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Jun 12 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DYLAN TREY FOSTER,

APPELLANT

APPELLATE CASE NO. 2022-001274

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

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ATTORNEY FOR APPELLANT

TABLE OF AUTHORITIES

South Carolina Cases

Bailey v. State, 392 S.C. 422, 709 S.E.2d 671(2011)..... 6, 7

State v. Brown, 360 S.C. 581, 602 S.E.2d 392 (2004) 6

State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986) 3, 6

State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)..... 3

State v. Summers, 276 S.C. 11, 274 S.E.2d 427 (1981) 6

State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996)..... 3

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in charging the lesser-included offense of second-degree criminal sexual conduct because the indictment did not allege threats or coercion, but only alleged “aggravated force,” resulting in a material variance?

STANDARD OF REVIEW

The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense. State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986). “An appellate court will not reverse the trial [court]’s decision absent an abuse of discretion.” State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). “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. at 570, 647 S.E.2d at 166–67. The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996).

ARGUMENT

The trial court erred in charging the lesser-included offense of second-degree criminal sexual conduct because the indictment did not allege threats or coercion, but only alleged “aggravated force,” resulting in a material variance.

The indictment drafted by the solicitors for first-degree CSC stated that appellant Dylan Trey Foster (“Foster”) “used aggravated force to accomplish this sexual battery.” R. 346. Nothing in the indictment mentions threats or coercion. R. 346. Over Foster’s objection, the trial judge submitted second-degree CSC to the jury. R. 272, l. 14 – 274, l. 7.

Complainant and Foster had recently ended a romantic relationship. R. 69, l. 14 – 19. They lived together and when they broke up in mid-June 2019, Foster moved out. R. 69, l. 18 – 70, l. 22. Complainant claimed the reason for the breakup was that Foster “had relapsed” and began using drugs. R. 70, l. 15 – 18.

On the night of July 30-31, 2019, Foster came to complainant’s house to retrieve some of his belongings. R. 70, l. 23 – 71, l. 21. He came to the front door, according to complainant’s testimony. R. 70, l. 23 – 71, l. 21. She gave Foster his things and then stepped outside the front door and smoked a cigarette with him. R. 70, l. 23 – 71, l. 21. She assumed Foster left. R. 70, l. 23 – 71, l. 21.

Complainant’s friend, Douglas Bowlby (“Bowlby”), testified that she called him and said Foster had been knocking on her sliding glass back door. R. 109, l. 13 – 19. Bowlby told the police that complainant said in this phone call that she told Foster he could sleep on her back porch. R. 123, l. 10 – 20.

Complainant testified that Foster returned to her house and knocked on the back door. R. 72, l. 3 – 19. Foster asked if he could stay the night because he was homeless. R. 72, l. 3 – 19.

She declined. R. 72, l. 3 – 19. Foster asked for a roll of toilet paper. R. 72, l. 3 – 19. When she opened the door to throw Foster the toilet paper, he rushed the entrance and stood in the doorway. R. 72, l. 3 – 19. Complainant again told him to leave, but Foster forced his way inside and shoved complainant on the couch. R. 73, l. 1 – 12.

Complainant then described a brutal assault and rape to the jury. R. 76, l. 9 – 87, l. 12. She claimed Foster held her down, choked her, and vaginally and orally raped her. R. 76, l. 9 – 87, l. 12. Foster threatened to kill her and leave her body for her sleeping children to find the next morning. R. 76, l. 9 – 87, l. 12. He made complainant take him to a gas station, withdraw money from her bank account, and drive him around to buy drugs. R. 76, l. 9 – 87, l. 12. Foster gave a recorded statement to the police and said complainant willingly let him in the house and consensually performed oral sex on him. State’s Ex. 20.

Complainant had video cameras at her house, but the videos were deleted. R. 97, l. 1 – 10. Video surveillance at the gas station contradicted complainant’s claim that Foster kept her phone. R. 101, l. 6 – 102, l. 13. Complainant told the police she dropped Foster off at a shopping center, but testified that Foster let her leave after taking him to a friend’s house. R. 123, l. 2 – 7. R. 87, l. 7 – 12.

After an in-chambers charge conference, appellant lodged his objection to the court’s intention to charge second-degree CSC as a lesser-included of first-degree CSC. R. 272, l. 14 – 273, l. 7. Defense counsel argued that the only fact on the indictment was “aggravated force” and that second-degree did not contain that element. R. 272, l. 14 – 273, l. 7. Appellant compared the two statutes, noting that second-degree CSC required “aggravated coercion” and that had not been alleged in the indictment. R. 272, l. 14 – 273, l. 7. Without this fact alleged, the jurors should not be allowed to consider that charge. R. 272, l. 14 – 273, l. 7. Judge Gravely

overruled the objection and charged the jury on second-degree CSC. R. 272, l. 14 – 273, l. 7. The jury acquitted Foster of first-degree CSC, but convicted him of second-degree. R. 336, l. 6 – 337, l. 14.

The court erred in charging second-degree CSC. Second-degree CSC states, “A person is guilty of criminal sexual conduct in the second degree if the actor uses aggravated coercion to accomplish sexual battery.” S.C. Code Ann. § 16-3-653(1). The indictment never mentions aggravated coercion; it only mentions aggravated force. “The definitions of aggravated force and aggravated coercion, along with the different maximum penalties, reveal the Legislature intended to draw a distinction between the actual use of force or violence during an assault and the threat of force or violence during or after an assault, with the former resulting in a conviction of greater degree and a harsher maximum penalty.” State v. Brown, 360 S.C. 581, 590, 602 S.E.2d 392, 397 (2004). Without including any facts to support the second-degree charge in the indictment, the State was limited to first-degree CSC or nothing. But see State v. Summers, 276 S.C. 11, 14-15, 274 S.E.2d 427, 429 (1981) (holding that second-degree CSC is a lesser-included offense of first-degree CSC); State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986).

“In South Carolina, it is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment.” Bailey v. State, 392 S.C. 422, 433, 709 S.E.2d 671, 677 (2011) (internal quotations and citations omitted). “A material variance between charge and proof entitles the defendant to a directed verdict; such a variance is not material if it is not an element of the offense.” Id. “While a conviction may be sustained under an indictment which is defective because it omits essential elements of the offense, such is not true when the indictment facially

charges a complete offense and the State presents evidence which convicts under a different theory than that alleged.” Id.

The rule from Bailey applies to this case. The State’s theory in the indictment alleged appellant used aggravated force and it convicted Foster on a theory of aggravated coercion. This creates a variance between the indictment and the proof at trial. Foster could not be convicted of an act not alleged in the indictment. Because the jury acquitted Foster of first-degree CSC, the variance requires this Court to direct a verdict on second-degree CSC. Appellant’s conviction should be reversed.

CONCLUSION

For the foregoing reasons, appellant's second-degree CSC conviction should be reversed.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of June, 2023.

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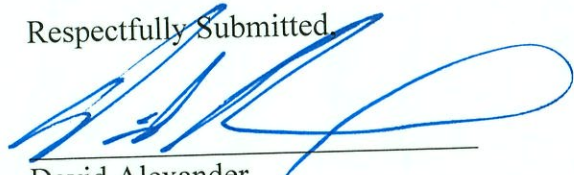
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dylan Trey Foster 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 Perry H. Gravely, which was held on August 31 - September 2, 2022, 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 Dylan Trey Foster.

Respectfully Submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

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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) Sentencing Sheets
- (3) Trial Transcript Dated August 31- September 2, 2022
- (4) State's Exhibit #20

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



David Alexander
Appellate Defender

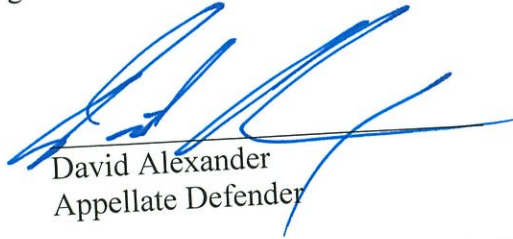
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ATTORNEY FOR APPELLANT

This 12th day of June, 2023.

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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