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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRIAN DAVID WALLS,

APPELLANT

APPELLATE CASE NO. 2024-001452

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY CHARGING THE JURY THAT THEY COULD CONVICT APPELLANT UNDER AN ALTERNATIVE THEORY OF CRIMINAL LIABILITY THAN THAT CHARGED IN THE INDICTMENT.

STATEMENT OF THE CASE

Appellant was indicted by a Beaufort County grand jury in July of 2022, for criminal sexual conduct in the first degree, kidnapping, and use of a vehicle without permission arising from an encounter with K.P. on December 6, 2016. R. * Indictments. Appellant was tried before the Honorable Carmen T. Mullen and a jury from August 26 – 28, 2024. R. 1. Sean Thornton and Jared Shedd appeared on behalf of the state and Juan Tolley and Jacob McFadden represented appellant. R. 2. The jury convicted appellant on all charges. The trial court sentenced appellant to consecutive life sentences[1] for the kidnapping and criminal sexual conduct convictions and an additional three years for the improper use of a vehicle conviction. Tr. 382, ll. 3 – 18; sentence sheets.

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[1] Appellant's counsel did not note an objection regarding the notice required before application of the life without parole provisions of S.C. Code Ann. § 17-25-45 (2015 as amended).

STANDARD OF REVIEW

"In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). "To warrant reversal, a trial judge's charge must be both erroneous and prejudicial." State v. Otts, 424 S.C. 150, 155, 817 S.E.2d 540, 543 (Ct. App. 2018) (*quoting* State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003)). "It is error to give instructions which may confuse or mislead the jury." State v. Rothell, 301 S.C. 168, 169–70, 391 S.E.2d 228, 229 (1990).

ARGUMENT

THE TRIAL COURT COMMITED REVERSIBLE ERROR BY CHARGING THE JURY THAT THEY COULD CONVICT APPELLANT UNDER AN ALTERNATIVE THEORY OF CRIMINAL LIABILITY THAN THAT CHARGED IN THE INDICTMENT.

A. How the issue was raised at trial.

Prior to the jury charge, appellant's counsel moved to restrict the language charged to the jury to conform the charge to the language used in the indictment as to the legal basis of appellant's potential liability for criminal sexual conduct.

> MS. TOLLEY: I guess one of the things is in the indictment, Your Honor, I think it only references Section A1 of the statute, such that it only says, "Didn't engage in sexual battery, abuse with aggravated force," which only references the Part A and not Part B of the criminal sexual conduct statute. And for that reason, I believe that it would only be appropriate to instruct the jury on portion A, criminal sexual conduct in the 1 first degree, I think those two entire sections.

Tr. 313, l. 17 – 314, l. 2.

The trial court disagreed and ruled that the use of the "et al" language in the indictment was sufficient to charge the jury under both aggravated force under S.C. Code Ann. § 16-3-652(1)(a) as well as the expanded liability portion under S.C. Code Ann. § 16-3-652(1)(b) (2010 as amended).

> THE COURT: I also note just on here that while the verbiage says, "Did engage in sexual 18 battery with the use of aggravated force upon [K.P.]," it then says, "on violation of 20 Section 16-3-652 et al."
>
> It doesn't subset and just say A1, so I think he's been properly on notice, and, again, in addition to your argument, he was also charged with kidnapping, so he would be on notice.

Tr. 313, l. 17 – 314, l. 1.

Over this objection, the trial judge charged the jury on both the indicted and the unindicted theories of liability:

> The defendant has been charged with criminal sexual conduct in the first degree. To prove criminal sexual conduct in the first degree, the State must that the defendant engaged in sexual battery with the victim and that the defendant either used aggravated force to accomplish the sexual battery or the victim submitted to sexual battery by the defendant under circumstances where the victim is also the victim of forcible confinement, kidnapping, trafficking of persons, robbery, extortion, burglary, house breaking, or any other similar offense or the defendant caused the victim without the victims defense to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered distributed, dispensed, or delivered a controlled substance, a controlled substance analog or any intoxicating substance.

Tr. 352, l. 23 – 353, l. 17.

B. How the trial court erred.

"In South Carolina, '[i]t 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.'" State v. Gunn, 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993) (*quoting* State v. Cody, 180 S.C. 417, 423, 186 S.E. 165, 167 (1936)). "[W]hile 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." Bailey v. State, 392 S.C. 422, 433, 709 S.E.2d 671, 677 (2011); *see also* State v. Smith, 406 S.C. 215, 219–20, 750 S.E.2d 612, 614 (2013) ("Because the section (A)(2) offense is not a lesser-included offense of section (A)(1), an indictment expressly charging only a section (A)(1) offense does not provide notice of a section (A)(2) charge.").

The indictment states in relevant part that "in Beaufort County, South Carolina, on or about December 6, 2016, [Appellant], did engage in *sexual battery with the use of aggravated force upon* [K.P.], all in violation of Section 16-3-652, et al. of the Code of Law of South Carolina." R*. CSC 1st Indictment (emphasis added).

By its express language, this indictment was for a violation of S.C. Code Ann. §16-3-652(1)(a) (2010 as amended). There was no allegation in the indictment that appellant was also being charged with a sexual battery involving when the alleged "victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, trafficking in persons, robbery, extortion, burglary, housebreaking, or any other similar offense or act." S.C. Code Ann. § 16-3-652(1)(b) (2010 as amended).

"If the State elects to charge a particular sexual battery in the indictment, it cannot thereafter expand the indictment to include other acts of sexual battery. Rather, when the State chooses to allege a specific act of sexual battery, it undertakes the burden of proving that act of sexual battery. It necessarily follows, as in Bailey, that the State cannot secure a conviction based on other, unindicted sexual batteries." State v. Dent, No. 2024-000355, 2025 WL 1947806 (S.C. July 16, 2025).

Here, the state elected to indict appellant for actively using "aggravated force" to complete a sexual assault. R*. CSC 1st Indictment. To convicted under S.C. Code Ann. §16-3-652(1)(a) (2010 as amended), the use of aggravated force is required.

> To convict a defendant of first-degree CSC, the State must present evidence the defendant committed a sexual battery and actually used aggravated force at the time of the assault, i.e., the defendant overcame the victim through the use of physical force, physical violence of a high and aggravated nature, or the threat of the use of a deadly weapon. The evidence must show the actual use of aggravated force occurred near in time and place to the assault, such

> that the effect of the aggravated force caused the victim to submit to the assault.

State v. Brown, 360 S.C. 581, 588, 602 S.E.2d 392, 396 (2004). As an alternative basis for liability, the state could produce evidence that the alleged victim submitted to a sexual battery "under circumstances where the victim is also the victim of forcible confinement, kidnapping, trafficking in persons, robbery, extortion, burglary, housebreaking, or any other similar offense or act." S.C. Code Ann. §16-3-652(1)(b) (2010 as amended). However, this alternative basis was not alleged in the indictment, which specifically elected to charge aggravated force.

In Brown, the failure of the state to present evidence to establish aggravated force required reversal of the convictions and, since the lesser included offenses were never charged to the jury, a bar to retrial under double jeopardy. Id., 360 S.C. at 598, 602 S.E.2d at 401 (holding the "first-degree convictions were reversed due to a lack of evidence on a material element of the offense, retrial of [Brown] on those three charges is barred by principles of double jeopardy."). While the error here was not a failure of proof of aggravated force, but one of improperly instructing the jury on the scope of the acts for which it could return a verdict, retrial would not be prohibited under double jeopardy. Regardless, under Brown and Dent, it was error for the trial court to expand the reach of the indictment and charge the jury under S.C. Code Ann. §16-3-652(1)(b) (2010 as amended).

C. Prejudice.

This case presented the jury with two opposing views of the admitted sexual encounter between appellant and K.P. Both parties admitted knowing each other for several years. Tr. 153, ll. 3 – 13; 284, ll. 13 - 17. K.P. admitted to consensual travel in K.P.'s vehicle leading up to the alleged sexual assault at the motel room that included appellant and K.P. hugging on video tape earlier in the day. Tr. 185, l. 7 – 186, l. 12. Both parties admitted the presence of four other people

during this car ride and during their sexual encounter. Tr. 157, l. 3 – 158, l. 5; 173, l. 14 – 174, l. 5; 286, l. 6 – 287, l. 24. Under K.P.'s version, appellant physically punched her in the face, forced her into a bathroom, and sexually assaulted her against her will and under further threat of violence due to a debt K.P.'s father owed. Tr. 167, l. 15 – 171, l. 12. K.P. alleged that she escaped appellant as they approached her vehicle to leave the hotel by running into the muddy marsh surrounding the hotel. Tr. 176, l. 18 – 177, l. 21. K.P. dialed 911 from the marsh and was found by law enforcement covered in mud and reporting the sexual assault. Tr. 177, l. 22 – 178, l. 22.

According to appellant, the sexual encounter in the bathroom was consensual and he did not physically assault K.P. Tr. 287, l. 3 – 288, l. 8. Notably, none of the other four people admittedly present in the hotel room during the alleged violent rape either reported the incident to police or presented testimony before the jury. Tr. 215, ll. 1 - 22. K.P.'s physical examination did not show trauma to her vaginal wall. Tr. 144, ll. 7 - 20. Photographs of K.P. taken by law enforcement did not show bruising to her face. Tr. 294, l. 23 – 295, l. 23. According to appellant, K.P. became upset after the consensual sexual encounter about the use of her vehicle and left the hotel on her own volition after an argument over the continued use of her vehicle. Tr. 289, l. 21 – 292, l. 18.

Certainly, the jury could (and ultimately did) believe K.P.'s version of events. However, that determination was based upon a credibility determination made by the jury in weighing K.P.'s version of events with that of appellant. The jury was thus presented with two distinct possibilities regarding the sexual encounter between appellant and K.P. in the bathroom. Notably, the jury could have, as noted by the trial court, believed some of the aspects of K.P.'s story but not all of it including the absence of aggravated force:

> So I think they can find from the evidence, if they chose to believe it, of course, him guilty of that. I also think they could find that based

> on the testimony of [K.P.], if they did not believe that she was kidnapped, in other words, if they thought she literally went into the back, if they found that what he did was not use any type of aggravated force.
>
> In other words, whatever they determine, even in her own, you know, rendition of he hit her, I think they could find aggravated force, and that she was in fear that he was going to hurt her.

Tr. 281, ll. 4 – 16.

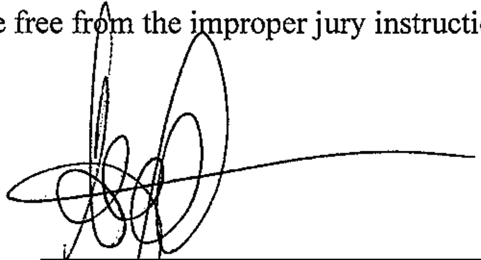
As such, the case depended on credibility. A case that depends on the credibility of the witnesses does not lend itself to a finding of harmless error. *See* State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012) (holding the state's reliance on circumstantial evidence and credibility of witnesses negated a finding of harmless error). In judging prejudice,

> for the evidence of guilt to be 'overwhelming' such that it categorically precludes a finding of prejudice—as we found it did in *Rosemond* and *Harris*—the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability ... the factfinder would have had a reasonable doubt' cannot possibly be met.

Smalls v. State, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018) (internal citations omitted). No such overwhelming evidence of guilt is present to overcome the prejudicial impact of the improper jury charge that improperly expanded appellant's criminal liability beyond the scope of the indictment.

CONCLUSION

Based upon the argument presented, this Court should reserve appellant's conviction under the indictment for criminal sexual conduct in the first degree and remand this matter to the Court of General Sessions for a new trial on that charge free from the improper jury instruction.



Gary H. Johnson
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of August, 2025.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

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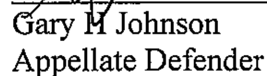
APPELLATE CASE NO. 2024-001452

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) Sentence Sheets
(3) Trial Transcript pgs. 1-10; 53-81; 83-145; 151-188; 192-219; 225-267; 280-385

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



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This 11th day of August, 2025.

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 11th day of August, 2025.

Gary H Johnson
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