STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

-v-

WILBUR A. RICKMON,

APPELLANT.

APPELLATE CASE NO. 2015-000989

INITIAL REPLY BRIEF OF APPELLANT

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SUMMARY OF REPLY

The State, in their Initial Brief of Respondent, completely failed to adequately address and overcome Appellant's contention that the "to wit" clause, in the True Bill Indictments from the Grand Jury, by definition, limited the scope and nature of the charges against Appellant, thus subjecting him to the very real probability that he was convicted without having proper notice of the charges for which he could prepare a defense, in violation of his due process rights. *See 41 Am.Jur.2d Indictments & Informations § 256* (2005) ("A material variance that violates a defendant's substantial right to be tried only on charges presented in an indictment constitutes fatal error and warrants a reversal on an appeal of a judgment of conviction of the offense not charged in the indictment.")

Although the State contends, through a footnote, that Appellant failed to properly preserve the issue of the jury charge variance for appeal (see Respondent's Initial Brief footnote #4) the trial court specifically noted Appellant's objections to the jury charges during the initial discussion and objections to those charges, thus preserving Appellant's right to argue this issue on appeal. (T. 275; 14-16).

Appellant maintains, counter to the State's contention, that no evidence of aggravated force, rising to the level consistent with that required for a conviction of first-degree CSC, was ever presented at trial, nor was any testimony presented that indicated Ms. Carver was restrained or held down by Appellant during sex.

ARGUMENT 1

The State chose to limit the scope of the charges that were being brought against

Appellant when they included a "to wit" clause within the Grand Jury indictment that essentially narrowed the charge to "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."

DISCUSSION

In Bailey v. State, the Supreme Court of South Carolina stated that "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.'[Emphasis added] " State v. Gunn, 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993) (quoting State v. Cody, 180 S.C. 417, 423, 186 S.E. 165, 167 (1936)). "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." Id. (citation omitted); *see 41 Am.Jur.2d Indictments & Informations § 252 (2005)* (stating that one of the two ways an indictment can be improperly modified is through "a variance, whereby the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment"). *See* Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011). In Bailey, the Court found that the indictment against the Defendant specifically alleged that he had committed an "act" resulting in a child's death and that the trial court erred when it enlarged the jury instructions to include "neglect," stating that such an enlargement was in "direct contravention of the specific act alleged in the indictment and, thus, constituted a material variance or a 'constructive amendment' to the indictment." Id. at 436. Id.

In our case, Appellant's grand jury indictment contained specific allegations, in the "to wit" clause, that only put him on notice that he was being charged with "confine victim to a room in his house and physically restrain her during a sexual assault." The enlargement of that charge to the jury to include "seize, inveigle, decoy, kidnap," amounted to a material variance or constructive amendment to the indictment, similar to that in the Bailey case. Id. Had the State included "seize, inveigle, decoy or kidnap" within the "to wit" clause, *then* Appellant would have been properly noticed of the charges that would be brought against him at trial. They did not.

ARGUMENT 2

Although the State contends, in Initial Brief of Respondent (footnote #4), that Appellant did not properly preserve his right to appeal the trial court's erroneous jury instructions, the objection to the enlargement of the instructions was not only properly made, it was noted by the trial court during trial.

DISCUSSION

Appellant properly objected to the intended enlargement of the jury instructions by the trial court judge during the discussions about the jury instructions. (T: 273, 23-25; 274, 1-25). The judge then confirmed notice of the objection. (T: 275, 14-16). This notice is sufficient to preserve the objection for appeal. See S.C. Criminal Rules, Rule 137.

ARGUMENT 3

The State failed to produce the requisite evidence at trial that Appellant actually used aggravated force, as defined by South Carolina's Supreme Court in State v.

Brown, to overcome Ms. Carver during a sexual battery, or to forcibly confine Ms. Carver for the purposes of doing sexual battery.

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, 602 S.E.2d 392 (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, 608 S.E.2d 455 (Ct. App. 2004). Failure to produce such evidence entitles the defendant to a directed verdict. State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011); *See also*, State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (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, 527 S.E.2d 367 (Ct. App. 2000).

During this trial, the trial court expressed doubts regarding whether the State had met its burden, saying "Initially we had put on page two of the charge the option for aggravated force, and I really don't know that that's applicable under the facts of this case." (T: 267, 3-8).

The State contends that our case is similar to the aggravated force found in 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))). In both those cases, substantial direct evidence showed the force used by Defendants against their victims was of a "high and aggravated nature" or included the threat of use of a deadly weapon. In Lindsey, the victim was locked in the backseat of a car and held down by the defendant's hands and body weight while she was kicking, fighting and attempting to push him off her. 355 S.C. 15 at 21. In Frazier, the victim was choked by defendant as she made a phone call outside a store, drug into the woods where he continued to choke her while ripping her shorts and underwear off. 302 S.C. 500 at 501. During the assault, defendant told the victim he was "going to kill her anyway." Id.

Our case is completely distinguishable from both Lindsey and Frazier. In our case, Ms. Carver's initial statement to police never even mentioned that Appellant had grabbed her arm. T: 145, 18-21. No evidence was presented at trial to indicate that Appellant ever physically restrained Ms. Carver during the sex act or physically forced her to enter the bedroom with him. In fact, in her own testimony, Ms. Carver admitted that she followed Appellant into the bedroom of her own accord. T: 142, 20-23.

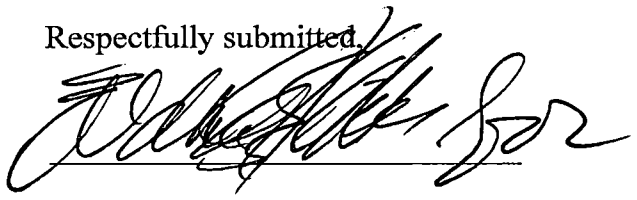
In State v. Green,, the Court, in reversing and remanding Green's conviction for first-degree CSC, stated that "section 16-3-651 clearly requires that the 'aggravation' necessary for a first-degree CSC conviction be associated with the degree of force used." Id. at 586. Similarly, our case does not represent the degree of force considered necessary to justify a first-degree CSC conviction.

CONCLUSION

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.

Respectfully submitted,



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