

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Oconee County  
R. Lawton McIntosh, Circuit Court Judge

**RECEIVED**

MAR 07 2016

**SC Court of Appeals**

THE STATE,

RESPONDENT,

-v-

WILBUR A. RICKMON,

APPELLANT.

APPELLATE CASE NO. 2015-000989

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INITIAL BRIEF OF APPELLANT

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STATEMENT OF  
ISSUES ON APPEAL

1.

Did the trial court commit reversible error by denying Appellant's motion for a directed verdict on the March 10, 2014 indictment for Sex / Criminal Sexual Conduct – First Degree when there was no evidence, direct or otherwise, of Appellant using "aggravated force to accomplish sexual battery", and insufficient circumstantial evidence was presented of any "forcible confinement," or other offense or act similar to forcible confinement, as specified in the true-billed Grand Jury indictment, that rose to a level sufficient to overcome a motion for directed verdict?

2.

Did the trial court commit reversible error by denying Appellant's motion for a directed verdict on the February 09, 2015 indictment of Kidnapping where the "to wit" clause in the grand jury true-bill indictment clearly specified that Appellant was being charged on "defendant did confine victim to a room in his home, physically restrained her during a sexual assault" and where, before charging the jury, the judge constructively amended the indictment, of his own accord, in order to accommodate facts presented by the State, without first seeking Grand Jury approval, in violation of Appellant's fundamental due process right to be informed of the nature and cause of the accusation against him so that a proper defense can be mounted?

## STATEMENT OF THE CASE

On March 10, 2014 Appellant was indicted by the Oconee County grand jury on a charge of First-degree Criminal Sexual Conduct (CSC), pursuant to S.C. Code Ann. §16-3-652 (1976) as amended, for a crime allegedly committed on or about September 27, 2013. The true-bill indictment caption charges Appellant with “Sex / Criminal Sexual Conduct – First Degree” (Indictment of Mar 10, 2014) and in the body describes the criminal activity being charged as follows:

“That Wilbur A Rickmon did in Oconee County, South Carolina, on or about September 27, 2013, engage in sexual battery (sexual intercourse) with AC, accompanied by the following circumstance(s): the defendant used *aggravated force* to accomplish the sexual battery and/or the victim submitted to sexual battery under circumstances where she was also the victim of *forcible confinement, or any other similar offense or act* [emphasis added]. This is in violation of 16-3-652 of the South Carolina Code of Laws (1976) as amended.”

Almost a year later, on February 9, 2015, Appellant was indicted a second time by an Oconee County grand jury on a caption of “Kidnapping”, pursuant to S.C. Code of Laws, §16-03-0910 (1976) as amended, for the same crime allegedly committed on or about September 27, 2013. (Indictment of Feb 08, 2015) This true-bill indictment body read:

“That Wilbur A. Rickmon did in Oconee County, on or about the on or about (sic) September 27, 2013, unlawfully seize, confine, inveigle, decoy, or kidnap, Amy Nicole Carver, by any means whatsoever, without the authority of law, *to wit: defendant did confine victim to a room in his home, physically restrained her*

*during a sexual assault* [emphasis added]. This is in violation of §16-3-0910 of the South Carolina Code of Laws (1976) as amended.”

Appellant was tried on both indictments on April 20, 2015 before the Honorable R. Lawton McIntosh, and a jury. R. Daniel Day, Jr., public defender, was the attorney for Appellant and Lindsey Satterfield Simmons, the assistant solicitor, represented the State.

At the culmination of the State’s case-in-chief, Appellant moved for a directed verdict on the February 09, 2015 indictment for kidnapping because of a lack of evidence sufficient to prove beyond a reasonable doubt the specific criminal acts set forth in the true-bill indictment. That motion was denied by the court.

Appellant then moved the court for a directed verdict on the March 10, 2014 indictment charging Sex / Criminal Sexual Conduct – First Degree because the evidence did not reach the minimum threshold for the matter to go to the jury based on the specifically limited charges within the true-bill indictment. That motion was also denied.

Defense counsel also objected, with court notice, to jury charges that included “seize, inveigle, or decoy” since they were not specified in the indictment against Appellant. That objection was overruled by the judge who concluded, “...the charge will be as I provided it to you *because I think it’s appropriate based on the facts of this case.*” [Emphasis added] Tr. page 274, lines 23-25.

At the conclusion of the trial, the jury found Appellant guilty on both charges, as amended by the judge.

The judge sentenced Appellant to two terms of Life in Prison Without Possibility of Parole (LWOP) based on S.C. Code of Laws §17-25-45 and a finding that the two charges for which Appellant was convicted were considered “most serious” offenses. (Sentence sheets)

This appeal follows.

### STATEMENT OF THE FACTS

In September of 2013, Wilbur Rickmon and Amy Carver lived in the same neighborhood, two trailers from each other. Tr. page 106, line 4. Ms. Carver would routinely help Mr. Rickmon file his unemployment claims on-line for a small fee, because he lacked the computer skills to do it for himself. Tr. page 106, lines 6-10.

On or about September 27, 201, Mr. Rickmon called Ms. Carver several times to arrange for her to come to his trailer to help him do his unemployment on his own computer. Tr. page 120, lines 21-25, page 121, lines 1-3. After speaking with Mr. Rickmon 2 or 3 times, Ms. Carver went to his trailer at about 4:10pm, after returning home from school and putting her daughter down for a nap. Tr. page 138, lines 11-25.

Ms. Carver went to Mr. Rickmon's trailer, entering through the back door. After working unsuccessfully to make the computer work, Ms. Carver followed Mr. Rickmon into his bedroom. In her recorded statement to the police, Ms. Carver said "he told me he had to show me something in the bedroom. I went in there and he shut the door and locked it." Tr. page 145, lines 11-16.

On three separate occasions that evening, Ms. Carver recounted what happened after she entered the bedroom - to Officer Bettingfield, to the doctor (Dr. Leap) at Oconee Medical Center, and later to Detective Smith.

In her initial statement to Officer Bettingfield, Ms. Carver said, "He then *took off* my pants, underwear, and threw me on the bed. He climbed on top of me and

started having sex with me. [Emphasis added] Tr. page 145, lines 19-21.

To Dr. Leap, she stated, “He grabbed my arm. . . [t]ook down my pants and underwear, threw me on the bed and started to rape me.” Tr. page 147, lines 14-20.

And, later, when speaking with Detective Smith, Ms. Carver said “He grabbed my left arm. He said he would give me \$50 to have sex. I said no. He took my shoe off, he undid my belt, pulled my pants off.” Tr. page 151, lines 18-20. It wasn’t until her testimony at trial that she claimed that Mr. Rickmon “*ripped off* her pants.” [Emphasis added] Tr. page 126, lines 21-22. The pants were never offered into evidence at trial.

After the sexual encounter was over, Ms. Carver said she “threw back on my pants and left.” Tr. page 145, lines 22-23. Subsequently, her mother called 911. Tr. page 129, lines 12-19.

In none of the statements made by Ms. Carver, to officers, medical personnel, or at trial did she ever accuse Mr. Rickmon of using aggravated force or violence, threat of violence, a weapon, or of biting, striking, or restraining her by force or threat.

#### *Procedural Facts*

On March 10, 2014, the Oconee County Grand Jury returned an indictment for Sex / Criminal Sexual Conduct - First Degree, in violation of §16-3-652 of the South Carolina Code of Laws (1976), as amended. (Indictment of March 10, 2014). The indictment charged Mr. Rickmon with “sexual battery (sexual intercourse) with AC [indicating their belief that Ms. Carver was a minor at the

time of the alleged assault, which she wasn't], accompanied by the following circumstance(s): the defendant used aggravated force to accomplish the sexual battery and/or the victim submitted to sexual battery under circumstances where she was also the victim of forcible confinement, or other similar offense or act.”

Id.

Almost a full year later, on February 9, 2015, a second Oconee County grand jury returned an indictment for Kidnapping, in violation of §16-3-0910 of the South Carolina Code of Laws (1976), as amended. (Indictment of February 9, 2015). This indictment charged that Mr. Rickmon did “unlawfully seize, confine, inveigle, decoy, or kidnap, Amy Nicole Carver, by any means whatsoever, without the authority of law, to wit: *defendant did confine victim to a room in his home, physically restrained her during a sexual assault.*” [Emphasis added] Id.

Jury trial commenced in the Court of General Sessions in Oconee County on April 20, 2015 and lasted for three days. At the conclusion of the State’s case, defense counsel asked for a directed verdict on the two indictments. Tr. page 269, lines 22-25; page 270, lines 1-25; page 271, lines 1-4, 9-13. Both motions were denied by the trial judge. Tr. page 271, lines 5-8, 14-15, 17-25; page 272, lines 1-18. Defense did not present a case.

Defense counsel also objected to the jury instructions which exceeded those specific items actually charged within the indictment. Tr. page 270, lines 2 – 25; page 271, lines 1 – 4. Whereas the indictment was for “...defendant used aggravated force to accomplish the sexual battery and/or the victim submitted to sexual battery under circumstances where she was also the victim of forcible

confinement, or any other similar offense or act,” (Indictment of February 9, 2015), the judge’s instructions included that the victim “was also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, house0breaking, or any other similar act or offense”, going well beyond that which is stated within the indictment. Tr. page 326, lines 8 – 12. The trial judge overruled Appellant’s objections to the proposed instructions. Tr. page 271, lines 5 – 8; page 274, lines 8-14, 20-25; page 275, lines 14-16.

After deliberation, the jury convicted Mr. Rickmon on both indictments. On September 22, 2014, Mr. Rickmon was sentenced by the court to two terms of Life Without Possibility of Parole (LWOP). Tr. page 351, lines 7-15. This appeal was timely filed.

## ARGUMENT 1

The trial court committed reversible error by denying Appellant’s motion for a directed verdict on the March 10, 2014 indictment of Sex / Criminal Sexual Conduct – First Degree when there was no evidence, direct or otherwise, of Appellant using “aggravated force to accomplish sexual battery”, and insufficient circumstantial evidence was presented of any “forcible confinement”, or other offense or act similar to forcible confinement, that rose to a level sufficient to overcome a motion for directed verdict.

### **STANDARD OF REVIEW**

When this Court reviews an appeal from the denial of a directed verdict, it views the evidence presented in the light most favorable to the State. State v. Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001) (citing to State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)). When there is any direct or substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant, the appellate court must find that the case was properly submitted to the jury. State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) (citing to State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000)).

The South Carolina Supreme Court has stated that in ruling on a motion for directed verdict the trial court is “concerned with the existence or nonexistence of evidence, not its weight.” See State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004), citing to State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002), (quoting “a defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged”), et al. The trial court should grant the directed verdict if the evidence “merely raises a suspicion that the accused is guilty”, (State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)).

### **DISCUSSION**

Our South Carolina Supreme Court has stated “A basic principle of criminal law is

that the State has the burden of proof as to all of the essential elements of the crime.” See State v. Attardo, 263 S.C. 546, 211 S.E.2d 868 (1975) citing to State v. Paulk, 18 S.C. 514 (1883). See also, State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010). And, “The accused is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged.” See State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004).

In meeting its burden of proof, the State must produce either direct or substantial circumstantial evidence that reasonably tends to prove the defendant has committed the crime charged. See State v. James, 362 S.C. 557, 565, 608 S.E.2d 455, 469 (Ct. App. 2004). Failure to produce such evidence entitles the defendant to a directed verdict. Odems, 395 S.C. at 586; See also, State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011). This Court has also held that “where the facts of the case, even if proved, do not constitute the alleged criminal conduct, a directed verdict must be granted.” State v. Jackson, 338 S.C. 565, 569, 527 S.E.2d 367, 369 (Ct. App. 2000).

The Oconee County Grand Jury true-bill indictment in this case, dated March 10, 2014, for Sex / Criminal Sexual Conduct – First Degree states;

That Wilbur A Rickmon did in Oconee County, South Carolina, on or about September 27, 2013, engage in sexual battery (sexual intercourse) with AC, accompanied by the following circumstance(s): the defendant used **aggravated force** to accomplish the sexual battery and/or the victim submitted to sexual battery under circumstances where she was also the victim of **forcible confinement**, or any other similar offense or act. This is in violation of 16-3-652 of the South Carolina Code of Laws (1976) as amended. [Emphasis added] (Indictment dated March 10, 2014)

In the above-referenced indictment, the Grand Jury has specifically limited the elements to be charged to “*aggravated force*” or “*forcible confinement, or any other similar offense or act.*”

#### *Aggravated Force*

Aggravated force has been defined in S.C. Code Ann. §16-3-651(c) as being “physical force or physical violence of a *high and aggravated nature* to overcome the victim or includes the threat of the use of a deadly weapon.” [Emphasis added]. Several cases, in rulings by this Court, help to define what is determined to be of a “high and aggravated nature”, including State v. Green, 327 S.C. 581, 586, 491 S.E.2d 263, 265 (Ct.

App. 1997), where this Court reversed and remanded the trial court's denial of Green's motion for a directed verdict, holding that "while the 'aggravation' necessary for an ABHAN conviction may not be related to the force used in the attack, but, instead, to the general circumstances surrounding the attack, section 16-3-651 *clearly requires* that the 'aggravation' necessary for a first-degree CSC conviction be associated with the degree of force used." [Emphasis added]

The State, in the instant case, referenced State v. Lindsey, 355 S.C. 15, 583 S.E.2d 740 (2003) and State v. Frazier, 302 S.C. 500, 397 S.E.2d 93 (1990) when arguing to the trial judge that the degree of "aggravated force" used (in Lindsey) was comparable to the degree of force used by Appellant against his accuser. Tr. page 267, lines 19-25; page 268, lines 1-5. Appellant disagrees.

In Lindsey, the defendant was found to have locked his victim in his car and held her down with his body and both his hands while the victim was "kicking, pushing, fighting and hitting to get him off of her." Id. at 21.

Our case differs greatly from Lindsey in that, here, the accuser, through statements made to various detectives and medical personnel and testimony at trial, claims that, during the alleged assault, the Appellant merely grabbed her arm and threw her on the bed, for example:

1) On Direct, accuser said "He grabbed my arm, my left arm, and threw me onto the bed and ripped off my pants." Tr. page 126, lines 18 – 20.

2) On Cross, from a statement given to Officer Bettingfield by the accuser on the night of the incident:

Q. "...I told him no. He then *took off* my pants, underwear, and he threw me on the bed. He climbed on top of me and he started having sex with me...."  
Tr. page 145, lines 18 – 21. [Emphasis added]

A. Yes. Tr. page 146, line 1.

Q. Never mentioned grabbing the arm, did you? Tr. page 146, line 2.

A. Not in that statement. Tr. page 146, line 3.

Q. And I take it that Officer Bettingfield, since he was trying to get down information, asked you to "Tell me what happened." Did he take you through "What happened next?" What happened next?" Tr. page 146, lines 4-7.

A. He grabbed my arm and threw me on the bed and *tore off* my pants, and my shoes came off with them. Tr. page 146, lines 8-9 (testimony at trial).

Q. You didn't mention that in here? (referencing the accuser's statement to Officer Bettingfield) Tr. page 146, line 10.

A. And I was under distress. That was right after it happened. Tr. page 146, lines 11-12.

3) On Cross, this partial exchange between defense counsel and accuser regarding the statement given to Dr. Leap at Oconee Medical Center on night of the incident:

Q. "...I told him no. He grabbed my arm?" Tr. page 147, lines 14-15.

A. Yes. Tr. page 147, line 16.

Q. So here you start talking about grabbing the arm? Tr. page 147, line 17.

A. Yes. Tr. page 147, line 18.

Q. "*Took down* my pants and underwear, threw me on the bed and started to rape me. At one point he stopped raping me to do oral sex to me and then started raping me again..." Tr. page 147, lines 19-22. [Emphasis added]

A. Yes. Tr. page 148, line 1.

4) On Cross, from statement given by accuser to Detective David Smith later that same night:

Q. "...He said, 'You know I love you. I will leave Darlene and get a house.' He grabbed my left arm. He said he would give me \$50 to have sex. I said no. He took my shoe off, he undid my belt, *pulled my pants off.*" All right. Now, for the first time, after you have spoken to at least four people, we now have a belt? Tr. page 151, lines 16-23. [Emphasis added]

A. Yes. Tr. page 151, lines 24.

.  
.

Q. Let's go over it again. He has you by your left arm, by one of his arms. We don't know which one? Tr. page 152, lines 6-7.

A. Yes. Tr. page 152, line 8.

Q. And that he still is able to unbuckle your belt? Tr. page 152, line 9.

A. His hands were free after he threw me onto the bed. Tr. page 152, line 10.

5) On Redirect:

Q. And why did you not fight the defendant harder that day? Tr. page 162, lines 6-7.

A. I was scared for my child's life and my life because I could smell the alcohol on him. Tr. page 162, lines 8-9.

Although the accuser claims on the stand that Appellant ripped her pants off, that claim is inconsistent with statements made by her to Officer Bettingfield and Detective Smith and medical doctor, Dr. Leap, on the day of the incident. No evidence of torn clothing was ever presented by the State at trial.

By contrast, in Lindsey, the victim was fighting, kicking, pushing and hitting her assailant while he held her down *with both hands and his body weight* while in a locked car, thus clearly establishing the "high and aggravated nature" and degree of force needed to meet the definition of aggravated force required for criminal sexual conduct of the first-degree. 355 S.C. 15 at 21.

Our case is substantially distinguishable from Lindsey. In the instant case, the accuser's own statement at trial, indicated that after Appellant threw her on his bed, "his hands were free" (Tr. page 152, line 10), showing that, at least after being thrown onto the bed, no "physical force or physical violence to overcome the victim" was being used by Appellant against the accuser, much less of a "high and aggravated nature." Also, accuser never once mentioned, in any statements or on the stand, any act of hers in resistance to Appellant's advances, as was described by the victim in Lindsey. And, there was no evidence ever presented in this trial of any "threat of the use of a deadly weapon."

In Frazier, the defendant was convicted of assault with intent to commit criminal sexual conduct when he grabbed a woman making a phone call at her neighborhood IGA, began to choke her and then dragged her into the woods. He ripped her shorts off and removed her underwear and prepared to assault her, when he was interrupted by car headlights. He then put his knee on the woman's chest and began to choke her, fleeing only when the car headlights did not move away. 302 S.C. 500 at 501 – 502.

In our case, there was no evidence of comparable violence, no choking, no evidence that Ms. Carver was dragged into the bedroom - instead we have her own testimony that

she *followed* Mr. Rickmon into the bedroom. Tr. page 151, lines 6-11. As such, this case is completely distinguishable from Frazier, too.

The evidence presented in this case is much more comparable to that of the Green case. Green, 327 S.C. 581 at 585-586. In Green, this Court makes the distinction that under section 16-3-652(1)(a), aggravated force is “aggravated” by the “degree of force used” (Id. at 586) and where this court determined that the lack of evidence of force being used on the victim was such that a directed verdict should have been granted on the charge of first-degree CSC. Id. at 588.

Because there is no evidence in this case to establish the “high and aggravated nature” of “aggravated force” as held by this Court in Lindsey and Frazier, and defined within pertinent South Carolina law (§16-3-651(c)), the State has failed to prove the essential elements necessary to establish that Appellant used “aggravated force,” as alleged in the indictment.

*Forcible confinement, or Any Other Similar Offense or Act*

The second part of the March 10 indictment to be addressed (Indictment of March 10, 2014) specifies “*and/or the victim submitted to sexual battery under circumstances where she was also the victim of forcible confinement, or any other similar offense or act.*” [Emphasis added]. This is NOT an exact restatement of S.C. Code Ann. §16-3-652(1)(b), but instead is a mere subset of the statute, indicating the Grand Jury only intended to indict Appellant on the “forcible confinement” and “or any other similar offense or act” elements of the statute. (Id.; see also Indictment of March 10, 2014).

There is no South Carolina case law that is on point for defining exactly what is meant by “*forcible confinement*,” and nothing within South Carolina statutes that defines the term. Evidence presented by the State at trial failed to prove that any force of any kind was used against the accuser to get her to go into Appellant’s bedroom. Accuser’s statements to police and testimony at trial during cross-examination indicated that she followed Appellant into his bedroom, *of her own accord*. Tr. page 150, lines 21 – 25, page 151, lines 1 -13.

Additionally, there was no evidence presented at trial that indicated she was restrained by Appellant or prevented from leaving the room. The accuser stated during cross-examination that, after grabbing her arm and throwing her onto the bed, Appellant’s

hands were free – indicating that he was not forcibly confining her. Tr. page 152, lines 3 – 11. In fact, the evidence also shows that the door to the bedroom was not *capable* of being locked and the accuser testified on both direct and cross that she was able to leave immediately after the sexual encounter was over. Tr. page 126, lines 5 – 9; page 127, lines 24-25; page 142, lines 17 – 25, page 143, lines 1 – 3; page 145, lines 6 – 25 (statement to Officer Bettingfield).

In Lindsey, the Court found that Lindsey actually confined his victim in the automobile by locking the doors, grabbing her hands and holding her down while she desperately fought to free herself. 355 S.C. 15 at 21.

By comparison, the Court in Green found that there was no evidence of Green using *any* force on his victim, “such that he should have been granted a directed verdict on the charge of first degree CSC.” Id. at 21, (citing to Green, 327 S.C. 581). Because the evidence presented in this case of the degree of force and lack of confinement was more similar in nature to that of the Green case than that of the Lindsey and Frazier cases, the trial court judge should have granted a directed verdict on the charge of first degree CSC because of insufficient substantial circumstantial evidence to prove the crimes as charged.

## ARGUMENT 2

The trial court committed reversible error by denying Appellant’s motion for a directed verdict on the February 9, 2015 indictment for Kidnapping where the “to wit” clause in the Grand Jury true-bill indictment clearly specified that Appellant was being charged on “defendant did confine victim to a room in his home, physically restrained her during a sexual assault” and where, before charging the jury, the judge constructively amended the indictment in order to accommodate facts presented by the State, without first seeking Grand Jury approval, in violation of Appellant’s Fifth Amendment and South Carolina rights to indictment by a Grand Jury.

## **DISCUSSION**

South Carolina Code of Laws, states that “no person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury...”

S.C. Code Ann. §17-19-10 (2010). The Grand Jury Clause of the Fifth Amendment of the Federal Constitution also “provides that no person may be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment by a grand jury... requires that an indictment be in place before a person can be held to reply to a charge ... allows criminal prosecutions only on the basis of an indictment, and requires that a defendant be charged with only those charges brought before the grand jury.” 41 Am. Jur. 2d Indictments and Informations § 4 (2015) (discussing the grand jury clause of the Fifth Amendment to the Federal Constitution.) A grand jury indictment may not be broadened through an actual or constructive amendment, without being resubmitted to the grand jury, when such an amendment substantially changes the crimes charged in the indictment. 41 Am. Jur. 2d Indictments and Informations § 5 (2015)

In cases where amendment of a previously issued indictment is made necessary by a *variance between the allegations of the indictment and the evidence* to be offered at trial, the law also allows the judge to amend the indictment unless “such amendment shall operate as a surprise to the defendant, in which case the defendant shall be entitled, upon demand, to a continuance of the cause.” S.C. Code Ann. §17-19-100 (2010).

In this case, because the indictment against Appellant narrowed the allegations against him to “did confine victim to a room in his home, physically restrained her during a sexual assault” it also narrowed the allowable scope of evidence offered at trial, requiring a directed verdict because there was a “material variance between the charge and the proof “ (State v. Evans, 322 S.C. 78, 470 S.E.2d 97 (1996)), which

operated as a surprise to the defendant without giving him the time or ability to demand a continuance of the cause to prepare a defense. See S.C. Code Ann. § 17-19-100 (2010)

In 2000, this Court reversed the conviction for armed robbery of Kelvin Jones (State v. Jones, 342 S.C. 252, 536 S.E.2d 396 (Ct. App.2000)), stating “Since there was a material variance between the charge and the proof, the defendant was entitled to a directed verdict.” (Id. at 253). In Jones, the defendant was indicted only for committing robbery “while possessing a pistol.” Id. In fact, the defendant did not have a gun at all, but merely alleged he was so armed, in violation of S.C. Code Ann. §16-11-330(A) (Supp.1999). Id. The Court ruled that since the indictment only charged the defendant with actual possession of a pistol and not alleging that he possessed a pistol, the “proof at trial is at variance with the indictment, and the failure to grant a directed verdict was error” (citing State v. Evans, 322 S.C 78, 470 S.E.2d 07 (1996) and State v. Sowell, 85 S.C. 278, 67 S.E. 316 (1910)).

The South Carolina Supreme Court quoted an applicable rule as follows: “As a general rule the [jury] instructions should be confined to the issues made by the pleadings, and should not be broader or narrower than the indictment or information, and an instruction which is not based on, and in conformity with, the issue properly raised by the pleadings is generally erroneous, . . . It has been held that the instructions should not . . . submit to the jury an offense not included in the indictment or information.” State v. Tabory, 262 S.C. 136, 139, 202 S.E.2d 852, 853 (1974).

In Tabory, the defendant was indicted on three counts of possession of controlled

substances and dangerous drugs under an indictment that was labeled “CONTRABAND - Three Counts”, even though the body of the indictment did not contain any allegations sufficient to charge him under the applicable contraband statute. Regardless, the judge instructed the jury as to the charges relating to both drug possession and contraband. Tabory was convicted on all the charges. Id. In reversing Tabory’s convictions, the Supreme Court they held that the “true test of the sufficiency of an indictment is whether it contains the necessary elements of the offense intended to be charged and sufficiently appraises the defendant of what he must be prepared to meet. The offense intended to be charged must be described with sufficient particularity that conviction or acquittal thereupon may be pleaded in bar to any subsequent prosecution.” Id. at 139 (citing to State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952)).

In another case, the defendant was indicted for criminal sexual conduct in the second degree (S.C. Code Ann. §16-3-653 (1976)). State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987) The judge’s charge to the jury was for the crime of second degree criminal sexual conduct *with a minor* (S.C. Code Ann. §16-3-655(3) (1976)), of which he was found guilty. 292 S.C. 497, 357 S.E.2d 461 (1987). [Emphasis added.] In Munn, the Supreme Court reversed and remanded the conviction,” holding that, even though not preserved, the defect was so fundamental that the indictment was wholly invalid and *not subject to waiver by the defendant*. [Emphasis added] Id. at 499 (citing to 41 Am. Jur. 2d Indictments and Informations § 299 (1968)).

In our case, the second true-bill indictment against Appellant, handed down by the Oconee County Grand Jury on February 9, 2015, reads as follows:

## KIDNAPPING

That Wilbur A. Rickmon did in Oconee County, on or about the on or about [sic] September 27, 2013, unlawfully seize, confine, inveigle, decoy, or kidnap,. Amy Nicole Carver, by any means whatsoever, without the authority of law, ***to wit: defendant did confine victim to a room in his home, physically restrained her during a sexual assault.*** This is in violation of §16-3-0910 of the South Carolina Code of Laws (1976) as amended. [Emphasis added.]

“To wit” is frequently used in legal texts as meaning “namely,” or “that is to say.” Black’s Law Dictionary (10th ed. 2014). It is also known as a “videlicet” from 15th century Latin, which is defined as “To wit; that is to say; namely; scilicet. The term is used primarily to point out, particularize, or make more specific what has been previously stated in general (or occas. obscure) language. One common function is to state the time, place, or manner when that is the essence of the matter at issue.” Id.

In case law from the State of Illinois (The People v. Rivas, 5 Ill.2d 556, 562, (Ill. 1955)), the Supreme Court of Illinois defined a videlicet as “When any fact alleged in pleading is preceded by ‘to-wit’ ‘that is to say,’ or ‘namely,’ such fact is said to be laid under a *videlicet*. The precise and legal use of a *videlicet* in every species of pleading is to enable the pleader to isolate, to distinguish and to fix with certainty that which before was general, and which, without such explanation, might with equal propriety have been applied to different objects.” Id. (citing to People v. Shaver, 367 Ill. 339, 342, 11 N.E.2d 400 (Ill. 1937)). In Rivas, the defendant had been indicted for selling drugs to a particular person on a particular date. The indictment videlicet specified “to-wit: six capsulefuls of a certain narcotic drug, to-wit: opium, that is to say, heroin...” Id. at 558. Defendant waived his right to trial by

jury. Id.

The judge granted a motion to exclude the evidence of the six capsules (which did, indeed, contain heroin), due to improper search and seizure by the police. Id. at 558, 560. However, the trial continued with evidence presented of previous sales of heroin by defendant Rivas to the same individual and, based upon that evidence, the trial judge found Rivas guilty as charged. Id. at 558.

The Supreme Court of Illinois, in defining and applying the *videlicet* found that “[b]y the *videlicet* the State particularized the offense with which defendant was charged. Id. at 562. They also noted, “The substance of one crime cannot be proved by proving the substance of another.” Id. at 563 (citing to People v. Richie, 317 Ill. 551 (Ill. 1925); People v. Turner, 260 Ill. 84, 102 NE 1036 (1913). In reversing Rivas’ conviction, the Supreme Court of Illinois said “In this case, the variance between the charge of the indictment and the proof is of such a substantive character as to mislead the accused in preparing his defense...” and as a result the State had failed to prove the offense as charged. Rivas at 564.

Closer to home, the South Carolina Supreme Court addressed the issue of a judge’s jury instructions allowing the jury to convict the defendant for an act that was not part of the *videlicet* or “to-wit” charge specified with particularity in the indictment. Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011). In Bailey, the defendant was indicted for Homicide by Child Abuse in an indictment which included the following to-wit clause; “The defendant inflicted upon said child physical injuries to his abdomen resulting in exsanguination and consequently the death of the child.” Id. at 438, (end note 4, the text of the indictment). The jury found no evidence that Bailey struck the victim and

requested, from the judge, a clarifying instruction regarding the indictment. Id. at 429. The judge's supplemental instructions added a "neglect" component that exceeded the original scope of the indictment, allowing the jury to convict Bailey of "an unindicted crime." Id. at 431.

In its ruling on the case, the Supreme Court stated, "In South Carolina, '[i]t is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the *particular* offense charged in the bill of indictment.'" Id. at 433 (citing to State v. Gunn, 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993); State v. Cody, 180 S.C. 417, 423, 186 S.E. 165, 167 (1936) quoting, "A material variance between charge and proof entitles the defendant to a directed verdict; such a variance is not material if it is not an element of the offense.") [Emphasis added].

In Appellant's case, the videlicet, or to-wit, clearly narrows and confines the elements of the charges indicted to "*defendant did confine victim to a room in his home, physically restrained her during a sexual assault.*" Thus, the judge's instructions to the jury which included the definitions for "knowingly," "seized," "inveigled," "decoyed," and "kidnapped," allowed the jury to consider evidence and convict the defendant on elements of charges that were not specified by the grand jury indictment. Tr. page 326, lines 14-25; page 327, lines 1-5.

The judge further instructed the jury, "the State does not have to prove that the defendant did all of these things. Instead, if you find beyond a reasonable doubt that the defendant did *any* of these things you may find the defendant guilty of kidnapping." Tr. page 327, lines 6-10. [Emphasis added.]

Whereas South Carolina law clearly requires that the objecting party do so *prior*

to the jury being sworn, in this case, Appellant was without prior warning that the judge intended to give jury instructions that included charges outside the particular offense listed in the to-wit clause of the bill of indictment. S.C. Code Ann. §17-19-90.

Because the State, knowing the evidence it intended to present before the jury, failed to make any request to amend the indictment prior to the jury having been sworn, Appellant was not afforded proper notice that a constructive amendment of the indictment was forthcoming and, thus, not given a fair opportunity to request a “continuance of the cause” to properly prepare a defense. S.C. Code Ann. §17-19-100 (1976), as amended.

The United States Supreme Court, in 1960, clarified the circumstances under which a defendant’s Fifth Amendment grand jury guarantee is violated by a conviction obtained in the face of variance between the indictment and the proof. United States v. Stirone, 361 U.S. 212 (1960).

In Stirone, the defendant had been indicted for and convicted of unlawful interference with interstate commerce in violation of the Hobbs Act (18 U.S.C. 1951). Stirone, at 218 – 219. The indictment clearly specified that Stirone had “engaged in extortion that obstructed shipments of sand from outside Pennsylvania into that State, where it was to be used in the construction of a steel mill.” But, the evidence presented by the prosecutor at trial went beyond that necessary to prove the offenses alleged and included proof Stirone also obstructed export of the steel eventually produced by the mill. Id. Because they could not be sure upon what “proof” Stirone had been convicted, the Supreme Court unanimously held that the

“indictment had been unconstitutionally ‘broadened,’” further concluding that to convict under those circumstances was ‘fatal error.’ Id.

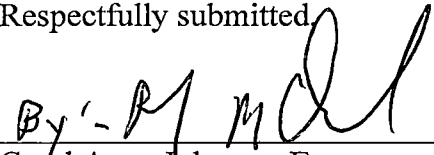
Similarly, in our case, because the trial judge allowed the jury to hear and deliberate on evidence that went beyond that necessary to prove the indicted offenses, this Court should find, as in *Stirone*, that the indictment for Kidnapping has been unconstitutionally broadened and that to convict under these circumstances was fatal error. Id.

#### CONCLUSION

The trial court erred in denying Appellant’s motion for a directed verdict in both indictments because (1) the State failed to present substantial circumstantial evidence of either aggravated force or forcible confinement sufficient to deny a motion for directed verdict on the charge of first degree CSC as indicted, and (2) the State impermissibly presented evidence that was not within the scope of that necessary to prove the charge of Kidnapping, as indicted. This Court should reverse the trial court’s denial of Appellant’s motions for directed verdicts, and find that it was fatal error for the trial court to convict Appellant for an indictment (Kidnapping) that was unconstitutionally broadened.

March 7, 2016

Respectfully submitted,

  
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