STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case Tracking No. 2012-212947

The State, Respondent,

vs.

Zinah D. Jennings, Appellant.

INITIAL BRIEF OF RESPONDENT

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II. The trial court properly refused to instruct the jury with Appellant's requested jury charge because it would have been a comment on the facts and was sufficiently covered by other instructions provided to the jury.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Appellant is the mother of a missing child, a boy who at the time of his disappearance was approximately 18 months old. Appellant's mother, Jocelyn Jennings, and Appellant had a rocky relationship once the baby was born. Appellant was in and out of her mother's home and frequently tried to avoid seeing her mother. (T.1486-1488; R.___). Jocelyn Jennings indicated she last saw the missing child on or about November 27, 2011, when Appellant stopped by one night. (T. 1490; R.___).

In the months leading up to the child's abandonment by Appellant, several disturbing trends emerged. Appellant was seen multiple times placing the child at unreasonable risk of harm or causing physical harm to the child. Further, she told friends of her desire to no longer have to care for the child.

In November 2011, Officer E.J. Walker conducted a traffic stop of Appellant after she ran a red light. When he approached the vehicle Appellant's roughly eighteen month old son was sitting in the front passenger seat and not in a rear child safety seat. (T.654-655; R.___). He further indicated she only had a booster type seat and not a proper child safety seat for a child of the boy's age. Officer Walker issued a ticket for Appellant's failure to have her child in a proper child restraint. (T.660; R.___).

Christian Dickerson, a close friend of Appellant, testified Appellant wanted to have a baby in order to try and get back together with Roderick Mitchell, the baby's father. (T.740-741; R.___). She testified after Appellant had the baby, Appellant's "character was a little different." (T.742; R.___). One day after the baby was born, Appellant was at Dickerson's house without the child. Appellant told Dickerson "she thought about throwing [the baby boy] out the car and continuing on the highway."

Appellant also stated, "it feels more than just overwhelming" and that she "[thought] about giving him away." (T.750; R.___). Subsequently, in September 2011, Dickerson invited Appellant and the baby boy over to her house to play with her son, who was a few months older. When they arrived Appellant's baby was up under her and would not go play. According to Dickerson, Appellant kicked the boy and told him to go play. When he did not move, Appellant kicked the baby boy again. (T.743; R.___). When Appellant was leaving, she told Dickerson "they were about to go because [the baby boy] was getting on her nerves." (T.751; R.___). Finally, Appellant told Dickerson "she thought about selling [the baby boy]" and "thought about giving him away and his check." (T.752; R.___).

Kristen Knight, a former bank teller where Appellant banked, saw Appellant multiple times in the drive through line. On those occasions, the baby boy was not in a child seat. Knight indicated she did not see a seat in the car. Instead, the baby boy was "jumping around in the back seat." Knight also saw Appellant come through the drive through while drinking on one occasion. (T.788; R.___).

On November 29, 2011, Appellant went to her bank because her credit card was not working. (T. 789; R.___). Further, she withdrew almost all of the money in her account. (T.798; R.___). She had the missing child with her that day. While there, the bank employees, including Knight, had to inform Appellant her son was heading out the front door because Appellant was not paying him any attention. (T.787-790; R.___). The bank's security cameras recorded Appellant and the missing boy at the bank on November 29. While Appellant returned to the bank after this date, she never brought her son with her. (T.791-793; R.___).

Appellant's step-sister, Denise Jennings, indicated Appellant and the missing child stayed at the residence until November 17, 2011. Denise Jennings explained she did not know why Appellant left that day, and she has not seen the missing child since that date. Denise Jennings stayed in touch with Appellant after she left by telephone. (T.939-940; R.___). Appellant told Denise about how the missing child was doing and even let her talk to him one time. However, in December 2011, Appellant stopped providing any information regarding the whereabouts of her son. (T.941; R.___). Denise Jennings also acted as the missing boy's primary caretaker while he and Appellant lived with her. (T.1001; R.___).

Roderick Mitchell, the missing boy's father, last saw his son on November 29, 2011. He went over that morning to pick up the missing boy. After some confusion between Mitchell and Appellant about when he planned to see his son, Mitchell decided to avoid an argument. Instead of taking the boy with him, Mitchell picked the boy up, gave him a hug and kiss, and left. (T.683-684; R.___).

On November 30, 2011, Marcus Johnson stopped at a gas station just off I-20 and Washington Road in Augusta. As he was leaving the store after paying for gas, a woman pulled his hair to get his attention. (T.812-813; R.___). The woman was Appellant. Even though the two had never met before, they talked about meeting and exchanged numbers. Appellant, however, indicated she had to take her brother or cousin to school so she had to leave. Johnson did not see a child or a car seat in Appellant's car. (T.814-818; R.___). After communicating for several days, Appellant returned to Augusta and met with

Johnson at his apartment. They had drinks, listened to music, and had sex. (T.818-819; R.___). Appellant left and Johnson had no more contact with her. (T.820; R.___).

Michael Sutton, an agent with the FBI, tracked Appellant's cell phone history to determine particular locations she visited. (T.835; 844-845; R.___). His analysis of her locations corroborated Johnson's story regarding her being in Augusta. According to Sutton, Appellant made several phone calls in Columbia on November 30, then began heading west toward Atlanta. Sutton explained she was in Augusta on the morning of November 30. She proceeded to Atlanta, where she remained for a couple hours before heading back to Columbia. (T.847-851; R.___).

Appellant visited Nina Simpson, her cousin, in Charlotte the beginning of December.[1] (T.1040; R.___). When Ms. Simpson arrived home, she found Appellant on the floor, propped up against a wall with her knees up to her chest and her arms around her knees. When Ms. Simpson asked if anything was wrong, Appellant responded, "uh-huh." (T.1041; R.___). Ms. Simpson then asked about Appellant's son and was told he was in Augusta. When Ms. Simpson went outside to call Appellant's step-father, Appellant abruptly left. (T.1042-1043; R.___).

Shondala Harris, who considered Appellant a "big sister" and had a couple of kids with Appellant's cousin, spent time with Appellant and her son. (T.1015; R.___). She last saw the missing child in September or October of 2011. (T. 1018-1020; R.___). In December 2011, Harris asked Appellant about her son, and Appellant indicated the boy was with Mitchell's girlfriend. (T.1020-1021; R.___). Appellant also told Harris being a mother was hard and "everyone is not mother material." (T.1021; R.___). On a

[1] Testimony originally indicated December 6, 2011, but subsequent testimony indicated Appellant was there on a Friday, which would have been December 2, 2011. (T.1040; 1043; R.___).

subsequent occasion, Appellant told Harris "That she wasn't going to be stuck in a house with him on Saturday," referring to her son. (T.1022; R.___).

Jocelyn Jennings indicated Appellant returned to her home December 7, 2011, but did not have her son with her. (T.1491; R.___). When she asked where the child was, Appellant "gave [her] the cold shoulder" and would not tell her. Thereafter, Jocelyn Jennings reported to Chief Randall Scott of the Columbia Police Department that her grandson was missing. (T.499-500; 1491-1492; 1515-1516; R.___).

On December 24, 2011, Officer Christon Miller reported to the scene of an automobile accident. When he arrived he found a black female in one of the vehicles. She refused to answer any of his questions, but did present her license. The female was treated by EMS personnel and taken to Richland Memorial Hospital. (T.529-530; R.___). Officer Miller imputed the information from the license indicating the female was Appellant. He received notification she was the subject of a missing person report and immediately contacted the Investigator Bailey who handled the missing person case. (T.531-532; R.___). Officer Miller then went to the hospital and talked with Appellant. He asked her where her child was and she responded she did not have a child. He asked again, and she gave him an address on Ridge Crest Lane for the child's location. She indicated it was an aunt's house. (T.532-533; R.___). He indicated she refused to answer any further questions.

When she arrived at the hospital, Appellant was seen by several nurses. In making conversation, the nurses asked her whether she had any children. Appellant responded she had no children. (T.511; 517; R.___). The nurses had to remove

Appellant's clothing and discovered a C-section scar. When asked about the scar and children, Appellant responded she had a girl. (T.517; R.___).

Sergeant Arthur Thomas, the supervisor of the special victims unit for the Columbia Police Department, indicated Appellant gave officers an address with an aunt regarding a possible location of the missing child. The officers followed up and were unable to locate the missing boy. (T.545-546; R.___). Captain Melron Kelly with the Columbia Police Department further explained he went to the residence on Ridge Crest Lane in East Point, Georgia. Appellant and the missing child stayed at the residence while she was in Georgia. A search of the residence and surrounding area did not turn up the missing child. (T.1215-1216; R.___). The residence belonged to Appellant's step-sister, Denise Jennings. (T.933; 1217; R.___).

During the course of his investigation, Investigator Bailey contacted several relatives of Appellant. Each provided him information that Appellant was fine, but none provided information regarding the missing child. A friend of Appellant, Yolanda Williams, indicated she saw Appellant, but the boy was not with her. Ms. Williams asked where he was and Appellant told her he was in Atlanta with Appellant's sister, presumably Denise Jennings. (T.720; 1223-1224; R.___).

Appellant next showed up at Harris' house after her accident on December 24, 2011. (T. 1023-1024; R.___). Harris indicated Appellant was alone and wanted to sleep. Harris asked Appellant where her son was, and Appellant responded with Denise Jennings in Atlanta. (T.1025; R.___). Harris then called Denise Jennings to find out about the missing child. Denise Jennings indicated she had not seen him since before Thanksgiving. (T.1026; R.___).

Jocelyn Jennings made contact with Investigator Bailey to let him know Appellant returned to her house. On December 27, 2011, Investigator Bailey went to Jocelyn Jennings's house to see Appellant, but she had already left by the time he arrived. (T.1230; 1516; R.___). That evening, Investigator Bailey received a text message from Jocelyn Jennings indicating Appellant was home. Investigator Bailey left his house and went and talked with Appellant. (T.1230-1231; R.___).

During this meeting, Appellant told Investigator Bailey the missing child was with the boy's biological father, Earnest Robinson. She indicated Robinson was a 2005 graduate of Dreher High School and lived in an apartment off Garner's Ferry Road. She also provided a phone number. Investigator Bailey followed up on the information while there with Appellant. The phone number came back as not belonging to anyone and no Earnest Robinson could be found in the South Carolina Department of Motor Vehicles database matching the information Appellant provided. When confronted with Investigator Bailey's findings, Appellant indicated Earnest Robinson had a New Jersey license. (T.1233-1235; State's Exhibit 78; R.___).

Appellant and Investigator Bailey arranged to meet the following day, December 28, at his office. (T.1235-1236; R.___). Investigator Bailey later learned from Jocelyn Jennings that Appellant left after he was at the house and did not return. Appellant did not make the meeting on December 28. After doing additional investigation into Earnest Robinson as well as contacting family members and other contacts of Appellant, Investigator Bailey secured a warrant for Appellant's arrest. (T.1239-1241; 1243-1245; R.___).

Late at night on December 29, Appellant turned herself in to the City of Columbia Police Department. Investigator Bailey and Sergeant Thomas met her at the police department and questioned her. (T.1246-1247; R.___). During the questioning, Appellant refused to give any concrete information about the missing child. She only indicated that he was fine. (T.1248; R.___). At several points in the questioning, she specifically admits not checking to determine if the child was still healthy or safe.

During the questioning she stated "I had to drop him off I just needed a break." When asked if she had checked on the child since dropping him off, she said no. She admitted she dropped him off a couple weeks before the questioning on December 29-30. Further, she indicated she "just dropped him off" and then when asked if she had talked with whomever she dropped the child off with, she responded: "They wanted me to come back and get him, but I haven't been back." (State's Exhibit 16).

ARGUMENT

I. The trial court properly denied Appellant's motion to quash the indictment. Many issues raised by Appellant regarding the indictment are not preserved or were waived at trial. Further, the indictment properly charges the elements of the crime and placed Appellant on notice of the charges she was called to answer.

Appellant contends the trial court erred denying her motion to quash the indictment. Many of the issues raised on appeal were never raised to the trial court and therefore are not preserved. Additionally, even if preserved some issues raised on appeal were waived at trial. Finally, the indictment was sufficient to provide the requisite notice, was not duplicitous, and did not result in an unconstitutional non-unanimous verdict.

Preservation

Prior to trial, Appellant moved to dismiss the case and quash the indictments. Her motion alleged the indictment "fails to give notice to the Defendant as to what conduct on her part constitutes a crime and simply repeats the language of S.C. Code §63-5-70;" "violates the Defendant's rights protected pursuant to the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article 1, §§3 and 14 of the South Carolina Constitution;" and "is vague and alleges no specific act of a criminal nature on the part of this Defendant." (Motion to Quash Indictment dated May 24, 2012; R.___). In support of her motion, Appellant filed a Memorandum in Support in which she alleged "the Indictment does not allege any facts . . . which tend to prove that Ms. Jennings' child has been neglected or abandoned by her or harmed in any way by her or with her knowledge and notice as required by the Constitutions both state and federal."

(Memorandum in Support of Motion to Quash dated May 6; p.2; R.___). Her memorandum asserts the indictment is insufficient in that no specific acts by Ms. Jennings are listed in the indictment, nor providing any evidentiary basis for the charges. Appellant's memorandum then attacks the sufficiency of the arrest warrants and the basis for the warrants. It further compares the warrants to the indictments to allege the indictments were procured on an insufficient basis. (Memorandum in Support of Motion to Quash dated May 6; R.___). Finally, in the memorandum, she alleges "The State has insufficient evidence to prosecute." (Memorandum in Support of Motion to Quash dated May 6, p.6; R.___).

At the hearing before Judge Cooper on the motion to quash, Appellant maintained "the indictment does not set forth, first of all, notice of conduct which would put the defendant on notice." He continued:

> The purpose of notice is to give the defendant and fully advise the defendant of the criminal charges against them so that one might defend themselves, and to just repeat the statute is not sufficient. The indictment should describe conduct demonstrated by the defendant which is a violation of the statute.

(6/7T.6-7; R.___). Appellant's counsel later summarized his argument very succinctly: "an indictment must be sufficient, and that's the only challenge that I make today." (6/7T.19; R.___).

The motions court issued an order resulting from the June hearing. In the Order denying Appellant's motion to quash, the trial court analyzed the sufficiency of the indictment in light of section 17-19-20 of the South Carolina Code and State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). (Order issued by Judge Cooper filed July 3, 2012; R.___).

During pretrial motions hearings before Judge McMahon, Appellant again raised the sufficiency of the indictment and asked they be quashed and charges dismissed. (T.72; R.___). During argument, he asserted the indictment must allege conduct on the part of the defendant which violates the statute and not just merely restate the statute. Specifically he states: "But what is inappropriate is that they don't assign any particular or any definite - - any set of facts showing what [Appellant] did in order to violate the statute [unlawful conduct towards a child]." (T.76; R.___). Judge McMahon, while questioning whether he could alter Judge Cooper's ruling, went further and specifically found the indictment sufficient. (T.83; R.___). He ultimately held: "So I would deny your motion . . . as far as the sufficiency of the indictment." (T.83; R.___.).

Appellant again raised the issue regarding the indictment at trial. In her arguments to Judge McMahon, she acknowledged Judge Cooper's Order and then repeated the arguments made before. She alleged the amended indictment merely repeated the statute and "[t]hat alone . . . is not enough." She maintained the statute has to indicate the facts which rose to the level of a violation of the statute. (T.457; R.___). She maintained the indictment was insufficient because it "does not describe any conduct on the part of Zinah Jennings." (T.457; R.___). Finally, he argued to quash the indictment and dismiss the charges because "the indictment must say what the defendant did." (T.463; R.___).

Judge McMahon then considered the sufficiency of the indictment and whether it properly apprised the defendant of the elements of the offense intended to be charged and the circumstances she had to be prepared to defend. He considered the indictment in light of section 17-19-20 and Gentry. (T.463-464; R.___). He found the indictment sufficient and that the State is not required to plead its evidence in the indictment. (T.464-465;

R.___). Judge McMahon acknowledged and confirmed Judge Cooper's prior Order, but also made the independent finding that the indictment was sufficient. (T.466; R.___). Subsequent to the court's ruling on the sufficiency of the indictment, the jury was sworn. (T.468; R.___).

At no time during any hearing before either Judge Cooper or Judge McMahon, nor in his motion or memorandum to quash the indictment, did Appellant argue the indictment was invalid because it was "vague," "duplicitous," "hid multiple offenses in one count to subvert Rule 404 and State v. Lyle," or violate Appellant's rights to a unanimous verdict. She merely alleged the indictment was insufficient to provide notice.[2] As a result, all of Appellant arguments regarding anything other than the sufficiency of the indictment based on the State's failure to include specific conduct or facts proving the acts done by Appellant in the indictment are not properly preserved for review on appeal. See S.C. Code Ann. § 17-19-90 (1985) ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards."); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (same).

Waiver

Additionally, Appellant cannot complain about the fact the jury could have rendered a non-unanimous verdict. In addition to never raising the issue to the court when moving to quash the indictment, he never asked the judge to require a special

[2] While Appellant mentions her motion to have the State elect under which subsection of section 63-5-70 it intended to pursue, Appellant has not raised an issue regarding the trial court's denial of the motion. Instead, the only issue raised is in regards to the motion to quash the indictment.

verdict form on which the jury could have indicated the basis for its guilty verdict. See e.g., State v. Samuels, 403 S.C. 551, 743 S.E.2d 773 (2013) (discussing use of a special verdict to prevent issues related to duplicity and non-unanimous verdicts). Specifically, when asked about the form of the verdict, Appellant indicated he had no objection. (T.1754; R.___). As a result, he has waived any right to complain about the nature of the jury's verdict.

Merits

Sufficiency of Indictment

The South Carolina Supreme Court addressed most issues related to the sufficiency of an indictment in State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The Court explained:

> The indictment is a notice document. A challenge to the indictment on the ground of insufficiency must be made before the jury is sworn as provided by § 17–19–90. If the objection is timely made, the circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.

Gentry, 363 S.C. at 102–03, 610 S.E.2d at 500 (citing State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003); S.C. Code Ann. § 17-19-20 (2005)). Further, the Court stated: "whether the indictment could be more definite or certain is irrelevant." Id. at 103, 610 S.E.2d at 500 (citing State v. Knuckles, 354 S.C. 626, 583 S.E.2d 51 (2003)).

Section 17-19-20 provides:

> Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

S.C. Code Ann. § 17-19-20 (2005); see also, State v. Shoemaker, 276 S.C. 86, 275 S.E.2d 878 (1981) (indictment phrased substantially in language of statute which creates and defines offense is ordinarily sufficient).

The language of the indictment in this case directly tracks the language of the statute establishing the offense of unlawful conduct toward a child, section 63-5-70. The indictment establishes the time frame during which the unlawful conduct occurred, the location being in Richland County, and the name of the victim. It lists the code section Appellant is alleged to have violated, as well as the elements of the crime.[3] (Amended Indictment; R.___). As a result, it properly provides notice to Appellant of the charges she faces and allows her to prepare a defense to those charges. Further, it allows the court to know what judgment to pronounce. Accordingly, even if the indictment could have been made more specific or definite, it met the requirements to sufficiently place Appellant on notice of her charges, and the trial court properly denied the motion to quash as to the only issue raised at trial related to the sufficiency of the indictment.

Duplicitous Indictment

A duplicitous indictment is one that alleges two distinct and separate offenses in the same count. See State v. Samuels, 403 S.C. 551, 555-556, 743 S.E.2d 773, 776

[3] See State v. Owens, 346 S.C. 637, 649, 552 S.E.2d 745, 751 (2001) (finding reference to code section in the body of the indictment provided appellant with notice of the elements).

(2013). However, an indictment alleging only a single crime and merely include more than one method of violation, not creating a new crime, is not duplicitous. See State v. Pee Dee News Co., Inc., 286 S.C. 562, 565, 336 S.E.2d 8, 9 (1985) (indictment for obscenity, which included multiple methods of violation of the statute found not duplicitous); State v. Sheppard, 248 S.C. 464, 466-467, 150 S.E.2d 916, 917 (1966) (finding indictment for DUI not duplicitous because the "indictment charges only one offense which may be established by proof that the defendant operated a motor vehicle while under the influence of intoxicating liquor or of narcotic drugs, either or both.").

While some cases seem to place form over substance in finding the use of "or" instead of "and" to be problematic, this Court should follow the logic and reasoning of Commonwealth. v. Schuler, 43 A.2d. 646 (Pa. Super. 1945), which was cited with approval in Sheppard. In Schuler, the Court explained it would not find the use of "or" instead of "and" in separating the various methods of committing a single crime fatal to the indictments or duplicitous:

> We shall resist the temptation to indulge in a profitless exercise in ancient and sterile dialectics. The difference between disjunctive and conjunctive pleading is mostly the difference between tweedledum and tweedledee, and modern jurisprudence, which appraises substance and not form as its essence, accords to such useless learning only a nodding acquaintance. What earthly difference is there between 'or' and 'and' in a count when the end result is that defendant in both instances must be prepared to meet both or all charges? Long ago (1757) Lord Mansfield gave short shrift to the distinction. Said he: 'Upon indictments, it has been so determined, that an alternative charge is not good, as 'forged or caused to be forged'; though only one need be proved, if laid conjunctively, as 'forged and caused to be forged.' But I do not see the reason of it; the substance is exactly the same; the defendant must come prepared against both. And it makes no difference to him in any respect': Rex v. Middlehurst, 1 Burr. 399, 98 English

> Reports 369. . . . The contention might well be dismissed upon the solid ground that even if the pleading were technically erroneous it is a mere formal defect which does not in fact prejudice the rights of the defendant, and therefore is harmless error.

Schuler, 43 A.2d at 647; see also, Calhoun v. State, 932 So.2d 923, 937 (Ala. Crim. App. 2005); Com. v. Murphy, 612 N.E.2d 1137, 1140 (Mass. 1993); Boggs v. Commonwealth, 148 S.W.2d 703 (Ky.App. 1941); State v. McDougald, 577 A.2d 419 (N.J. 1990); Gheorghiu v. Com., 682 S.E.2d 50, 65 (Va. App. 2009), *reversed on other grounds by* Gheorghiu v. Com., 701 S.E.2d 407 (Va. 2010).

The indictment in the present case is not duplicitous in that it alleges the commission of only one crime, unlawful conduct towards a child. It alleges the single crime, by setting forth the various means in which the crime can be committed under section 63-5-70. Setting forth the various means of committing the crime has been previously held appropriate by the South Carolina Supreme Court.

Further, any issue with the indictment is entirely harmless and has not prejudiced Appellant. As stated in Samuels: "proceeding to trial on a duplicitous indictment does not alone create reversible error. For example, federal courts employ a prejudice analysis and will reverse a conviction for duplicity only where two or more distinct crimes are combined into one count and the defendant is prejudiced thereby." Samuels, 403 S.C. at 556, 743 S.E.2d at 776. All three subsections of the statute were adequately proven by the evidence detailed in the factual section above. The Appellant caused direct harm to the child through her kicking of the child; she placed the child at unreasonable risk of harm by allowing him to be unrestrained in her moving vehicle; and the evidence

indicated she has wilfully abandoned her child based on her own statement where she left the child and has done nothing to check on the child or verify its health or safety.

Appellant was only sentenced based on the single count of unlawful conduct of a child. While Appellant labels Senior Assistant Solicitor Campbell's indictment of only one count of unlawful conduct towards a child "an amazing display of chutzpah," if you accept Appellant's argument that the State presented evidence of twelve different indictable offenses, then her action was action an amazing display of restraint. Under Appellant's theory of how this case should have been indicted, she faced twelve separate counts of unlawful conduct, all of which are supported by evidence presented by the State, and would face up to 120 years in prison instead of facing one single count and ten years in prison. As a result, Appellant cannot demonstrate how she was ultimately prejudiced by the State's decision to indict her on one count of unlawful conduct of a child listing the three means by which the crime is committed as opposed to indicting each possible act separately. See e.g., U.S. v. Sturdivant, 244 F.3d 71, 80 (2nd Cir. 2001) ("a court can avoid prejudice to the defendant by sentencing him based upon a conviction for only one offense").

In addition, the trial court charged the jury that its verdict had to be unanimous. Specifically, he charged: "Ladies and gentlemen, your verdict must be unanimous. All 12 of you must agree." He continued: "If you find, after your determination of the facts, that the State has met its burden of proving its case beyond a reasonable doubt . . . **if that fact finding is unanimous** . . . ." (T.1745; R.___). This charge provided assurance that the jury rendered a unanimous verdict. Appellant has failed to demonstrate any prejudice from going forward on this indictment even if this Court found it was duplicitous.

II. The trial court properly refused to instruct the jury with Appellant's requested jury charge because it would have been a comment on the facts and was sufficiently covered by other instructions provided to the jury.

Appellant maintains the trial court erred in failing to give a jury instruction regarding her right not to tell police where she left her child. The jury instruction requested is a comment on the facts of the case, and therefore not an appropriate instruction. Further, Appellant's right to remain silent and the fact her silence cannot be used against her was adequately covered by the court's instructions.

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Id. at 479, 697 S.E.2d at 583. Further, a court may not comment on the facts of the case in its jury instructions. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.").

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 v.State, 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." Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (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).

Appellant's proposed jury charge was a direct comment on the facts of the case. Her charge referenced specific arguments made by counsel and the specific facts of the case to "instruct" the jury on the law. The trial court properly indicated counsel could certainly argue the contents of the jury charge, but the charge as requested would be an impermissible charge on the facts.

Further, Appellant requested charge was adequately covered by the charge given by the court. The main gist of her charge request was her right to remain silent. The trial court specifically charged the jury: "**A defendant has the constitutional right to remain silent, and the assertion of this right must not be considered by you in your deliberations.**" The court continued by reminding the jury: "The defendant is not required to prove her innocence. The burden of proof remains on the State to prove guilt beyond a reasonable doubt." (T.1738; R.___) (emphasis added). These jury charges properly and sufficiently cover the legal aspects of Appellant's request to charge.

CONCLUSION

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

Respectfully submitted,

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October 17, 2014