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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2024-001452

The State, ...Respondent,

v.

Brian David Walls,.....Appellant.

AMENDED INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Brian David Walls (Appellant) was indicted at the June, 2017 term of the Beaufort County Grand Jury for first-degree criminal sexual conduct (CSC) (2016-GS-07-2232) and use of a vehicle without permission (2016-GS-07-2233). He was subsequently indicted at the July, 2022 term for kidnapping (2016-GS-07-2234). On August 26-28, 2024, Appellant proceeded to trial before the Honorable Carmen T. Mullen and a jury. He was represented by Assistant Public Defenders Juan Tolley and Jacob McFadden of the Fourteenth Circuit Public Defender's Office. Respondent (the State) was represented by Deputy Solicitor Sean Thornton and Assistant Solicitor Jared Shedd of the Fourteenth Circuit Solicitor's Office. (Tr.p.1-p.2). At the conclusion of trial, the jury found Appellant guilty as indicted. The State advised the trial court that Appellant had previously been convicted of murder and was serving a sentence of forty years' imprisonment for that crime. Judge Mullen sentenced Appellant to life imprisonment without the possibility of parole (LWOP) for first-degree CSC; a consecutive term of LWOP for kidnapping; and three (3) years' consecutive imprisonment for use of a vehicle without permission, with all three sentences to be served consecutively to the pre-existing forty-year sentence for murder. (Indictments; Sentencing Sheets; Tr.p.372-p.382).

Appellant made a motion for judgement notwithstanding the verdict and that motion was denied. (Tr.p.383-p.384). Appellant timely filed a notice of intent to appeal his convictions and sentence, and a brief was submitted in support of his appeal by Appellate Defender Gary H. Johnson of the South Carolina Commission on Indigent Defense. This Brief of Respondent on behalf of the State now follows.

STATEMENT OF FACTS

On August 26, 2024, after voir dire, jury selection, and pretrial matters, the jury was sworn and the trial began. (Tr.p.1-p.68). Appellant did not challenge the sufficiency of the indictments or claim they did not provide adequate notice of the charges and what he was called upon to defend. The State and Appellant then gave opening statements. The solicitor explained that the charges against Appellant stemmed from an incident that occurred on December 6, 2016, in the bathroom of the Howard Johnson's hotel on Trask Parkway in Beaufort. He said the case was about Appellant's rape and kidnapping of Daryan P (Victim), after which Appellant stole Victim's car and fled. The solicitor noted the three indictments that had been issued by the grand jury and touched upon some key statutory elements the State intended to prove during trial. He then explained the burden of proof before asking the jurors to pay attention, listen closely to witnesses, evaluate exhibits, and focus on the physical evidence when determining the facts and rendering a verdict that speaks the truth. (Tr.p.75-p.78). In regard to first-degree CSC, the solicitor said: "It requires proof, which is defined as sexual intercourse, and that the battery was accomplished through the use of aggravated force. The force actually applied to accomplish the sexual assault." (Tr.p.76, lines 1-6). In his opening statement, Appellant focused on the presumption of innocence and claimed "[t]hings are not always as they seem." He asked the jurors to listen with an open mind and to use their common sense and suggested that at the end of trial, they would agree that things alleged are not as they seem. (Tr.p.78-p.80).

After opening statements, the State presented its case-in-chief, calling a series of police officers, first responders, chain-of-custody witnesses, medical personnel, experts, and the Victim herself to describe: (1) the assault, the escape, the ensuing investigation; (2) Victim's injuries; and (3) the semen and saliva DNA matches to Appellant. Allyson Moreira, the 911 clerk for the

Beaufort County Sheriff's Department, authenticated an audio recording of a 911 call following the incident and it was admitted into evidence as State's Exhibit #1 and played for the jury. (Tr.p.80-p.83). Beaufort Police Department (BPD) Officer Eric Hayes was working patrol on December 6, 2016, when he was called out to respond to a water rescue at the Howard Johnson's Hotel. Other first-responders were already on scene, but Hayes was the first police officer to arrive. He assisted firefighters who were looking for a woman in the marsh area behind the hotel when he heard screams for help. Hayes and the others helped Victim out of the pluff mud[1] at which point she reported she had recently been sexually assaulted in the hotel and that someone stole her car. Hayes then handed Victim off to the medical personnel on scene so she could receive treatment. He explained that what had started as a water rescue turned into a sexual assault investigation. (Tr.p.83-p.93).

Paramedic Katherin Roos with Beaufort County EMS was admitted as an expert in emergency medical care and pre-hospital medical care. She was dispatched to the scene where she encountered a female patient who was visibly upset and covered waist-deep in pluff mud. Roos took Victim's vitals and noted she was suffering from tachycardia—a fast heart rate. Victim reported she was raped at the Howard Johnson's and was subsequently transported to the hospital. Roos said that in addition to being covered in mud, Victim's skin was cool to the touch and her face was noticeably red, which was consistent with her having been struck in the face. Victim reported pain in her face and her knee. (Tr.p.94-p.101). BPD patrol supervisor Joel Blackwell was also dispatched to assist with a water emergency at the Howard Johnson's but was later advised it was related to an assault. He explained that when Victim was assisted out of

[1] Although the transcript repeatedly indicates the testimony was about "fluff mud," the common term to describe the particular mud in the marshes of lowcountry South Carolina and the term the State has elected to use in this brief is "pluff mud."

the marsh area, she appeared hysterical and reported escaping from her vehicle and running into the wood line to get away from her attacker after being raped. (Tr.p.102-p.109).

Sexual assault nurse examiner (SANE) Ashley Hildreth described performing a forensic examination of Victim after she had been transported to the Beaufort Memorial Hospital. She was admitted as an expert in forensic nursing and as a SANE nurse and gave details from the examination while referencing her written report. Hildreth noted that although Victim was tearful, she was able to talk in a coherent fashion, was readily able to recall events, and had clear speech and a steady gait. Victim reported she had been sexually assaulted in a bathroom at a hotel on Boundary Street. Victim also reported pain on the right side of her face and explained she had been punched during the assault. Hildreth said Victim had a laceration on her lip. Hildreth then proceeded to collect and bag Victim's clothes for further examination, and she collected several swabs to test for DNA. These included a buccal swab to serve as a standard, a swab from Victim's left breast because she reported being licked by her assailant, and a vaginal swab because she reported she had been penetrated vaginally. Hildreth sealed the collected items and secured them until they were picked up by officer Cottingham. (Tr.p125-p.142; p.145-p.146). BPD officer Hillary Cottingham was at the hospital during the SANE exam to receive the evidence collected. She described Victim as being steady on her feet, coherent, and able to answer questions. (Tr.p.146-p.151).

Victim then took the stand to provide details of the events prior to, during, and after the brutal sexual assault. She first identified Appellant in the courtroom and said she knew him prior to the rape as a friend of her father's. Victim then described the individuals who were with Appellant when she responded to his request for a ride and who also accompanied them to the hotel room where the incident occurred, including: Courtney Brock, John Priester, and

Appellant's children. Victim knew Appellant and his kids at the time but did not know Brock or Priester prior to the incident. Victim said she drove the group to the Howard Johnson's and was planning to leave after dropping them off, but Appellant asked her to help bring some stuff up to room. When she did, Priester closed the door behind them, and Appellant hit her hard in the face. He then grabbed her nose and mouth, pulled her against him, and told her not to scream. Victim started crying and said she had to go to the bathroom. Priester then patted Victim down, took her keys, phone, and chap stick and placed them on the bed, and removed her sweater. Appellant then walked Victim into the bathroom with his hand on the back of her neck, closed the door, and watched her urinate. He told her that her father owed people money, and Priester was associated with those people. (Tr.p.151-p.170).

Victim was crying, offered to retrieve money from an ATM, and said Appellant could have anything she had. Appellant refused her offer and said she had no other choice at this point. He then turned Victim around, put his hand on the back of her neck, bent her over, and sexually assaulted her from behind by forcing his penis into her vagina. In the middle of the assault, Appellant told Victim to turn around and called for Brock to bring him a beer, which she did. He took a swig and then put his penis back inside Victim to continue the sexual assault from the front. Appellant began kissing Victim and put his mouth on her breast before ejaculating, pulling up his pants, and walking her out of the bathroom by the hand. He told the others his "girl" was going to take him to an ATM. Victim grabbed her sweater, car keys, and phone and went with Appellant to her car. She got into the driver's seat and started the car, attempting to drive away as Appellant was getting into the passenger side; however, despite spinning around in the parking lot, Appellant managed to get all the way into the car and started hitting her. Victim slammed on the brakes, jumped out of the car, ran towards the trees, and went into the marsh to

escape before calling 911. Victim said she knew how dangerous the marsh could be but still went in so she could escape from Appellant before he drove away in her car. She identified various photographs of the injuries she received before, during, and after the sexual assault. (Tr.p.170-p.184).

BPD investigator Joshua Dowling was brought into the investigation after the hotel room had been secured. He first went to the hospital to talk to Victim. Dowling described Victim as extremely distraught, wide-eyed, and apprehensive. She told him she had been raped in the bathroom of unit 227 at the Howard Johnson's. During the investigation, Dowling obtained a search warrant to process the hotel room for evidence, and during his testimony, he identified various photos taken at the scene. He noted a BOLO was issued for Victim's vehicle, which was later located in Appellant's possession in Chesterfield County. Dowling then identified security camera footage taken from the hotel and a portion of that video was played for the jury. Finally, Downing described obtaining a DNA sample from Appellant. (Tr.p.192-213). Lieutenant Wayne Jordan of the Chesterfield County Sheriff's Department testified they located Victim's car in Pageland the day after the incident, and that Appellant was in the driver's seat. (Tr.p.219-p.224).

Former SLED forensic serologist Verona Herrera, who was the evidence processing technician for the DNA section at the time of the incident, was admitted as an expert in forensic serology. She received the biological evidence collected, including oral and vaginal swabs from Victim to test for semen, a swab from Victim's left breast to test for saliva, fingernail scrapings, and buccal swabs from Victim and Appellant to serve as standards. Herrera did presumptive testing, finding positive results for spermatozoa and semen from the vaginal swab, and positive

results for saliva from the breast swab which were then forwarded to the DNA lab for further testing. (Tr.p.225-p.235).

SLED DNA analyst, Agent Sarah Zapata was admitted as an expert in DNA analysis and serology. She explained how DNA is tested for identification purposes, including use of the Starmix software program and the statistical results produced through comparison to known standards—which in this case were taken from Appellant and Victim. With reference to her written report, Zapata testified it was 110 septillion times more likely the DNA from the sperm fraction found in Victim's vagina was from Appellant than from an unidentified, unrelated individual. In regard to the DNA taken from Victim's breast, Zapata testified it was 89 septillion times more likely a mixture of Victim and Appellant's DNA than a mixture of Victim and an unidentified, unrelated individual. (Tr.p.236-p.250).

At the conclusion of Agent Zapata's testimony, the State rested. (Tr.p.252). Appellant moved for a directed verdict as to all charges and the motion was denied. (Tr.p.253). The trial court then advised Appellant on the record regarding his right to testify and the parties briefly discussed jury charges in anticipation of the upcoming charge conference before breaking for the day. (Tr.p.254-p.267). The State requested a charge on the lesser-included offense of second-degree CSC. (Tr.p.261, lines 12-18). The trial judge initially said: "I always do that," but later indicated she would not charge the lesser included offense unless someone could convince her it needed to be done. (Tr.p.261, line 19-p.263, line 11). The judge noted the first-degree CSC statute had two applicable subsections which could fit the facts of the case, one where the actor uses aggravated force to accomplish the sexual battery (16-3-652(1)(a)), and a second where the victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement or kidnapping (16-3-652(1)(b)), and said she believed the

evidence supported a finding of forcible confinement rather than the aggravated coercion that would be required for second-degree CSC. (Tr.p.234, lines 1-13). Appellant's counsel was asked her position and she advised the trial judge she wanted to review the statute and cases overnight. (Tr.p.234, lines 21-25).

When the trial resumed the following morning, Appellant told the trial court he would not be calling Priester as a witness and that Brock had pleaded the Fifth and he would therefore not be able to call her as a witness either. Brock's attorney, Ms. Delaney, noted that Appellant and Brock were co-defendants who had been convicted of murder in a separate case and that Brock did not want to risk saying anything incriminating since her murder case was pending on appeal. Appellant advised he would be testifying on his own behalf. (Tr.p.273-p.277).

The trial court then held a charge conference to discuss the intended jury charge. The judge advised she would instruct on: the rule that the charge, arrest, and indictments are not evidence; the presumption of innocence; reasonable doubt; the roles of the judge and jury; direct and circumstantial evidence; credibility of witnesses; and expert witnesses. In regard to CSC, the judge announced she had reviewed the relevant caselaw and would charge both CSC first-degree and CSC second-degree as a lesser-included offense. The judge then specifically found that the jury could find, from the evidence, that Appellant committed the CSC under subsection (1)(a), which required aggravated force, or under (1)(b), which could include confinement or kidnapping. (Tr.p.280-p.281). Appellant was given the opportunity to comment on the intended charge and raised *no objection* to the announced charge on both subsections (1)(a) and (1)(b) of first-degree CSC. He also made no mention of the indictments and failed to raise any claim that charging the jury on subsection (1)(b) improperly expanded the CSC indictment in any way. (Tr.p.282, lines 2-5).

Appellant then took the stand in his own defense. He explained his relationship with Victim, whom he called "Fuzzy," and provided his own version of the night in question and the encounter at the Howard Johnson's. Appellant claimed that when he, Priester, Brock, his two children, and Victim arrived at the hotel, he and Victim had consensual sex in the bathroom then hung out and smoked a couple of cigarettes. He claimed Victim never said she did not want to have sex, never said "stop," and never screamed or resisted at all. He also claimed they had had sex before. Appellant claimed that after the consensual sex, he and Victim got into an argument about gas money when they went to the car, and that she "got pissy" at him because Appellant threatened to tell her boyfriend about their encounter. He said Victim refused to drive him to Pageland and walked away so he ultimately drove her car there by himself. Appellant said he did not chase Victim into the marsh and that the car did not spin around in circles before he left for Pageland. (Tr.p.284-292). After finishing his testimony, Appellant rested. (Tr.p.312). Appellant renewed his motion for a directed verdict as to all charges and the motion was again denied. (Tr.p.313).

Prior to making closing arguments, Appellant's counsel stated for the first time:

> I guess one of the things is in the indictment, Your Honor, I think it only references Section A1 of the statute, such that is [sic] only says: "Didn't [sic] 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 be appropriate to instruct the jury on portion A, criminal sexual conduct in the first degree, I think those two entire sections.

(Tr.p.313, line 17-p.314, line 2). The State objected to limiting the jury charge by excluding a charge on subsection (1)(b) of the statute, arguing the indictments were simply notice documents, and that where Appellant was separately indicted for kidnapping, the combination of

that indictment and the first-degree CSC indictment certainly put him on notice of the possible ways the State could prove his guilt, including of first-degree CSC under subsection (1)(b) of the statute. (Tr.p.314, lines 3-16). The trial court agreed, denying Appellant's request to limit the jury charge on two grounds. First, the trial judge noted the verbiage on the CSC indictment says: "Did engage in sexual battery with the use of aggravated force upon [Victim]," and then says "on violation of Section 16-3-652 *et al.*" The court found this language [et al.] did not warrant a limitation on the charge to just (1)(a), because it properly put Appellant on notice about *all* parts of the referenced statute. The trial court further found, as argued by the State, that the additional kidnapping indictment also put Appellant on notice that he could be convicted under subsection (1)(b). (Tr.p.315, line 1).

The parties proceeded to make closing arguments. During its close, the State argued in part that the trial judge's charge on the law would include a charge that before the jury could convict, the State would have to prove beyond a reasonable doubt that the sexual battery was committed *either* by aggravated force *or* during circumstances that constituted kidnapping. (Tr.p.319, lines 11-22) (emphasis added). In response, Appellant challenged Victim's credibility, arguing her story simply did not make sense, that the sex was entirely consensual, and that there was *no kidnapping or force* used. (Tr.p.337-p.342).

The trial judge then charged the jury on the roles of the judge and jury, including: the judge's duty to charge the law applicable to the case and the jury's duty to accept and apply that law; that the indictments are not evidence; the burden of proof; the presumption of innocence; reasonable doubt; direct and circumstantial evidence; credibility of witnesses; expert witnesses; the elements of each offense; and the verdict forms. (Tr.p.344-p.361). In regard to first-degree CSC, the trial court charged:

> 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 [sic] 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 [sic] to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance analog or any intoxicating substance.

(Tr.p.352, line 23-p.353, line 17). At the conclusion of the jury charge, the trial court asked if there were any exceptions from either party. Appellant asked the trial court to bring the jury back and give a charge on "consent," but *did not object or otherwise take exception* to the charge the trial court had given on all *three alternative modes* to prove first-degree CSC under the statute. S.C. Code Ann. § 16-3-652(1)(a) [aggravated force], -652(1)(b) [forcible confinement or kidnapping], and -652(1)(c) [incapacitation or helplessness] (Supp. 2016). The trial court denied the request for a consent charge, holding the charge as given was sufficient to cover the concept of consent. (Tr.p.361, line 20-p.362, line 17).

After deliberating and asking to watch a portion of the security camera video from the hotel, the jury reached a unanimous verdict, finding Appellant guilty of all three indicted charges. Judge Mullen sentenced Appellant to life imprisonment without the possibility of parole (LWOP) for first-degree CSC; a consecutive term of LWOP for kidnapping; and three (3) years' consecutive imprisonment for use of a vehicle without permission, with all three sentences to be served consecutively to his pre-existing sentence of forty (40) years' imprisonment for murder. (Indictments; Sentencing Sheets; Tr.p.372-p.382).

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012); *State v. Wharton*, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). "The evidence presented at trial determines the law to be charged to the jury." *State v. Gilliland*, 402 S.C. 389, 400, 741 S.E.2d 521, 527 (Ct. App. 2012). On appeal, an appellate court reviewing a trial judge's jury charge must view the charge as a whole and in light of the evidence and issues presented at trial. *State v. Dent*, 440 S.C. 449, 453, 892 S.E.2d 294, 296 (2023); *State v. Simmons*, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); *see Todd v. State*, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation[.]"). The appellate court will only reverse a trial judge's decision regarding jury instructions when that decision constituted a prejudicial abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000); *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985). 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. *Brown* at 87, 736 S.E.2d at 265; *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011); *State v. Morris*, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008). If the jury instructions presented were substantially correct and covered the applicable law, the trial judge's decision will not be reversed on appeal. *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016); *State v. Ezell*, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996). Indeed, the substance of the law is what must be charged to the jury. *Marin*, 415 S.C. at 482, 783 S.E.2d at 812-13.

ARGUMENT

I.

Appellant's claim that the trial court erred in charging the jury on two possible modes of criminal liability under section 16-3-652 of the South Carolina Code is not preserved for appellate review because Appellant waived any previous objection by declining to take exception to the trial court's modified charge *after* it was given to the jury. In any event, the trial court properly charged the jury on the law of first-degree CSC, including all possible modes of criminal liability set forth in the statute, because the charge given: (1) was substantially correct and adequately covered the law applicable to the case such that a reasonable juror would have understood the charge; and (2) did not impermissibly broaden the scope of the indictments beyond the notice sufficiently given to Appellant of the elements of the offenses charged. Finally, any possible error in the jury charge was entirely harmless because, beyond a reasonable doubt, it did not affect the jury's deliberations or contribute to the verdict.

Appellant argues the trial court committed reversible error by charging the jury that they could convict him under an alternative theory of criminal liability than that charged in the indictment. He contends that because the first-degree CSC indictment alleged he engaged in sexual battery with Victim "with the use of aggravated force," but did not also specifically allege that he engaged in the 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," the trial court's jury charge on these two possible modes of criminal liability under the statute impermissibly enlarged the indictment, creating a material variance between the evidence sufficient to convict and the specific allegations in the indictment. (Brief of Appellant, p.4-p.9). The State disagrees and submits Appellant's argument should be denied and dismissed for a number of reasons.

Issue Not Preserved for Appeal

First, this Court could find the argument raised in Appellant's brief is not preserved for appellate review because, after initially asking the court to refrain from charging the language

from subsection (1)(b) of section 16-3-652, Appellant raised no objection to the trial court's post-charge conference modification of its intended charge, which had been announced as including subsections (1)(a) and (1)(b) of section 16-3-652 over Appellant's objection, and *instead* charged language from subsections (1)(a), (1)(b), *and* (1)(c) of section 16-3-652. In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004). In addition to the general requirements of our issue preservation rules, the South Carolina Rules of Criminal Procedure provide specific guidance in regard to raising and preserving an objection to a jury charge. *See* Rule 20, SCRCrimP (outlining the requirements for requesting jury instructions and objecting to a jury charge). Pursuant to Rule 20, a defendant must object to the jury charge as given or request an additional charge when afforded the opportunity to do so in order to properly preserve an objection to a charge. *State v. Stone*, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985).

In interpreting Rule 20, our courts have recognized that it is "the long-standing rule that where a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at conclusion of the court's instruction." *See State v. Johnson*, 439 S.C. 331, 340-41, 887 S.E.2d 127, 131-32 (2023) (quoting *State v. Johnson*, 333 S.C. 62, 64 n.1, 508 S.E.2d 29, 30 n.1 (1998)); *State v. Bryant*, 391 S.C. 225, 231, 705 S.E.2d 465, 469 (Ct. App. 2010). Thus typically, if there was an on-the-record discussion regarding a requested charge and an on-the-record ruling as to whether the court would give that charge, the defendant would not need to again object to the charge once given to preserve the issue for appeal. The typical rule does *not* hold, however, when a

defendant abandons a request to charge after the on-the-record ruling denying his request. *State v. Rios*, 388 S.C. 335, 340-41, 696 S.E.2d 608, 611-12 (Ct. App. 2010).

In *Rios*, the defendant argued the trial court erred in failing to charge the jury on involuntary manslaughter and self-defense. *Rios*, 388 S.C. at 340, 696 S.E.2d at 611. This Court found Rios's argument was not properly before it for review because he abandoned his request for jury charges on involuntary manslaughter and self-defense *when he acquiesced* to the trial court's charge decision on those issues, and asked the trial court to charge voluntary manslaughter, accident, and murder. *Rios*, 388 S.C. at 341, 696 S.E.2d at 612 (emphasis added). The Court found Rios waived appellate review of the issue because an issue conceded in the trial court cannot be argued on appeal. *Id.*

Here, as in *Rios*, Appellant arguably waived or abandoned his challenge to the trial court's refusal to refrain from charging subsection (1)(b) because he neither objected nor took exception when the trial judge deviated from the prior announced ruling by charging *both* subsections (1)(b) *and* (1)(c), which was in accordance with the court's ruling regarding the "et al." language in the indictment. Appellant effectively acquiesced in the trial court's modification when he did not object or otherwise take exception to the charge the trial court had given on all *three alternative modes* to prove first-degree CSC under the statute. S.C. Code Ann. § 16-3-652(1)(a) [aggravated force], -652(1)(b) [forcible confinement or kidnapping], and -652(1)(c) [incapacitated or helpless] (Supp. 2016). Thus, this Court could conclude Appellant's argument about the jury charge is not preserved for consideration in this appeal. *Rogers* at 183, 603 S.E.2d at 912-13; Rule 20, SCRCrimP.

Discussion / Analysis

Even if this Court determines Appellant's argument is preserved for appellate review, it is without merit. The trial court properly charged the jury on the law of first-degree CSC, including all possible modes of criminal liability set forth in the statute, because the charge given was: (1) substantially correct and adequately covered the law applicable to the case such that a reasonable juror would have understood the charge; and (2) did not impermissibly broaden the scope of the indictments beyond the notice sufficiently given to Appellant of the elements of the offenses charged. A trial court is required to charge the current and correct law of South Carolina. *See State v. Rayfield*, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 73 (2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. *See Rayfield*, 369 S.C. at 119, 631 S.E.2d at 251; *Sheppard*, 357 S.C. at 665, 594 S.E.2d at 473; *State v. Patterson*, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (citations omitted).

Jury instructions must be considered as a whole and if as a whole they are free from error, any isolated portions which might be misleading do not constitute reversible error. *State v. Jackson*, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. *State v. Lee Grigg*, 374 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007).

The trial court's jury charge on first-degree CSC included the elements of the offense and was an entirely proper jury charge under the law of South Carolina. *See* S.C. Code Ann. § 16-3-652 (Supp. 2017) (providing: " (1) A person is guilty of criminal sexual conduct in the first

degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven: (a) The actor uses aggravated force to accomplish sexual battery; (b) The 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; (c) The actor causes the victim, without the victim's consent, 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 analogue, or any intoxicating substance."). When considered as a whole, the charge was substantially correct, adequately covered the law, and was not confusing; therefore, its substance presents no grounds for reversal.

Additionally, the jury charge given on the entirety of the law on first-degree CSC did not impermissibly broaden the scope of the indictments beyond the notice adequately given to Appellant where both the notice given by the individual CSC indictment was sufficient and where the notice given by the collective indictments for which Appellant was on trial was sufficient when taken as a whole. An indictment is a notice document and its sufficiency is judged by 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. *See State v. Gentry*, 363 S.C. 93, 102-03, 610 S.E.2d 494, 500 (2005). The two key indictments here read in relevant part: (1) "That in Beaufort County, South Carolina, on or about December 6, 2016, the Defendant, Brian David Walls, did engage in sexual battery with the use of aggravated force

upon [Victim], all in violation of Section 16-3-652, et al. of the Codes of Law of South Carolina." (Indictment No. 2016-GS-07-02232 for CSC 1st Degree); and (2) "That in Beaufort County, South Carolina, on or about December 6, 2016, the Defendant, Brian David Walls, did seize, confine, inveigle, decoy, kidnap, abduct, or carry away [Victim] without authority of law, all in violation of Section 16-3-910, et al. of the Code of Laws of South Carolina." (Indictment No. 2016-GS-07-00234 for Kidnapping).

The first-degree CSC indictment alone meets the requirements of *Gentry* by referencing the charging statute, perhaps by an inartful use of the Latin phrase "et al.," but an adequate reference nonetheless, which incorporated all aspects of the statute, including the three possible modes of criminal liability the State could seek to prove. The State's decision to focus the indictment language on the mode requiring aggravated force did not eliminate or otherwise abridge the reference to the statute as a whole; therefore, as found by the trial court, Appellant had notice of all alternate modes of proof.

Further, and more critically, when taken collectively the indictments for which Appellant was on trial certainly meet the requirements of *Gentry*. The jury charge did not impermissibly broaden the scope of the indictments by including *both* subsections (1)(a) and (1)(b) in its definition of first-degree CSC because Appellant was also indicted and tried for kidnapping Victim during the rape. Appellant was clearly on notice he was being charged with *both* first-degree CSC and kidnapping, and the charges were based on his action of kidnapping or forcibly confining Victim and sexually assaulting her with aggravated force while she was so confined. The indictments by their explicit terms covered both possible circumstances or modes of proof covered by the trial court's jury charge. In addition, kidnapping is a continuing offense; in this case the act of kidnapping began with getting Victim to the hotel room under false pretenses and

ended when she was finally able to escape after being confined and raped by Appellant. *See State v. Tucker*, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999) ("Kidnaping is a continuing offense. The offense commences when one is wrongfully deprived of freedom and continues until freedom is restored.").

While the language describing the aggravated force used during the assault further explained Appellant's actions during the sexual battery, it did not preclude any action of kidnapping or confining Victim as a mode of proof. The forcible sexual assault was accomplished in part as a result of the kidnapping by Appellant, luring Victim to the hotel room under the false pretense of needing help bringing the food up from the car, following her into the bathroom, and closing the door. Clearly, the actions described by the indictment began with Appellant's inveigling of Victim and ended when he released her from confinement in the bathroom, after the rape. Accordingly, the trial court's jury charge did not impermissibly broaden the indictments or result in Appellant being convicted of a charge for which he was not indicted.[2]

A comparison to other cases is illustrative. In *State v. Smith*, our Supreme Court held that an indictment alleging that defendant violated the statutory provision of homicide by child abuse as a principal did not provide notice of homicide by child abuse by aiding and abetting. *State v. Smith*, 406 S.C. 215, 219-20, 750 S.E.2d 612, 614 (2013). This was because: ". . . the language of section 16-3-85 unambiguously signals the General Assembly's intent to codify two distinct crimes—homicide by child abuse as a principal pursuant to section (A)(1) and homicide by child abuse by aiding and abetting pursuant to section (A)(2), each with distinct elements and

[2] As noted above, reversal of this CSC conviction would not appreciably change Appellant's sentence because he received a life without parole sentence for the kidnapping. Additionally, if reversed the State would be able to re-indict Appellant either eliminating the restrictive language or altering it to include specifics about the circumstances of kidnapping Victim as the mode for accomplishing the sexual assault.

sentencing ranges." *Smith*, 406 S.C. at 219, 750 S.E.2d at 614. But here, where the charge was first-degree CSC, there is no similar signal of the General Assembly's intent to codify two distinct crimes—each with different elements and sentencing ranges. Rather, the statute here unambiguously establishes a *single crime* which consists of a sexual battery "if any one or more of the following (three) circumstances are proven" and a *single sentencing range* of "imprisonment for not more than thirty years." S.C. Code Ann. § 16-3-652. Consequently, the problems with the indictment in *Smith* are not present, and the trial court's jury charge stemming from Appellant's indictments was proper.

More recently, in *State v. Dent*, the State elected to charge a particular sexual battery in the indictment (fellatio) and thereafter impermissibly expanded the indictment to include other acts of sexual battery. *State v. Dent*, 446 S.C. 121, 134, 919 S.E.2d 394, 401 (2025). Here, the indictment was not so drawn, instead simply charging sexual battery without specifying the act. Thus, *Dent* also does not control the outcome in Appellant's case. As explained by our supreme court in *Dent*, the ultimate goal from a due process perspective is to ensure the indictment gives fair notice of the charges against the accused. *Id.* at 125, 919 S.E.2d at 396 (2025) ("Indictments matter. In criminal trials, where the weight of the government comes to bear against an individual citizen, indictments are a foundational part of that citizen's constitutional right to due process: they put the citizen on formal notice of the charges against him and the theories the government intends to present at trial to show the citizen violated the law, thereby allowing the citizen to prepare a defense. A conviction based on unindicted conduct cannot stand.").

Here the indictments as a whole clearly provided fair notice. It is disingenuous for Appellant to claim he did not have fair notice that the State sought to prove him guilty of kidnapping, a circumstance that the first-degree CSC statute [which, as noted above, was cited in

the indictment without limiting language referencing a specific subsection] establishes as an alternative mode of proof. Appellant *knew* he was accused of using aggravated force *and* of forcibly confining or kidnapping Victim to rape her, and he prepared his defense of "consent" with that knowledge in mind. He had fair notice, and the trial court properly charged the jury accordingly.

Harmless Error / No Prejudice

Even if this Court finds the trial court somehow erred in charging the jury on two possible modes of criminal liability under section 16-3-652 of the South Carolina Code rather than limiting the charge to aggravated force, any possible error was harmless beyond a reasonable doubt because the error was not prejudicial to Appellant. To reverse a criminal conviction based on an erroneous jury instruction, the appellate court must find the error was a prejudicial error. *State v. Bowers*, 436 S.C. 640, 646, 875 S.E.2d 608, 611 (2022). Prejudicial error in a jury instruction is an error that contributed to the jury verdict. *Id.* The question that must be addressed is not whether the error was harmless beyond a reasonable doubt because of overwhelming evidence of guilt; rather, the question is whether the erroneous jury charge affected the jury's deliberations and, thus, contributed to the verdict. *Id.* at 646-47, 875 S.E.2d at 611. Indeed, when considering whether an error with respect to jury instructions was harmless, the appellate court must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict. *State v. Perry*, 440 S.C. 396, 408, 892 S.E.2d 273, 279 (2023). If the appellate court has any reasonable doubt as to whether the erroneous charge contributed to the verdict, it must reverse the conviction. *Id.* To determine whether the erroneous jury charge contributed to the verdict the court must attempt to determine how the jury understood the jury

instruction. *Bowers,* at 647, 875 S.E.2d at 611. The appropriate test involves determining what a reasonable juror would have understood the charge to mean. *Id.*

Here, Appellant could not possibly have suffered any prejudice because, where the jury flatly rejected Appellant's claim that the sex was consensual, it could have reached no other conclusion but that the circumstances of the sexual battery included aggravated force. Victim testified Appellant punched her extremely hard in the face immediately before the sexual assault, (Tr.p.167, line 15-p.168, line 22), and two trial witnesses described specific physical evidence of that strike to Victim's face (Tr.p.100, line 14-p.101, line 14; p.135, lines 8-15). Thus, the record contained ample evidence Appellant used aggravated force. *Compare State v. Brown*, 360 S.C. 581, 590, 602 S.E.2d 392, 397 (2004) (affirming this Court's reversal of Brown's conviction for first-degree CSC where the record contained no evidence he used aggravated force while sexually assaulting his daughters on the dates specified in the indictments).

As explained in *Dent*, the trial court impermissibly enlarged the indictment, creating a material variance between the evidence sufficient to convict Dent and the specific allegation in the indictment. *Dent*, 446 S.C. at 135, 919 S.E.2d at 401. In Appellant's case, there was no variance between the evidence sufficient to convict on first-degree CSC and the specific allegations in the indictments, both because the jury necessarily found aggravated force and because the acts alleged in the two key indictments put Appellant on notice of what he was called upon to answer and apprised him of the elements of both offenses, all of which allowed him to decide to stand trial. Notably Appellant chose to stand trial, a trial during which he testified in his defense and claimed he was *not guilty* of either kidnapping *or* first-degree CSC, under any circumstances, because the sexual battery was part of a consensual sexual encounter he had with Victim.

In this case, the exact same evidentiary theory was used by the State under the kidnapping charge *and* the alternative circumstances of proving the first-degree CSC charge. Thus, Appellant was on notice of the first-degree CSC charge and the two possible ways it could be shown, by virtue of the kidnapping indictment. *See State v. Green*, 406 S.C. 589, 595, 753 S.E.2d 259, 262 (Ct. App. 2014) (Noting that, unlike in *Bailey*, where the trail court allowed for a conviction upon a theory not alleged in the indictment, in *Green* the same theory was used by the State under the attempted burglary and first degree burglary charge, so Green was on notice of the charge and its lesser included offenses). Here, the additional kidnapping indictment similarly distinguishes Appellant's case from *Bailey*. In *Bailey*, there was extensive evidence the jury was confused by the alternative elements in the homicide by child abuse statute, i.e., an "act" versus and "omission." Nothing here suggests any similar confusion. Indeed, there were no questions from the jury and no supplemental instruction from the trial judge on the three statutory circumstances which could support first-degree CSC. Consequently, the alleged error in the jury charge did not contribute to the guilty verdicts and could not have prejudiced Appellant. *Bowers* at 646-47, 875 S.E.2d at 611. Where Appellant was on notice of the offenses and the jury was not confused, Appellant suffered no prejudice Thus, any possible error was harmless beyond a reasonable doubt.

In conclusion, Appellant's conviction and sentence for first-degree CSC should be affirmed. His argument is not preserved for appellate review and even if preserved, the trial court committed no error in charging the jury with the complete language of section 16-3-652, including the alternative statutory circumstances which could prove the offense despite the language used in the first-degree CSC indictment because: (1) that indictment referenced the statute as a whole and (2) the additional kidnapping indictment provided sufficient notice of the

alternative circumstances of proof under *Gentry*. In any event, any possible error was harmless beyond a reasonable doubt.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that Appellant's convictions and sentence be affirmed.

Respectfully submitted,

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Columbia, South Carolina
November 7, 2025

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2024-001452

The State, ...Respondent,

v.

Brian David Walls,.....Appellant.

PROOF OF SERVICE

I, Susan Spencer, Legal Assistant, hereby certify that I have served the *Amended Initial Brief of Respondent*, dated November 7, 2025, on Appellant by sending an electronic copy via email to Gary H. Johnson, counsel of record for Appellant, at the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served. This 7th day of November, 2025.

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