STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



---

Appeal from Greenwood County

Honorable Frank R. Addy, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

HOWARD JAMES WOODS, JR.

APPELLANT



APPELLATE CASE NO. 2017-000775

---

# FINAL BRIEF OF APPELLANT

---

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes



### Rules



### Constitutional Provisions

## STATEMENT OF ISSUE ON APPEAL

Whether the judge abused his discretion by not enforcing his pre-trial indictment ruling, and by allowing testimony from the alleged victim that appellant sexually assaulted her when she was twelve years old, since these allegations were outside the time frame of the indictment which alleged acts between 14 and 16 years-old, and denied appellant his due process right to notice of the allegations he had to defend against?

## STATEMENT OF THE CASE

Appellant was indicted at the January 2017 term of the Greenwood County Grand Jury for the offenses of criminal sexual conduct with a minor in the first degree, and criminal sexual conduct with a minor in the second degree. R. 220-223. Appellant's case was called to trial on March 14, 2017, before the Honorable Frank R. Addy, Jr., and a jury. Jana Nelson and Jennifer Clinkscales represented appellant. Deputy solicitor Yates Brown and assistant solicitor Anna Sumner represented the state. R. 1.

On March 15, 2017, the jury found appellant not guilty of criminal sexual conduct in the first degree. However, the jury convicted appellant on the charge of criminal sexual conduct in the second degree. R. 210, l. 20 – 211, l. 4. Judge Addy sentenced appellant to fifteen years' imprisonment. R. 219, ll. 3-13.

This appeal follows.

## ARGUMENT

The judge abused his discretion by not enforcing his pre-trial indictment ruling, and by allowing testimony from the alleged victim that appellant sexually assaulted her when she was twelve years old, since these allegations were outside the time frame of the indictment which alleged acts between 14 and 16 years-old, and denied appellant his due process right to notice of the allegations he had to defend against.

**Relevant Facts**

Prior to trial, defense counsel moved to quash the indictments as overbroad. She complained that the discovery showed only one incident occurred on the first degree criminal sexual conduct with a minor charge, yet that indictment covered a period of two years. Similarly, the indictment for criminal sexual conduct in the second degree covered a period of seven years. Defense counsel argued these indictments were overbroad and denied appellant his right to due process under the state and federal constitutions because he could not defend himself against such broad indictment time frames that conflicted with the discovery in the case. R. 4, l. 20 – 6, l. 5.

**Indictments – notice of allegations**

The judge agreed with defense counsel as to the time periods being confusing, and he stated that the state would be limited to only offering evidence within the strict time frames alleged in the indictments. The judge noted specifically on the indictment for criminal sexual conduct in the second degree that it alleged the victim was "14 but less than 16 years of age," but alleged a broader time frame. The judge ruled that the indictment referenced the age frame as being between 14 to 16 years old, and that he was going to limit the state to evidence of that time frame. "That's equitable, and it's also exactly what Mr. Woods is indicted for. If a longer period

of time or a more broad period of time had been desired, then a different indictment should have been prepared or different charges should have been prepared." R. 4, l. 20 – 10, l. 4. The judge denied the motion to quash but ruled the state could only present testimony against appellant that he was on notice for by way of the two indictments referenced above. R. 8, l. 19 – 9, l. 24.

As will be seen infra, the indictment for criminal sexual conduct in the first degree involved one incident where the alleged victim claimed at nine years old appellant blindfolded her and performed some unknown sexual act or oral sex on her. The jury acquitted appellant of this offense. The indictment for criminal sexual conduct in the second degree alleged appellant committed a sexual battery upon the alleged victim when she was at "least fourteen, but less than sixteen years of age." R. 222 – 223.

**Trial evidence**

The complaining witness was twenty-two years old at the time of trial. She reported the sexual abuse she allegedly suffered as a child to the police when she was twenty-one. R. 26, ll. 7 – 17. She alleged the abuse stopped at 16, as will be seen infra, so there was a six year delay in the allegation to law enforcement.

Appellant was the complaining witness's "stepfather," although he never married her mother. "He pretty much watched me grow up from an infant until I was fifteen." R. 26, ll. 18-20.

She alleged when she was nine years old that she twisted her ankle while getting on the school bus so her mother let her stay home. She said that she went to bed and went back to sleep. However, she claimed appellant woke her up, blindfolded her, and committed some sexual act upon her. At one point she alleged it must have been oral sex, but at other times she

admitted she did not know exactly what happened since she was blindfolded. As stated, appellant was found not guilty of that allegation. R. 26, l. 21 – 27, l. 8.

The complaining witness claimed she told her mother about the blindfold allegation. However, at other points she said he mother did not know anything about her sexual activity until she got pregnant at the age of fifteen. R. 29, ll. 10-14.

**The allegation at 12 years old**

The solicitor then inquired about an allegation of sexual abuse when the witness was twelve years old. Defense counsel repeated her earlier objection to any testimony of an assault "outside the time frame of the indictment." Counsel had earlier argued that such allegations would violate appellant's right to due process of law because he could not prepare to defend against them. A bench conference was held, and the judge overruled the defense objection despite his pretrial ruling on the indictment covering the ages of at least 14 years old but less than 16 years old. R. 30, l. 11 – 32, l. 22.

When the solicitor then asked the witness what happened specifically to her at the age of twelve, defense counsel renewed her objection. The judge again overruled the objection. R. 32, l. 23 – 33, l. 2. The witness then claimed that appellant had anal and sexual intercourse with her, and oral sex. R. 33, l. 7 – 34, l. 1. The witness also said the sexual acts would occur once or twice a week. R. 34, ll. 5-19.

Later in the trial, when investigator Sharon Middleton began to testify about the alleged victim starting "her menstrual cycle, and appellant "began having sexual intercourse with her -- defense counsel renewed her previous objection. The judge asked the solicitor to "[m]ove it along a little bit if we could, please," in response to the objection. R. 93, l. 18 – 94, l. 8. The solicitor then asked: "How long did that continue?" Investigator Middleton said: "It continued

until she was 15 years old." Middleton repeated the complaining witness's allegations that appellant had sexual intercourse, anal intercourse, and oral sex with the alleged victim. R. 93, l. 18 – 94, l. 25. As stated, the complaining witness reported the alleged abuse to the police when she was twenty-one years old. R. 95, ll. 11-17.

There were inconsistencies in the alleged victim's testimony, as defense counsel pointed out. For example, at one point, the alleged victim claimed her mother did not know about any of the allegations of sexual abuse until she was pregnant at 15, and at another point she said she told her mother about the blindfolded allegation at age nine before that time. R. 49, ll. 9-13.

**Appellant continuously denies the allegations**

On cross-examination of investigator Middleton, she admitted she got an arrest warrant for appellant based on the alleged victim's allegations. R. 105, l. 18 – 135, l. 1.

Middleton went to appellant's house and asked appellant to accompany her to the police station to talk. She was driving an unmarked car and she did not tell appellant that she had warrants for his arrest. Appellant agreed to go to the police station and talk. R. 106, l. 2 – 107, l. 6.

The interrogation was videotaped but Middleton did not tell appellant he was being taped. R. 107, ll. 3-18. Middleton admitted she was going to arrest appellant at the end of the conversation regardless of what he said. Appellant continuously denied the allegations. R. 107, l. 22 – 113, l. 16. Appellant denied he knew that the alleged victim was ever pregnant, and he denied knowing anything about her having an abortion. R. 112, l. 3 – 116, l. 12.

Middleton admitted that despite every technique she used, appellant continuously and consistently denied sexually abusing the complaining witness. Middleton acknowledged that she told appellant that everyone made mistakes, that he was not a bad person, that he was a good

person, and that he needed to admit the sexual abuse so the complaining witness would not commit suicide. R. 116, l. 1 – 122, l. 20.

**The mother testifies**

The alleged victim's mother, Cheryl Worsley, testified that appellant was her boyfriend of fifteen years, and he had the role of a stepfather to her daughter. Worsley said she trusted appellant to be alone with her daughter. R. 138, l. 19 – 139, l. 14.

Worsley claimed she found out appellant was "cheating on me" when her daughter was thirteen or fourteen years old, and she moved into an apartment with her daughter. She later learned that her daughter was pregnant when she was fifteen, and she alleged appellant went with her and her daughter to Augusta so her daughter could have an abortion. Worsley said appellant paid for the abortion. R. 141, l. 5 – 144, l. 3.

The records custodian for the facility where the abortion was performed admitted appellant's name did not appear anywhere in the records, including as the person who paid for the abortion. R. 136, l. 13 – 137, l. 6.

Worsley acknowledged that appellant denied that he had sex with her daughter, which caused her daughter to become pregnant. R. 143, ll. 1-12. Worsley admitted she allowed appellant to continue to live with her and her daughter for two or three weeks after the abortion where her daughter had alleged appellant got her pregnant. R. 143, ll. 13-23.

**Discussion**

"An indictment is a critical document in criminal defense preparation that is grounded in constitutional and statutory principles. See S.C. Const. art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been

committed...."); S.C. Code Ann. § 17–19–10 (2014) ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury...."). As we explained in State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005):

> The indictment is the charge of the state against the defendant, **the pleading by which he is informed of the fact, and the nature and scope of the accusation**. When that indictment is presented, that accusation made, that pleading filed, the accused has two courses of procedure open to him. He may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined; or, waiving them, he may put in issue the truth of the accusation, and demand the judgment of his peers on the merits of the charge. If he omits the former, and chooses the latter, he ought not, when defeated on the latter,—when found guilty of the crime charged,—to be permitted to go back to the former, and inquire as to the manner and means by which the charge was presented.

Id. at 102, 610 S.E.2d at 499–500 (citations omitted) (emphasis added).

If a defendant raises a timely challenge to the sufficiency of an indictment, the reviewing court is charged with:

> determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, **and the defendant to know what he is called upon to answer** and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.

Gentry, 363 S.C. at 102–03, 610 S.E.2d at 500 (emphasis added)." State v. Baker, 411 S.C. 583, 588-589, 769 S.E.2d 860, 863 (2015).

In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all surrounding circumstances. Here, as defense counsel correctly argued, the discovery was a surrounding circumstance. See State v. Tumbleston, 373 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct. App. 2007). The defendant should not be

taken by surprise, and unable to combat the charges against him. State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1981).

Here, while the trial judge refused to quash the indictments as being overbroad, he agreed they were confusing, and he ruled that the state would be limited to presenting evidence on the allegations contained in the indictments in strict terms. The state could have sought another indictment the judge correctly observed. The judge ruled it was only fair and "equitable" to rule in this manner. The indictment for criminal sexual conduct with a minor in the second degree was limited to allegations that occurred when the alleged victim was at least fourteen years old but less than sixteen. That was the pre-trial ruling limiting the state to the strict terms of the indictment.

Yet the state's first witness, the alleged victim, was allowed to testify that at the age of twelve, appellant had sexual intercourse and anal intercourse with her, and he also had oral sex with her. These allegations, which were not contained in the indictment, were devastating, and their enormous prejudicial effect should respectfully be apparent to appellant's defense.

The testimony of Investigator Sharon Middleton reveals she had arrest warrants for appellant when she picked him up at his house and asked him to come to the police station to talk about the allegations. Appellant was not aware of the arrest warrants, and he was not aware that he was being videotaped. Yet, appellant voluntarily talked to Middleton, and he continuously and consistently denied the allegations. He denied knowing the alleged victim was pregnant, and he denied knowing she had an abortion. Middleton acknowledged she used various tactics to attempt to get appellant to consent, but appellant was steadfast that the allegations the alleged victim made to the police when she was twenty-one years old about the childhood sexual abuse by him were not true. R. 106 – 121.

The state intentionally prejudiced appellant -- outside the indictments -- by offering allegations from the alleged victim that appellant had anal sex with her when she was twelve-years-old as well as sexual intercourse and oral sex.

Defense counsel correctly argued that offering evidence outside that for which appellant was on notice from the indictments would violate his right to due process because of lack of notice. The judge would not quash the indictments but he ruled the state would be limited to the strict allegations in the indictment. Here the meant to allegations when the alleged victim was between the ages of 14 and 16 years old as for the indictment for criminal sexual conduct in the second degree. R. 222 – 223.

Appellant had absolutely no notice of these allegations that he anally raped and had sexual intercourse and oral sex with the alleged victim when she was twelve years old. This testimony was simply "thrown out" on direct examination during the state's case-in-chief. The judge erred by not enforcing his pre-trial ruling, and sustaining the objections.

The state correctly made no argument that this objectionable testimony was admissible as a prior bad act. The evidence of it was not clear and convincing, and even if the evidence of it was clear and convincing, the probative value of these allegations of anal and other intercourse at age twelve was substantially outweighed by its danger of unfair prejudice to appellant. See State v. Beck, 342 S.C. 129, 135-136, 563 S.E.2d 679, 682-683 (2000); State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); Rule 403, SCRE; Rule 404(b), SCRE.

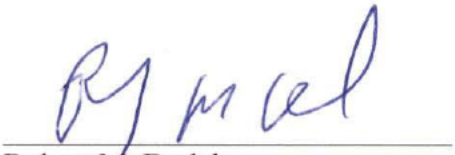
There were inconsistencies in the alleged victim's allegations as pointed out by defense counsel in her closing argument, and seen. These included allegations that her mother would leave unexpectedly at night time and appellant would sneak in her room and have sex with her,

whether appellant was even living in the same household when she alleged he got her pregnant, the nature of the "blindfold" incident, and the number of sexual assaults she claimed occurred conflicted with the time frames in which they happened. See R. 172, l. 6 – 185, l. 12.

The jury verdict finding appellant guilty of criminal sexual conduct with a minor may well have been achieved by this evidence that was inadmissible since it was not in the indictment as the judge ruled that appellant had anal and sexual intercourse and oral sex *with his twelve year old "step daughter."* He was acquitted on the "blindfold" sexual abuse allegation, which the jury did not believe, given its verdict. The objected-to evidence that was outside the age limits enumerated in the indictment denied appellant his right to due process by way of fair notice, and it also denied appellant a fair trial.

## CONCLUSION

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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of September, 2018.

## CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

September 18, 2018

Robert M. Dudek
Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589