ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JACQUELINE YVETTE SULLIVAN,

APPELLANT

APPELLATE CASE NO. 2012-212562

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in refusing to charge the lesser included offense of simple assault and battery in regard to the charge of assault and battery of a high and aggravated nature alleging that Appellant kicked an officer?

2. Did the trial judge err in refusing to direct a verdict of acquittal in regard to the charges of assault and battery of a high and aggravated nature and assault and battery upon an emergency medical service provider where the allegation was that Appellant spit at the officer and the medical service provider?

STATEMENT OF THE CASE

In April of 2010, the Greenville County Grand Jury indicted Sullivan for two counts of assault and battery of a high and aggravated nature [ABHAN] and one count of assault and battery upon an emergency medical service provider, indictments #2009-GS-23-9873, 9874, 9875[1]. On April 19, 2012, Sullivan proceeded to jury trial before the Honorable Edward W. Miller. Attorney Larry Cooke represented Sullivan at trial. Attorney Jeff Weston prosecuted the case on behalf of the State. The jury returned verdicts of guilty and Judge Miller sentenced Sullivan to ten years provided upon the service of 24 months the balance was suspended with three years probation for one of the ABHAN charges, ten suspended during probation on the other ABHAN charge and 24 months concurrent for the assault and battery upon an emergency medical service provider charge. A timely notice of intent to appeal was served on April 27, 2012. This appeal follows.

[1] It is unclear why the indictment number is 2009. The 2009 term is scratched out and replaced with 2010, and the stamp reflects September 13, 2010. (App. pp. 160-165).

ARGUMENT

1. The trial judge erred in refusing to charge the lesser included offense of simple assault and battery in regard to the charge of assault and battery of a high and aggravated nature alleging that Appellant kicked an officer.

Appellant, Jacqueline Yvette Sullivan, was arrested for prostitution during an undercover sting operation by the Greenville County Sheriff's Department. Investigator Chad Ayers was part of the arrest team of the undercover operation. (R. p. 41, lines 10-22). According to Investigator Ayers, as he was transporting Sullivan to the detention center, she became angry and tried to kick out the back window of the patrol car. (R. p. 45, line 9 – p. 46, lines 1-3). Investigator Ayers testified that he called for back up, stopped his car and opened the back door to try to stop Sullivan from kicking the window. (R. p. 47, line 11 – p. 48, lines 1-6). The investigator testified that as he tried to tase Sullivan, she kicked him in the groin. (R. p. 48, lines 6-25).

At the close of the case, counsel for Sullivan asked for a charge on the lesser included offense of simple assault and battery. (R. p. 123, line 6 – p. 124, lines 1-17). The judge denied the motion stating, "Well the acts of circumstances of aggravation in this case is through he resistance of lawful authority. . . . There hasn't been any evidence to show that these men weren't acting lawfully when they made the arrest." (R. p. 123, lines 12-18). The judge erred.

In State v. Patterson, 337 S.C. 215, 231, 522 S.E.2d 845, 853 (Ct.App. 1999) the South Carolina Court of Appeals wrote:

> Assault and battery of a high and aggravated nature is an unlawful act of violent injury to another accompanied by circumstances of aggravation. State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (1999). Examples of circumstances of aggravation include the use of a deadly weapon, the infliction of serious bodily injury, the intent to commit a felony, great disparity between the ages and physical conditions of the parties involved,

> and the difference in the sexes. Id. Other circumstances include indecent liberties or familiarities with a female, the purposeful infliction of shame and disgrace, and resistance to lawful authority. Id. Simple assault and battery, in contrast, is "an unlawful act of violent injury to another unaccompanied by any circumstances of aggravation." State v. Sprouse, 325 S.C. 275, 285-86, 478 S.E.2d 871, 877 (Ct.App.1996).

There is evidence in the record which warrant an instruction on the lesser included offense of simple assault and battery. The Court of Appeals in Patterson also wrote:

> Due process requires that a lesser included offense be charged when the evidence warrants it but only if the evidence would permit a jury rationally to find the defendant guilty of the lesser offense. Tyndall, supra. In 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. Id.

337 S.C. at 233, 522 S.E.2d at 854 (citing State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct.App. 1999)). The jury could rationally have found that Sullivan was not resisting lawful authority when she kicked Investigator Ayers but was rather protecting herself from being tased. The judge erred in refusing to charge the lesser included offense of simple assault and battery. The error is not harmless.

> 2. The trial judge erred in refusing to direct a verdict of acquittal in regard to the charges of assault and battery of a high and aggravated nature and assault and battery upon an emergency medical service provider where the allegation was that Appellant spit at the officer and the medical service provider

The indictment for assault and battery upon an emergency medical service provider, indictment #2009-GS-23-9874 alleges, "That JACQUELINE YVETTE SULLIVAN did in Greenville County, on or about the 1st day of October, 2009, willfully and unlawfully commit an assault and battery upon JEFF FOWLER, an Emergency Medical Service

Provider by spitting in his face, while he was performing an/or providing medical aide. This is in violation of § 16-3-635 of the South Carolina Code of Laws (1976) as amended." (R. p. 163). Fowler testified that as he was attempting to treat Sullivan, she spit at him. (R. p. 74, lines 6-8).

The second ABHAN indictment, 2009-GS-23-9873, involved Sgt. Robert Curtis with the Greenville County Sheriff's Department. Sgt Curtis testified that Sullivan spit at him. (R. p. 82, lines 14-18). There is no allegation that Sullivan kicked or hit Fowler or Sgt Curtis. These two indictments are based solely on her spitting at them.

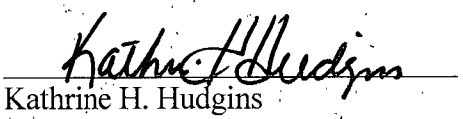
Spitting does not constitute a battery. In In the Interst of Doe, 318 S.C. 527, 533-534, 458 S.E.2d 556, 560 (Ct.App. 1995) the South Carolina Court of Appeals wrote, "Assault differs from assault and battery in that there is no touching of the victim in an assault. Id. at 431, 75 S.E. at 703. (illustrations of assault include any attempt to do violence in a rude, angry, or resentful manner; raising a stick or fist, within striking distance; pointing a gun within the distance it will carry; spitting in one's face, and the like)." See also State v. Sanders, 92 S.C. 427, 75 S.E. 702 (1912).

The judge erred in refusing to direct a verdict of acquittal for the two charges alleging that spitting constitutes a battery. The error is not harmless. The conviction and sentences for these two charges should be reversed.

CONCLUSION

Based on the argument presented in issue one, the ABHAN conviction and sentence should be reversed and that charge remanded for a new trial. Based on the argument presented in issue two, the conviction and sentence for the remaining ABHAN charge and the assault and battery upon an emergency medical service provider should be reversed.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of May, 2013.

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APPELLATE CASE NO. 2012-212562

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jacqueline Yvette Sullivan states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge Edward W. Miller, which was held on April 19, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She 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, she asks the Court to relieve her as counsel for Jacqueline Yvette Sullivan.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of May, 2013.

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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) Trial Transcript

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

May 1st, 2013

Kathrine H. Hudgins
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Attorney for Appellant

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Jacqueline Yvette Sullivan, at 21 Capitol Court, Greenville SC 29601, this 1st day of May, 2013.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of May, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 1, 2013

Kathrine H. Hudgins
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