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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County
Honorable Marvin H. Dukes, III, Circuit Court Judge
Appellate Case No. 2025-000414

THE STATE,

Respondent,

vs.

JAMES AUSTIN EDWARD TOWNSEND,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

"Whether the trial court erred in refusing to instruct the jury on criminal sexual conduct with a minor, third degree, as a lesser-included offense when evidence existed there was touching but not actual penetration?"

COUNTER-STATEMENT OF ISSUE ON APPEAL

Did the trial judge somehow err by declining to instruct the jury on third-degree criminal sexual conduct with a minor when that unindicted offense was not a lesser-included offense of the indicted charge of first-degree criminal sexual conduct with a minor since: (1) each of those offenses contains at least one element the other does not; and (2) the legislature elected not to delineate third-degree criminal sexual conduct with a minor as a lesser-included offense of any other crimes, including first-degree criminal sexual conduct with a minor?

STATEMENT OF THE CASE

In April of 2023, Appellant James Austin Edward Townsend, who was then twenty-one years old, was arrested following an investigation into allegations he sexually abused a six-year-old girl a few weeks earlier during a game of hide-and-seek. In June of 2023, the Colleton County Grand Jury indicted Appellant for first-degree criminal sexual conduct with a minor. On February 24, 2025, a jury trial was commenced in the Colleton County Court of General Sessions with the Honorable Marvin H. Dukes, III, circuit court judge, presiding. At the conclusion of the three-day trial, the jury convicted Appellant as indicted. After the verdict, the trial judge deferred sentencing until the following day. Thereafter, on the next day, the trial judge sentenced Appellant to a thirty-year term of imprisonment. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

On March 20, 2023, a six-year-old girl ("Victim") living in Walterboro, South Carolina, made a disturbing disclosure to her older sister[1] ("Sister"). (R. p. 23; p. 25; p. 27). Specifically, Victim revealed she had been sexually abused while playing a game of hide-and-seek. (R. p. 23).

In response to that shocking revelation, Sister alerted the girls' mother ("Mother"). (R. p. 24). Mother then quickly spoke with Victim herself and asked Victim to tell her everything she could remember. (R. p. 27; p. 29). Just as she did with Sister, Victim disclosed the sexual assault to Mother and again affirmed it occurred while she was playing hide-and-seek earlier that month. (R. p. 27). More specifically, Victim stated "Austin," who was later identified as twenty-one-year-old Appellant,[2] asked her to be his partner during the hide-and-seek game, the two went "over by the pump house" together, and then "Austin" put his hand down her pants and "touched her where she went potty."[3] (R. pp. 30-31; p. 40). Victim further reported she did not reveal the abuse earlier because she was scared and had been told to keep it a secret. (R. p. 27). After revealing the details of that terrible occurrence to Mother, Victim proceeded to burst into tears. (R. pp. 30-31).

Following that, Mother promptly reported what had been disclosed to law enforcement, and an investigation into the matter was rapidly initiated. (R. p. 15; p. 26). As part of that investigation, Mother—at the direction of law enforcement—brought Victim to Hopeful

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[1] Victim's older sister was around twelve years old at the time of Victim's disclosure. (R. p. 22).

[2] Appellant was one of Victim's neighbors and lived in a house on the property directly next to Victim's home. (R. pp. 28-29).

[3] The specifics of Victim's disclosure to Mother are now able to be recounted because they were strategically elicited by defense counsel during his cross-examination of Mother during trial. (R. pp. 30-31).

Horizons, a children's advocacy center, on April 20, 2023, for a forensic interview. (R. p. 29; p. 32; pp. 42-43; pp. 49-50). On that date, Brooke Bentley, a licensed professional counselor at the center, met with Victim and spoke with her one on one about what had happened. (R. p. 43). During the interview, Victim once again reported Appellant—whom she identified as "Austin"—sexually assaulted her while the two were behind a small cabin together during a game of hide-and-seek. (R. p. 40; State's Ex. # 1 (Forensic Interview Recording)). More specifically, Victim revealed Appellant put his hand underneath her clothing and touched her *inside* the part of the body she used to go to the bathroom.[4] (State's Ex. # 1). And, when asked to identify where the touching occurred on a diagram of a female body, Victim pointed to the groin area on the diagram. (State's Ex. # 1). Furthermore, Victim again reported Appellant told her to keep what he had done secret. (State's Ex. # 1).

Ultimately, based on what was uncovered through the investigation into the incident, Appellant was arrested on April 26, 2023, for first-degree criminal sexual conduct with a minor. (R. p. 51; pp. 152-153). On the following day, Sergeant William Ballard from the Colleton County Sheriff's Office met with Appellant and conducted an interview of him. (R. pp. 51-52). During that interview, Appellant—after being advised of and waiving his rights—admitted he had been involved in the game of hide-and-seek along with Victim. (State's Ex. # 3 (Redacted Interview Recording)). However, he insisted he hid by himself during that game, claimed he was never near the "little girl," and denied doing anything that would get him in trouble. (R. p. 67; State's Ex. # 1). Eventually though, Appellant confessed he actually was with the "little girl" during the hide-and-seek game, and he candidly admitted he put his hand down her shorts while

[4] When asked if the sexual abuse occurred more than once, Victim initially indicated it had, but she later clarified it had actually only happened on the single occasion she had described. (State's Ex. # 1).

they were behind a building and tried to penetrate her vagina with his finger. (State's Ex. # 1). Additionally, Appellant acknowledged he told his victim not to say anything about what had happened and warned her they would both get in trouble if she did. (State's Ex. # 1). Beyond that, Appellant admitted he knew and understood what he did was wrong and asserted he needed to get help. (State's Ex. # 1).

Subsequent to that, Appellant was indicted for first-degree criminal sexual conduct with a minor, and he elected to proceed forward to trial. (R. p. 2; pp. 154-155). During trial, Victim, who was by then eight years old, recounted the details of the sexual abuse she suffered at Appellant's hands and identified Appellant in the courtroom as her abuser. (R. pp. 35-40). However, by that point, Victim indicated she could not remember what Appellant did with his fingers when he put them underneath her clothing, and she now stated he touched the *outside* of "[w]here [she] go[es] pee." (R. pp. 37-38). In addition to that, evidence and testimony was presented about what was uncovered through the investigation into the incident, and the forensic interview recording was—without objection—admitted into evidence and played for the jury. (R. pp. 14-34; pp. 42-45). Furthermore, Sergeant Ballard testified about Appellant's post-arrest confession, and a redacted recording of Appellant's damning admissions to the officer was admitted into evidence and played for the jury. (R. pp. 47-67).

Following the presentation of that testimony and evidence, the State rested its case, and Appellant personally elected not to testify in his own defense. (R. p. 67; p. 70). However, his older brother, Andrew Tye,[5] [6] testified on Appellant's behalf, claimed their mother was outside

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[5] During his testimony, Tye admitted he had previously been convicted of multiple criminal offenses, including providing false information. (R. p. 74).

[6] In addition to Tye's testimony, defense counsel also elicited testimony from Angela Believue, a records clerk at the Colleton County Sheriff's Office. (R. pp. 75-76). Through her testimony,

the "majority of the time" on the date of the incident, and alleged he personally was outside on that date when his mother was not. (R. p. 73). As to why, Tye stated he always supervised Appellant when Appellant was around children based on what he had heard about "some things" that happened in Tennessee. (R. p. 73). Tye acknowledged, though, that Appellant was unsupervised for at least some period during the hide-and-seek game, but he claimed that lack of supervision only lasted for a period of five minutes at most. (R. p. 73).

Subsequent to the presentation of that testimony, the defense rested its case. (R. p. 82). After that occurred, the trial judge had a discussion with the parties about potential jury instructions on lesser-included offenses. (R. p. 85).

During that discussion, defense counsel requested a jury instruction on third-degree criminal sexual conduct with a minor as a purported lesser-included offense of the indicted charge regardless of whether such an instruction would be "right or wrong." (R. p. 86; pp. 92-94). In support of that request, defense counsel maintained the facts presented during trial "suggested the possibility" Appellant was guilty of third-degree criminal sexual conduct with a minor since there was "ample evidence" no penetration had occurred. (R. p. 87). Furthermore, while conceding the offense of committing a lewd act upon a child "[u]nder the old common law" was *not* a lesser-included offense of any degree of criminal sexual conduct with a minor, defense counsel noted the case law articulating that holding pre-dated the Omnibus Crime Reduction and Sentencing Reform Act of 2010,[7] which changed the "numbering of things" and

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Believue confirmed she had been unable to locate the body camera recording from the deputy who initially responded to Victim's home when the sexual abuse was reported to law enforcement, and she further offered a possible explanation for why that recording might have been unavailable. (R. pp. 14-18; pp. 76-79; p. 82).

[7] Third-degree criminal sexual conduct with a minor was not enacted through the Omnibus Crime Reduction and Sentencing Reform Act of 2010 but, instead, was enacted through separate legislation from 2012. Act No. 255, § 1, 2012 S.C. Acts & Joint Resolutions.

"where they were numbered first, second and third degree." (R. pp. 86-88). In light of that renumbering, defense counsel suggested: "Lesser includes, includes, second, third, whatever I mean, to the extent that the evidence allows it." (R. pp. 87-88).

Conversely, the solicitor correctly noted the "elements" test was the proper test for determining whether a new statutory offense does or does not constitute a lesser-included offense of another crime in South Carolina. (R. p. 89). With that in mind, the solicitor argued third-degree criminal sexual conduct with a minor was not a lesser-included offense of first-degree criminal sexual conduct with a minor pursuant to the applicable "elements" test. (R. pp. 89-90). And, as support for that, the solicitor aptly noted the elements of the former offense of committing a lewd act upon a child, which was expressly recognized not to be a lesser-included offense of first-degree criminal sexual conduct with a minor, were *identical*[8] to the elements of the new offense of third-degree criminal sexual conduct with a minor. (R. pp. 89-90).

Ultimately, after considering the arguments, the trial judge agreed with the solicitor's position and concluded a jury instruction on third-degree criminal sexual conduct with a minor as a purported lesser-included offense was not appropriate. (R. p. 101). Thereafter, consistent with that determination, the trial judge did *not* include a jury instruction on third-degree criminal sexual conduct with a minor as part of his jury charge, and the jury subsequently convicted Appellant of first-degree criminal sexual conduct with a minor. (R. pp. 121-133; p. 140).

[8] As he necessarily must, Appellant now concedes on appeal the elements of third-degree criminal sexual conduct with a minor are, in fact, "identical" to the elements of committing a lewd act upon a child. (App. Br. p. 6).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). 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 from trial. 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 in analyzing whether the defendant's due process rights have been violated."). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996); see State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied."). Moreover, an appellate court will only reverse a trial judge's decision regarding jury instructions when that decision constitutes an abuse of discretion resulting in actual prejudice. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000); see Rauch v. Zayas, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985) ("[A]n alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial.").

ARGUMENT

The trial judge properly declined to instruct the jury on third-degree criminal sexual conduct with a minor because that unindicted offense was not a lesser-included offense of the indicted charge of first-degree criminal sexual conduct with a minor since: (1) each of those offenses contains at least one element the other does not; and (2) the legislature elected not to delineate third-degree criminal sexual conduct with a minor as a lesser-included offense of any other crimes, including first-degree criminal sexual conduct with a minor.

Appellant contends the trial judge reversibly erred by refusing to instruct the jury on third-degree criminal sexual conduct with a minor. In support of that contention, Appellant maintains: (1) third-degree criminal sexual conduct with a minor is, in fact, a lesser-included offense of the indicted crime of first-degree criminal sexual conduct with a minor; and (2) there was evidence presented during trial from which the jury could have concluded Appellant was guilty of third-degree criminal sexual conduct with a minor instead of first-degree criminal sexual conduct with a minor since Victim testified during trial she had not been penetrated. Appellant is wrong. Contrary to his position, third-degree criminal sexual conduct with a minor is not a lesser-included offense of first-degree criminal sexual conduct with a minor because: (1) each of those offenses contains at least one element the other does not; and (2) the legislature elected not to delineate third-degree criminal sexual conduct with a minor as a lesser-included offense of any other crimes, including first-degree criminal sexual conduct with a minor. Accordingly, since Appellant was not indicted for third-degree criminal sexual conduct with a minor and that offense was not a lesser-included offense of the indicted charge, the trial judge committed no conceivable error by refusing to instruct the jury on that unindicted offense. Appellant's conviction should be affirmed.

The purpose of a trial judge's jury instructions is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987).

When instructing a jury on the law, a trial judge is required to charge only the current and correct law of South Carolina, and the law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009); see State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003) ("In general, the trial judge is required to charge only the current and correct law of South Carolina, . . . and the law to be charged to the jury is determined by the evidence at trial." (citations omitted)). Ordinarily, a trial court has a duty to give a requested instruction when it correctly states the law applicable to the issues and is supported by the evidence, but a trial judge should decline to give a requested instruction when it tenders an issue that is not presented or supported by the evidence. State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996); see State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975) ("No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence.").

When instructing the jury on the law, "[a] trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Green, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012). Generally, pursuant to the accepted test for determining whether an offense is a lesser-included offense of another, an offense is considered to be a lesser-included offense of a greater offense if the greater offense includes all the elements of the lesser-included offense. State v. Primus, 349 S.C. 576, 579-580, 564 S.E.2d 103, 105 (2002), overruled on other grounds by State v. Gentry, 563 S.C. 93, 610 S.E.2d 494 (2005). However, "[i]f the lesser offense includes an element which is not included in the greater offense, then the lesser offense is *not* included in the greater offense." Id. at 580, 564 S.E.2d at 105 (emphasis added). Significantly, in determining whether an offense is a lesser-included offense of another, courts in South Carolina typically

apply the "elements" test to make that determination with few exceptions. See id. ("While the Court recognizes the existence of a few anomalies, it generally adheres to the use of the traditional elements test."). In fact, our Supreme Court has recently recognized there is no longer a need for any analysis *other than* the "elements" test when determining whether a statutory offense that has not been statutorily delineated as a lesser-included offense of another is a lesser-included offense. See State v. Hernandez, 428 S.C. 257, 261, 834 S.E.2d 432, 462 (2019) (instructing there is "no longer" a need "to ignore the elements test" when determining whether a statutory offense is a lesser-included offense of another).

In the case sub judice, the question at the heart of the matter hinges on whether the newly-created—as of 2012—statutory offense of third-degree criminal sexual conduct with a minor, which replaced the former offense of committing a lewd act upon a child in a largely verbatim fashion, constitutes a lesser-included offense of first-degree criminal sexual conduct with a minor, which is the offense for which Appellant was indicted. The answer to that question is a straightforward one. It does not because: (1) each offense requires proof of some element the other does not; and (2) the legislature elected not to delineate third-degree criminal sexual conduct with a minor as a lesser-included offense of *any* other crime, including first-degree criminal sexual conduct with a minor.

Looking to the elements of the first-degree criminal sexual conduct with a minor, that particular offense occurs when either "the actor engages in sexual battery with a victim who is less than eleven years of age" or "the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty to or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D)." S.C. Code

Ann. § 16-3-655(A). Thus, to prove an offender like Appellant guilty under the version of the offense for which Appellant was charged, the State must demonstrate beyond a reasonable doubt the offender engaged in a specific type of act—a *sexual battery*—upon a victim under the age of eleven. Id.; see State v. Adams, 430 S.C. 420, 434, 845 S.E.2d 217, 224 (Ct. App. 2020) ("There is no ambiguity in the text, which tells us flatly an element that must be proven is a 'sexual battery.' ").

Meanwhile, based on the plain statutory language defining first-degree criminal sexual conduct with a minor, no particular or specific criminal intent must be proven to establish the offense other than the general intent to commit the prohibited act. S.C. Code Ann. § 16-3-655(A); see Black's Law Dictionary 608 (9th ed. 2009) (defining "engage" as "[t]o employ or involve oneself; to take part in; to embark on"); New Oxford American Dictionary 574 (3rd ed. 2010) (defining "engage" when referring to engaging in some act as "participate or become involved in"); see also State v. Kirkland, 282 S.C. 14, 16, 317 S.E.2d 444, 444-445 (1984) (recognizing a statute prohibiting sexual intercourse with any person confined to a mental institution necessitated proof only of "the mere commission of the act of intercourse itself" due to the absence of statutory language requiring something more, such as knowledge); cf. Carter v. United States, 530 U.S. 255, 269 (2000) ("The presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.' " (citation omitted)). In fact, based on the legislature's express inclusion of an exception in the definition of sexual battery, a person's reason, motive, or purpose for engaging in a penetrative sexual battery is entirely irrelevant *unless* it was accomplished for a limited purpose falling within the exception, which excludes only medically-recognized acts. See S.C. Code Ann. § 16-3-651(h) (excluding *only* "intrusion . . . accomplished

for medically recognized treatment or diagnostic purposes" from the definition of "sexual battery"); see also Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction expressio unius est exclusio alterius or inclusio unius est exclusio alterius holds that to express or include one thing implies the exclusion of another, or of the alternative." (internal quotations omitted)); State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute."). Otherwise, if proof of some *other* criminal purpose or intent beyond the general intent to commit the act itself would be necessary for an act to qualify as a sexual battery, the limited purpose-based statutory exception set out in the definition of sexual battery would be rendered entirely meaningless as a penetrative act accomplished for purposes of medically-recognized treatment or diagnosis is inherently not accomplished with criminal intent and, thus, would *already* be excluded from constituting a sexual battery without any need whatsoever for the delineated exception to exist. See In re Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (instructing "[a] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous" (citations and internal quotations omitted)).

Contrastingly, looking to the elements of third-degree criminal sexual conduct with a minor, that particular offense occurs when a person "over fourteen years of age . . . wilfully and lewdly commits or attempts to commit a lewd or lascivious act upon or with the body, or its parts, of a child under sixteen years of age, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child." S.C. Code Ann. § 16-3-655(C); cf. S.C. Code Ann. § 16-15-140 (repealed) ("It is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or

its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child."). Thus, just like the precursor offense of committing a lewd act upon a child, third-degree criminal sexual conduct with a minor requires proof the offender: (1) *wilfully* committed or attempted to commit; (2) a lewd or lascivious act; (3) "upon *or* with the body, or its parts, of a child under sixteen years of age"; (4) with the "intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child." S.C. Code Ann. § 16-3-655(C) (emphasis added). Accordingly, unlike first-degree criminal sexual conduct with a minor, the offense of third-degree criminal sexual conduct with a minor can be committed through a wider range of acts and conduct *and* requires not just a general intent to commit the prohibited act but a specifically-delineated type of intent. Id.

With the elements of those statutory offenses in mind, third-degree criminal sexual conduct with a minor—just like the precursor offense of committing a lewd act upon a child before it—is not a lesser-included offense of first-degree criminal sexual conduct with a minor pursuant to the controlling "elements" test because the greater offense does *not* include all the elements of the lesser offense. See Campbell v. State, 342 S.C. 100, 102, 535 S.E.2d 928, 929 (2000) ("Committing a lewd act upon a minor is not a lesser included offense of first degree criminal sexual conduct with a minor."). Specifically, first-degree criminal sexual conduct with a minor requires proof of a sexual battery while third-degree criminal sexual conduct with a minor does not; instead, the lesser of those offenses allows for proof of a much broader range of acts, including acts *with*—as opposed to upon—the body of a child, other than sexual batteries. S.C. Code Ann. § 16-3-655(A); S.C. Code Ann. § 16-3-655(C). Likewise, third-degree criminal sexual conduct with a minor requires proof the offender acted with the specific intent of

appealing to the lust, passions, or sexual desires of himself or the child while first-degree criminal sexual conduct with a minor does not.[9] Id. Because each offense requires proof of elements the other does not and because the elements of the lesser offense are not always required elements of the greater offense, third-degree criminal sexual conduct with a minor is simply not a lesser-included offense of first-degree criminal sexual conduct with a minor pursuant to the controlling "elements" test. See Knox v. State, 340 S.C. 81, 85, 530 S.E.2d 887, 889 (2000) ("A lesser offense is included in the greater only if each of its elements is *always* a necessary element of the greater offense."), overruled on other grounds by State v. Gentry, 563 S.C. 93, 610 S.E.2d 494 (2005); cf. State v. Norton, 286 S.C. 95, 97, 332 S.E.2d 531, 532 (1985)

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[9] Now, on appeal, Appellant suggests—for the first time—first-degree criminal sexual conduct with a minor does, in fact, require proof of an intent to appeal to the lusts, passions, or sexual desires of the actor or child and, thus, contains the exact same intent requirement as third-degree criminal sexual conduct with a minor. (App. Br. p. 7). Notwithstanding the fact it was manifestly not properly preserved for appellate review since it was neither raised to nor ruled upon by the trial judge during trial, that newly-advanced claim is fundamentally incorrect and demonstrates a profound misunderstanding of the nature of rape. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (explaining an appellant "is limited to the grounds raised at trial"); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."). Significantly, while many rapes—or, stated differently, sexual batteries—are committed for the purpose of gratifying the lusts, passions, and sexual desires of the offender, that is not always so; many rapists commit their detestable crimes for the purpose of hurting, intimidating, punishing, or controlling their victims instead of for personal sexual gratification. See, e.g., State v. Arnett, 49 S.W.3d 250, 261-262 (Tenn. 2001) (recognizing not every rape is committed "for the purpose of sexual fulfillment," explaining "there are multiple motivations for rape," and reaffirming "evidence of ejaculation, by itself, does not prove that the rapist's motive was to gratify a desire for pleasure"). That fact very well may be the exact reason why our legislature elected to expressly include a requirement for proof of an "intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires" in both the third-degree criminal sexual conduct with a minor statute and its precursor statute but omitted that particular intent requirement from offenses like first-degree criminal sexual conduct with a minor that require proof of the commission of a sexual battery. See Bittner v. United States, 598 U.S. 85, 94 (2023) ("When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning (expressio unius est exclusio alterius).").

(analyzing first-degree criminal sexual conduct with a minor and committing a lewd act upon a child and instructing "[e]ach statute requires proof of an element not required by the other").

Meanwhile, unlike it has done in the past when it intended for offenses that would not satisfy the "elements" test to be lesser-included offenses of other crimes, the legislature elected *not* to delineate third-degree criminal sexual conduct with a minor as a lesser-included offense of any other offenses, including first-degree criminal sexual conduct with a minor. See, e.g., S.C. Code Ann. § 16-3-600(B)(3) ("Assault and battery of a high and aggravated nature is a lesser-included offense of attempted murder, as defined in Section 16-3-29."); S.C. Code Ann. § 16-3-600(C)(3) ("Assault and battery in the first degree is a lesser-included offense of assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29."); S.C. Code Ann. § 16-3-600(D)(3) ("Assault and battery in the second-degree is a lesser-included offense of assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Sections 16-3-29."); S.C. Code Ann. § 16-3-600(E)(3) ("Assault and battery in the third degree is a lesser-included offense of assault and battery in the second degree, as defined in subsection (D)(1), assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29."). Under such circumstances, it is clear the legislature—by enacting a new statutory offense using "identical" language to the language setting out a precursor statutory offense that it knew had been expressly recognized *not* to be a lesser-included offense of first-degree criminal sexual

conduct with a minor[10]—did not intend third-degree criminal sexual conduct with a minor to be a lesser-included offense of first-degree criminal sexual conduct with a minor since it tellingly declined to state otherwise in the enacting legislation. See McLeod v. Starnes, 396 S.C. 647, 660, 723 S.E.2d 198, 205 (2012) ("The Legislature is presumed to be aware of this Court's interpretation of its statutes." (citation and internal quotations omitted)); cf. Nelson v. Ozmint, 390 S.C. 432, 436, 702 S.E.2d 369, 371 (2010) (finding the legislature's inclusion of language allowing for early release in one statute but omitting it in another evidenced the legislature intent for a defendant convicted of the offense delineated in the statute not containing the early release language to be ineligible for it).

For all the foregoing reasons, third-degree criminal sexual conduct with a minor was and is—just as the trial judge wisely recognized—*not* a lesser-included offense of the indicted offense of first-degree criminal sexual conduct with a minor.[11] See State v. Elliott, 346 S.C. 603,

[10] For the first time on appeal, Appellant appears to suggest third-degree criminal sexual conduct with a minor should be treated as a lesser-included offense of first-degree criminal sexual conduct with a minor because similar offenses have "traditionally" been considered to be lesser-included offenses of crimes similar to first-degree criminal sexual conduct with a minor. (App. Br. pp. 9-10). Once again, that particular argument was neither raised to nor ruled upon by the trial judge and, therefore, was not properly preserved for appellate review. See Patterson, 324 at 19, 482 S.E.2d at 767 ("Appellant is limited to the grounds raised at trial"). However, even if it somehow was preserved for consideration on appeal, it makes little logical sense given the decades-long tradition in South Carolina concerning the "identical" precursor offense to third-degree criminal sexual conduct with a minor was to expressly treat it as *not* being a lesser-included offense of first-degree criminal sexual conduct with a minor. See Campbell, 342 S.C. at 102, 535 S.E.2d at 929 (instructing—while citing to an earlier appellate decision on the matter—committing a lewd act upon a child was not a lesser included offense of first-degree criminal sexual conduct with a minor).

[11] Notably, because third-degree criminal sexual conduct with a minor is not a lesser-included offense of first-degree criminal sexual conduct with a minor, Appellant could have been—and still could be—charged with the distinct offense of third-degree criminal sexual conduct with a minor for the inappropriate touching that occurred separate and apart from the penetration of his six-year-old victim's vagina. See State v. Moyd, 321 S.C. 256, 258, 468 S.E.2d 7, 9 (1996) ("A defendant may be severally indicted and punished for separate offenses without being placed in

606, 552 S.E.2d 727, 728 (2001) ("The test for determining when an offense is a lesser included offense of another is whether the greater of the two offenses includes all the elements of the lesser offense."), overruled on other grounds by State v. Gentry, 563 S.C. 93, 610 S.E.2d 494 (2005). Accordingly, the trial judge committed no conceivable error by declining defense counsel's request and refusing to instruct the jury on the unindicted offense of third-degree criminal sexual conduct with a minor. See Rye, 375 S.C. at 123, 651 S.E.2d at 323 ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied."); State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002) ("Only law applicable to the case should be charged to the jury."). Appellant's conviction should be affirmed.

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double jeopardy where a single act consists of two 'distinct' offenses."); State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989) ("Under South Carolina law, distinct criminal offenses may arise from a single act.").

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

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SC Court of Appeals

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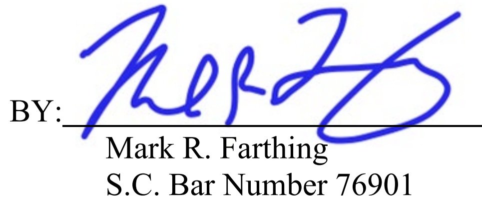

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May 12, 2026