STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case Tracking No. 2015-000989

The State, Respondent,

vs.

Wilbur A. Rickmon, Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court correctly denied Appellant's motion for a directed verdict on the charge of criminal sexual conduct in the first degree because the State presented ample evidence of Appellant's use of "aggravated force" or "forcible confinement."

II. The trial court did not err in denying Appellant's motion for a directed verdict on the charge of kidnapping because the State presented ample evidence warranting submitting the case to the jury. Further, the trial court did not err in charging the jury with the law on kidnapping when Appellant was clearly provided notice in the indictment of all bases for a kidnapping charge.

STATEMENT OF THE CASE

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

ARGUMENT

I. The trial court correctly denied Appellant's motion for a directed verdict on the charge of criminal sexual conduct in the first degree because the State presented ample evidence of Appellant's use of "aggravated force" or "forcible confinement."

Appellant contends the trial court erred in denying his motion for a directed verdict on the criminal sexual conduct in the first degree (CSC) charge because the State failed to provide sufficient evidence of either the use of aggravated force by Appellant or the forcible confinement or similar act in order to accomplish the sexual battery. The State presented ample evidence from which a reasonable juror could conclude Appellant was guilty beyond a reasonable doubt.[1]

"On appeal from the denial of a directed verdict, [the Appellate] Court views the evidence and all reasonable inferences in the light most favorable to the State." State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). As the South Carolina Supreme Court recently reiterated: "[W]hen ruling on a directed verdict motion, the trial court views the evidence in the light most favorable to the State and must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'" State v. Bennett, 415 S.C. 232, 236-37, 781 S.E.2d 352, 354 (2016) (quoting State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955)). "Therefore, although the jury must consider alternative hypotheses, the court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." Id. "Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial

[1] Even though Appellant initially denied having sex with the victim, identity is not an issue in the case as the DNA conclusively established Appellant's semen was present in the victim. (T.193-194; 230; R.___).

evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." Id.

In the instant case, the testimony of the victim established direct evidence of Appellant's use of aggravated force as well as the forcible confinement of the victim sufficient to warrant sending the case to the jury. It is clear the State proceeded under section 16-3-652(1)(a) or (b):

> A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:
>
> (a) The actor uses aggravated force to accomplish sexual battery.
>
> (b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, trafficking in persons, robbery, extortion, burglary, housebreaking, or any other similar offense or act.

S.C. Code Ann. § 16-3-652(1)(a)-(b) (Supp. 2013). Under section 16-3-651(c), "aggravated force means that the actor uses 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." S.C. Code Ann. § 16-3-651(c) (Supp. 2013).

> To convict a defendant of first-degree CSC, the State must present evidence the defendant committed a sexual battery and *actually used* aggravated force at the time of the assault, i.e., the defendant overcame the victim through the use of physical force, physical violence of a high and aggravated nature, or the threat of the use of a deadly weapon. The evidence must show the actual use of aggravated force occurred near in time and place to the assault, such that the effect of the aggravated force caused the victim to submit to the assault.

State v. Brown, 360 S.C. 581, 588, 602 S.E.2d 392, 396 (2004) (italics in original and citations omitted).

In State v. Green, the Court of Appeals addressed whether it was appropriate to look to the circumstances of aggravation established for common law ABHAN to define the aggravated force required under section 16-3-652(1)(a). The Court concluded:

> Therefore, under section 16–3–652(1)(a), a sexual battery constitutes first-degree CSC only if it was accomplished through the use of force and the force constitutes aggravated force. Thus, 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.

State v. Green, 327 S.C. 581, 586, 491 S.E.2d 263, 265 (Ct. App. 1997). The Court in Green found no aggravated force used when the assailant performed oral sex on the victim after shaving the victim's pubic area. The Court specifically noted the victim "did not testify that he held her down or otherwise used any force" in committing the sexual battery. Id. at 588, 491 S.E.2d at 266.

In State v. Lindsey, the South Carolina Supreme Court found aggravated force was used. The Court explained the assailant "[confined] his victim in the automobile, Lindsey grabbed her hands, got on top of her and was holding her down with his body and hands." State v. Lindsey, 355 S.C. 15, 21, 583 S.E.2d 740, 743 (2003). The Court in Lindsey noted its case was similar to State v. Frazier, 302 S.C. 500, 397 S.E.2d 93 (1990), in which the Supreme Court upheld an assault with intent to commit criminal sexual conduct in the first degree[2] conviction on evidence the defendant grabbed victim, forced her into the woods and ripped her clothes off in an effort to commit a sexual battery.

[2] Conviction of the offense in Frazier required an assault accompanied by (1) the intent to engage in sexual battery and (2) the intent to either use aggravated force to accomplish sexual battery or to have the victim submit to sexual battery under circumstances where the victim is also the victim of forcible confinement, kidnapping, robbery, extortion or burglary. See S.C. Code Ann. § 16-3-652 and 16-3-656 (Supp. 2013).

This case is much more similar to Lindsey and Frazier than it is to Green. The seventeen-year-old victim, pregnant at the time of the rape by Appellant, refused Appellant's offer to have sex with him in exchange for $50. The seventeen-year-old pregnant victim was then forcibly raped by Appellant. (T.126; R.___). She testified Appellant "grabbed my arm, my left arm, and threw me onto the bed and ripped off my pants." (T.126; R.___). The victim testified several times Appellant grabbed her arm. (T.126; 144; 146; R.___). The seventeen-year-old pregnant victim also told doctors and Detective Smith Appellant grabbed her arm. (T.147; 150-151; 169; 177; R.___).

Additionally, the seventeen-year-old pregnant victim indicated Appellant "threw" her on the bed and raped her. (T.126; 146; R.___). Further, in her statement to police after the incident, she explained Appellant "threw" her onto the bed and then "climbed on top of me and he started having sex with me." (T. 145; R.___). In her statement to doctors recorded in their notes, the pregnant victim stated Appellant "took down my pants and underwear, threw me on the bed and started to rape me." (T.147; R.___). The seventeen-year-old pregnant victim indicated: "he grabbed my arm and threw me onto the bed, undid my belt, took off my pants, and my shoe came off with it." (T.152; R.___). Clearly, this testimony is similar to the testimony in Lindsey and Frazier and supported the trial court's decision to submit the case to the jury as well as supported a reasonable juror's decision Appellant committed a sexual battery using aggravated force.

Additionally, the evidence established the sexual battery was accomplished by the pregnant seventeen-year-old victim submitting under circumstances where the victim is also the victim of forcible confinement, kidnapping, trafficking in persons, robbery, extortion, burglary, housebreaking, or any other similar offense or act. The victim testified she entered Appellant's home through the back door. Upon entering, Appellant shut and locked the door. (T.119; 124;

R.___). After being unable to connect to the internet using the Appellant's computer, the victim was lured into Appellant's bedroom. Appellant claimed the Wi-Fi was located in the bedroom and the victim needed to go with him in there to determine if something was wrong. Upon entering the bedroom, Appellant closed the door to the bedroom and the victim no longer felt free to leave. (T.126; R.___). She testified: "I went to his bedroom and he shut the door and locked it, and then he raped me." (T.133; R.___). Further, the pregnant seventeen-year-old victim indicated she "thought the bedroom door was locked because it had no knob. All it was was a lock." (T.139; R.___). She testified that once the rape was complete, she had to "unlock all the locks to get out." (T.140; R.___). Additionally, in her statements to police and doctors, the seventeen-year-old pregnant victim indicated Appellant shut the door to the bedroom and locked it prior to forcibly raping her. (T.145; 147; 150-151; R.___). This testimony is clear, direct evidence the victim submitted to the sexual battery under circumstances of forcible confinement, kidnapping, or similar act.

The testimony of the victim, as well as her prior statements to police and the doctors, provided ample evidence the sexual battery was accomplished using aggravated force or under circumstances where the victim is also the victim of forcible confinement, kidnapping, trafficking in persons, robbery, extortion, burglary, housebreaking, or any other similar offense or act. As a result, the trial court did not err in submitting the case to the jury for its consideration and denying Appellant's motion for directed verdict.

II. The trial court did not err in denying Appellant's motion for a directed verdict on the charge of kidnapping because the State presented ample evidence warranting submitting the case to the jury. Further, the trial court did not err in charging the jury with the law on kidnapping when Appellant was clearly provided notice in the indictment of all bases for a kidnapping charge.

Appellant maintains the trial court erred in denying his motion for directed verdict on the kidnapping charge because the State failed to prove the allegations set forth in the indictment that Appellant "did confine the victim to a room in his home, physically restrained her during a sexual assault." Further, he asserts the trial court impermissibly broadened the indictment and allowed the jury to convict based on a particular offense not specified in the indictment.

The State presented ample evidence to support the trial court's denial of Appellant's motion for directed verdict. Further, the trial court's jury charge did not impermissibly broaden the indictment in this case.[3]

First, the State presented ample evidence Appellant confined the victim to a room in his home and physically restrained her during a sexual assault. As discussed in issue one, the victim testified Appellant lured her into his bedroom, shut the door, and she believed it was locked. She testified she did not feel free to leave. (T.126; 133; 139; 140; 150-151; R.___). Further, she testified he grabbed her by the arm and threw her on the bed. She then stated he climbed on top of her and raped her. (T.126; 144; 145; 146; R.___). This testimony presents sufficient evidence to enable a reasonable juror to convict Appellant of the crime of kidnapping and warranted

[3] The State believes this Court should, in its discretion, refuse to consider any error regarding the kidnapping charge once it affirms the CSC charge. Appellant received a life without the possibility of parole sentence on the CSC charge and so any change in the status of his kidnapping charge would not result in any change for Appellant. (Sentencing Sheets; R.___). See e.g, Hirabayashi v. United States, 320 U.S. 81, 84 (1943) (finding it "unnecessary to consider questions raised with respect to the first count" when the court sustained the conviction on a second count resulting in the same sentence).

submitting the case to the jury. As a result, the trial court did not err in denying Appellant's motion for a directed verdict on the kidnapping charge.

Additionally, the trial court properly charged the jury on the law of kidnapping based on the indictment.[4] A trial court is required to charge the current and correct law of South Carolina. See State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 73 (2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. See Rayfield, 369 S.C. at 119, 631 S.E.2d at 251; Sheppard, 357 S.C. at 665, 594 S.E.2d at 473; State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." 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).

The trial court's jury charge on kidnapping included the elements of the offense and was an entirely proper jury charge under the law of South Carolina. See S.C. Code Ann. § 16-3-910 (Supp. 2013) (defining kidnapping by providing: "Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever

[4] Initially, an issue related to the jury charge does not appear to be preserved for review on appeal because counsel waived any objection by responding "No, your honor" when asked by the trial court if he had any additions or exceptions to the jury charges as given. (T.334; R.___). See e.g., State v. Rios, 388 S.C. 335, 341-342, 696 S.E.2d 608, 612 (Ct. App. 2010).

without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony").

Additionally, an indictment is a notice document and its sufficiency is judged by whether: (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged. See State v. Gentry, 363 S.C. 93, 102-103, 610 S.E.2d 494, 500 (2005). The indictment in the case *sub judice* read:

> That Wilbur A. Rickmon did in Oconee County, on or about the on or about September 27, 2013, unlawfully seize, confine, inveigle, decoy, or kidnap, [the victim] 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.

(Indictment for Kidnapping; R.___). The indictment certainly meets the requirements of Gentry.

The jury charge did not impermissibly broaden the scope of the indictment by including the term inveigle in its definition of kidnapping. Appellant was clearly on notice he was being charged with kidnapping and the charges were based on seizing, confining, inveigling, decoying, or kidnapping the victim. The indictment by its terms covered all possible circumstances covered by the trial court's jury charge. The Court even omitted some circumstances as suggested by trial counsel because they were not proven or included in the indictment—for example abducting and carrying away a person.

In addition, kidnapping is a continuing offense; in this case the act of kidnapping began with the inveigling by getting the victim to his bedroom under false pretenses and ended when she was finally able to escape after being restrained and raped. See State v. Tucker, 334 S.C. 1,

13, 512 S.E.2d 99, 105 (1999) ("Kidnaping is a continuing offense. The offense commences when one is wrongfully deprived of freedom and continues until freedom is restored.").

While the "to wit" clause further explains Appellant's actions, it does not preclude any action of inveigling or decoying the victim. The confining of the victim was done as a result of the inveigling by Appellant, luring the victim to his bedroom under the false pretense of needing to show her the Wi-Fi equipment. (T.126; R.___). Clearly, the actions described by the indictment began with Appellant's inveigling of the victim and ended when he seized her person by restraining her during the rape. (T.126; 145; R.___). Accordingly, the trial court's jury charge did not impermissibly broaden the indictment or result in Appellant being convicted of a charge for which he was not indicted.[5]

[5] As noted above, reversal of this conviction would not change Appellant's status because he received the life without parole sentence for the CSC. Additionally, if reversed the case would be remanded for a new trial on the current indictment or the State would be able to re-indict Appellant either eliminating the restrictive language or altering it to include specifics of inveigling the victim.

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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May 20, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case Tracking No. 2015-000989

The State, Respondent,

vs.

Wilbur A. Rickmon, Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 20th day of May, 2016.

Sally Ellison

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RE: State v. Wilbur A. Rickmon
Appellate Case Tracking No. 2015-000989

Dear Ms. Johnson and Mr. Dudek:

I am enclosing copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case. If you have any questions, please do not hesitate to contact me.

Sincerely,

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Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services