or a female and a female who are cohabiting or formerly have cohabited. Id. at 505, 808 S.E.2d at 815.

In State v. Lewis, 434 S.C. 158, 863 S.E.2d 1 (2021), the Supreme Court dealt with a void for vagueness challenge to the statute which criminalizes misconduct of public officers. The Supreme Court ultimately found that the statute was not void for vagueness because it contained words with settled legal meanings, including words such as "official misconduct," "corruption," and "fraud." Id. at 168-69, 863 S.E.2d at 6-7.

However, the concurrence in Lewis aptly noted that even though the statute was not void for vagueness, the trial judge erred in failing to define the term "fraud" to provide the jury with a meaningful standard by which it could evaluate whether the defendant's conduct was criminal. Id. at 174, 863 S.E.2d at 10 (Few, J., concurring in result).³ The concurrence agreed that the trial judge's failure to define "fraud" left the crime itself for which the defendant was charged undefined, which meant ordinary jurors would not know what conduct was prohibited. Id. at 173, 863 S.E.2d at 11; see also State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994) (finding that trial judge erred in failing to define "positive act" in its instructions regarding the mens rea requirement in a kidnapping prosecution); State v. Buckner, 341 S.C. 241, 534 S.E.2d 15 (Ct. App. 2000) (holding that the trial judge erred by lowering the state's burden of proof in unlawful

³ The majority opinion did not address this question holding instead that it was procedurally barred. Lewis, 434 S.C. at 170, n.8, 863 S.E.2d at 7, n.8.

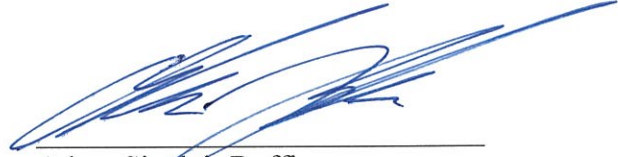
use of a telephone prosecution where the trial judge charged the jury on the statute and also defined the statutory terms). Although the concurrence ultimately concluded that the error was harmless beyond a reasonable doubt, it noted: “If the trial court had defined fraud for the jury, in my opinion, the jury could not have convicted him of misconduct in office on the basis of the State’s fraud argument.” Lewis, 434 S.C. at 179, 863 S.E.2d at 12.

Here, had the trial judge defined “cohabitation” for the jury as requested by trial counsel, Appellant would not have been convicted of DVHAN or any degree of domestic violence. There was no evidence in the record that Appellant and Flores ever “lived together as spouses.” Nor was there any evidence that they mutually assumed the rights and obligations that are typically manifested by married people. Instead, Flores only testified that Appellant sometimes stayed at her house but would come and go and that he sometimes left clothes there. Flores acknowledged they only were in a relationship for eight months. R. 128, ll. 2 – 20.

The solicitor capitalized on the trial judge’s failure to define the word “cohabitation” in her closing argument by arguing that Appellant and Flores cohabited simply by virtue of their having been in a sexual relationship. Even under the definition of “cohabitation” suggested by the state – unmarried people living together in a sexual relationship – this was a misleading statement to the jury. R. 218, ll. 6 – 15. The trial judge erred in refusing to define the term “cohabitation” for the jury so it would have a meaningful standard by which to determine whether Appellant and Flores were “household members.” Appellant’s DVHAN conviction should be reversed.

CONCLUSION

By reason of the foregoing argument, Appellant's convictions should be reversed, and this case remanded to the Colleton County Court of General Sessions for a new trial.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of February, 2022.

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V.

WALTER A. PALACIOS,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Walter A. Palacios states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge DeAndrea G. Benjamin, which was held on June 1-3, 2021, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Walter A. Palacios.

Respectfully Submitted,



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of February, 2022.

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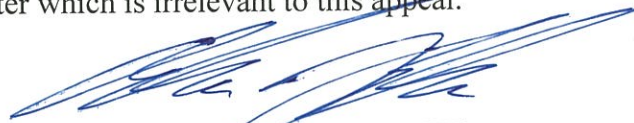
APPELLANT

**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Entire trial transcript;
- (3) Court's Exhibit 1 (Charge request).

I certify that this designation contains no matter which is irrelevant to this appeal.



Adam Sinclair Ruffin
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CERTIFICATE OF COUNSEL

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



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February 11, 2022.