

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BERKELEY COUNTY

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER W. BERKE,

APPELLANT

APPELLATE CASE NO. 2014-000464

RECORD ON APPEAL

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THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

**STATE’S EXHIBITS # 1 THROUGH #11
(PHOTOGRAPHS)**

he is accused so as to enable him to prepare his defense or plead his conviction or acquittal as a bar to further prosecution for the same offense, as where the statute characterizes the offense in mere general or generic terms, or does not sufficiently define the crime or set forth all its essential elements. In such situation the statutory words must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged."

Conclusion

The ability of the defendant to know just what he is alleged to have done or not done to violate a statute is imperative for his defense. It is an issue that rarely arises, if at all, in cases where the statutes clearly defines the proscribed actions. For example, in Criminal Sexual Conduct cases, terms are very clearly defined. However, in this case, the statute at issue does not clearly define what actions constitute a violation. What is alleged in the indictment is that the defendant, over a 9 month period, placed the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety .

To answer to such an allegation, with nothing more, is nearly impossible. As *Gentry* reminded, an Indictment is a notice document. Included in that notice should be information of the "fact, and the nature and scope" of the accusation. The indictment in this case does not provide the defendant with information about the nature and scope of the accusation.

For these reasons, the Defendant seeks an Order of the Court quashing the indictment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Cody Groeber', written over a horizontal line.

Cody Groeber
Chad Shelton
Attorneys for CHRISTOPHER BERKE

xwm
FILED

STATE OF SOUTH CAROLINA IN THE COURT OF GENERAL SESSIONS
COUNTY OF BERKELEY, NINTH JUDICIAL CIRCUIT

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.
STATE'S REPLY to DEFENSE MOTION
to QUASH INDICTMENT
INDICTMENT #'s: 2013GS0800603
2013GS0800604

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

14 MAR -3 AM 9:14

FILED

1 W...1

Vs.

Christopher Berke,

Defendant

CHARGES: Unlawful Conduct Toward a
Child; Infliction of Great Bodily Injury upon
Child

For its Reply, The State asserts that the Indictment 2013-GS-08-000603 is sufficient because it states the offense of Unlawful Conduct Toward a Child with sufficient certainty and particularity to enable the court to know what Judgment to pronounce and appries the defendant of the elements of the offense intended to be charged.

PROCEDURAL HISTORY

Indictment 2013-GS-08-000603 states the statutory language for §63-05-70, and gives a date of offense as December 1, 2010-September 6, 2011; it reads:

Unlawful Conduct Toward a Child, That Christopher W Berke did in Berkeley County, South Carolina, on or between December 1, 2010 and September 6, 2011, have charge or custody of Minor , and did place the child at unreasonable risk of harm affecting the child's life, physical or mental health or safety. This is in violation of Section 63-5-70 of the South Carolina Code of Laws (1976) as amended." The grand jury returned a True Bill on the indictment on March 20, 2013 (attached as State's Exhibit 1a and 1b). Defense counsel has the full

investigation file, extensive medical records, everything in the state's file, has consulted with the state's expert and has arranged for defense's own expert to consult with the state's expert. Additionally, in response to defendant's request for more specific information regarding this specific indictment, an email was sent to defense counsel, Chad Shelton on February 15, 2014, enumerating the specific facts within the discovery that support the charge. (attached as State's Exhibit 2).

ARGUMENT

The test for determining the sufficiency of the indictment is twofold:

"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." *State v. Gentry*, 363 S.C. 93 (2005). The Defendant concedes that the indictment sufficiently apprises him of the elements of the offense that is intended to be charged. That leaves the question of whether or not the defendant knows what he is called upon to answer.

South Carolina Courts have consistently adopted a broad view in evaluating the sufficiency of an indictment that goes beyond the four corners of the document itself. The Court in *State v Adams*, 277 S.C. 115, 283 S.E. 2d 582 (1981) stated: "In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances." *Adams* at 588. Other Courts have narrowed

the issue to what is required vs. what is possible: "Further, whether the indictment could be more definite or certain is irrelevant." *State v. Knuckles*, 354 S.C. 626, 583 S.E. 2d 51 (2003).

The Courts have looked to a number of factors in defining "surrounding circumstances" including the trial itself and a preliminary hearing. *State v Reddick*, 348 S.C. 631560 S.E.2d 441 (2002) details an extensive history of the Courts' treatment of this issue. The *Reddick* Court begins by stating the Rule in *State v Beam*, 336 S.C. 45, 518 S.E.2d 297, (Ct. App. 1999): "The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." *Beam* at 50. The *Reddick* Court proceeded to illustrate the various ways previous Courts had looked beyond the indictment itself to determine sufficiency. The Court begins by examining *State v Crenshaw* 274 S.C. 475, S.E. 2d 61 (1980):

"To determine if the appellants were on notice and apprised of the charges against them, the Court examined the indictment "on its face," and considered the events at trial:

As the indictment bears the specific code section on its face and there was lengthy discussion concerning that code section throughout the trial, appellants obviously knew for what crime they were being prosecuted. Further, an indictment charging a statutory crime need not use the precise language of the statute in describing the offense, if the words used are equivalent to those employed by the statute, *Livingston v. Commonwealth*, 184 Va. 830, 36 S.E.2d 561 (1946), as was the case in this instance."

The Court then went further in its analysis by discussing *State v Adams*, 277 S.C. 115, 283 S.E. 2d 582 (1981):

“Like *Crenshaw*, The *Adams* Court examined the totality of the circumstances to determine if the appellant was cognizant of the crimes for which he was charged:

[A]ll the surrounding circumstances must be weighed before an accurate determination of whether a defendant was or was not prejudiced can be reached. *State v, Hiott, supra; State v Shoemaker*, [276 S.C. 86, 275 S.E. 2d 878 (1981); *State V Evans*, 216 S.C. 328, 57 S.E 2d 756 (1981).” In this case the statement signed by Adams itself described his *mens rea*. He was indicted for the crimes accompanying the housebreaking-kidnapping and murder. In addition, he was accorded a preliminary hearing. Under all the circumstances, the contention that the indictment failed to fulfill its purposes is not supported. There is no indication that the appellant was unfairly prejudiced since he obviously knew the crimes for which he was being tried. “

Adams at 444-445

In the present case, the indictment states the language of the statute very specifically (see state's exhibit 1a and State's 1b). Defense Counsel has extensive discovery on this case including access to the state's experts, expansive medical records and the full investigative file. Additionally, an email was sent in response to defense counsel's request for further information stating in part: “the Unlawful Conduct Charge is for neglect of^{Minor} from the time of their presence in Berkeley County., Not taking her to well visits, not getting her immunizations, not treating her broken leg, not treating her arm and not treating her head injury that ultimately landed her in the hospital” (See State's Exhibit 2). Considering the indictment itself, all of the

Rule 5 material, the access to the state's expert witness and the additional information provided in response to defense counsel's request, the indictment is sufficient considering the standard required, which is to look at the indictment with a practical eye in view of all the surrounding circumstances.

With regard to the Defendant's argument that the time frame addressed in the indictment is overly broad, the state asserts that utilizing a range of dates in its indictment is supported by precedent. "In *State v. Tumbleston*, 376 S.C. 90 (Ct. App. 2007), the appellate court recognized a two prong test: (1) whether time is a material element of the offense; and (2) whether the time period covered by the indictment occurred prior to the return of the indictment by the grand jury. *Tumbleston* at 98-99. The indictment satisfies both prongs of this test. First Time is not a material element of the statute. Secondly, The time period covered in the indictment is December 1, 2010- September 6, 2011, and it was returned by the Grand Jury on March 20, 2013. Clearly the time period covered in the indictment occurred prior to the return of the indictment. The present case clearly satisfies both prongs of this test. Counsel argues that somehow the indictment is still overly broad and fails because the statute in the present case is so different than the criminal sexual conduct statutes addressed in *Tumbleston*; and the difference in statutes so distinguishes *Tumblestone* as to make it inapplicable. The state disagrees. *Tumblestone* addressed the three year range of dates in that case terms of the unique issue regarding crimes against children that are continuous in nature. The *Tumblestone* Court stated:

"The stealth and repetitive nature of the alleged conduct compels identification of the broader time period. The victim is a young child, whom one cannot reasonably expect to recall the exact

dates of the sexual abuse. B.J. verified the abuse began while she was in kindergarten, and she ensured the end of the abuse when she disclosed the offenses to her mother." *Tumblestone* at 102.

In the present case, the victim is fifteen months old. She was subjected to neglect that can only be determined by a careful review of her medical records and a physical examination showing untreated injuries. It would be impossible for the state to pinpoint the specific dates of each instance of neglect because of the continuous pattern of inaction by defendant (the very fact that he does not call attention to each medical need of the child is the reason the date is unavailable), the inability of the victim to talk due to her age, and fact that there are multiple acts of neglect over a period of time.

CONCLUSION

For the foregoing reasons, the State contends that the indictment is sufficient and request the Court deny Defense' Motion to Quash.

Respectfully submitted,



Anne Williams

Assistant Solicitor

AMW2013-01-00292

WITNESSES

Berkeley County Sheriff's Office

J.R. A. 2014

AGENCY CASE NUMBER

201109038539

ARREST WARRANT NUMBER

Direct Indictment

DATE OF ARREST

January 25, 2013

ACTION OF GRAND JURY

True Bill

J.R. Kendrick

Foreperson of Grand Jury

Date: *03/20/13*

VERDICT

[Signature] *3/5/14*

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2013GS0800603

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

March Term 2013

THE STATE

Vs

CHRISTOPHER W BERKE

DOB:

W/M

Indictment for

Unlawful Conduct Toward a Child

MARY F. BERKOW
CLERK OF COURT
BERKELEY COUNTY, S.C.

13 MAR 20 PM 1:11

JRH
FILED

JRH

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)

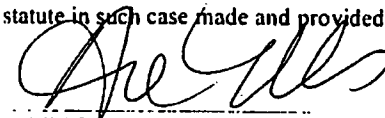
INDICTMENT

At a Court of General Sessions, convened on March 20, 2013 the Grand Jurors of Berkeley County present upon their oath:

Unlawful Conduct Toward a Child

That Christopher W Berke did in Berkeley County, South Carolina, on or between December 1, 2010 and September 6, 2011, have charge or custody of Minor _____, and did place the child at unreasonable risk of harm affecting the child's life, physical or mental health or safety. This is in violation of Section 63-5-70 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


 ANNE M. WILLIAMS
 ASSISTANT SOLICITOR

AMW2013-01-00292

WITNESSES

Berkeley County Sheriff's Office

[Signature]

AGENCY CASE NUMBER

201109038539

ARREST WARRANT NUMBER

Direct Indictment

DATE OF ARREST

January 25, 2013

ACTION OF GRAND JURY

True Bill

[Signature]

Foreperson of Grand Jury

Date: 03/20/13

VERDICT

[Signature] 3/13/14

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2013GS0800604

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

March Term 2013

THE STATE

Vs

CHRISTOPHER W BERKE

DOB:

W/M

Indictment for

Infliction of Great Bodily Injury Upon a Child

FILED
13 MAR 20 PM 1:11
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

[Handwritten mark]

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)

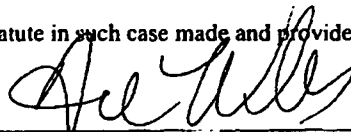
INDICTMENT

At a Court of General Sessions, convened on March 20, 2013 the Grand Jurors of Berkeley County present upon their oath:

Infliction of Great Bodily Injury upon a Child

That Christopher W Berke did in Berkeley County, South Carolina, on or between September 3, 2011 and September 6, 2011, willfully and unlawfully inflict great bodily injury upon, Minor Berke, date of birth _____, to wit: injured the victims head, ears and face causing a skull fracture, and brain injury and other cranial and muscle damage. This is in violation of Section 16-3-95 of the South Carolina Code of Laws (1976) as amended.

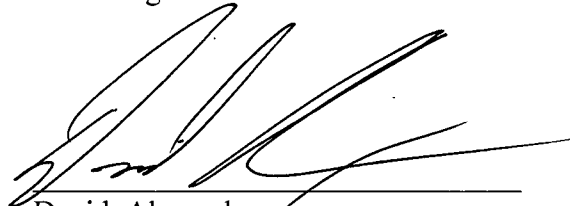
Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


 ANNE M. WILLIAMS
 ASSISTANT SOLICITOR

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 27th, 2015

A handwritten signature in black ink, appearing to read 'D. Alexander', written over a horizontal line.

David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
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ATTORNEY FOR APPELLANT

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

APR 27 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CHRISTOPHER W. BERKE,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the Record on Appeal in the above referenced case has been served upon William M. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of April, 2015.



Brandon Hall
Administrative Specialist

SUBSCRIBED AND SWORN TO before me
this 27th day of April, 2015.

Heaven Kennedy (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.