STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County

Honorable Roger L. Couch, Circuit Court Judge

LUCIUS SIMUEL,

PETITIONER,

V.

THE STATE,

RESPONDENT

APPELLATE CASE NO 2016-001607

SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA

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APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court judge erred by sentencing appellant to life without parole, pursuant to *S.C. Code Ann.* §17-25-45, when the predicate offense, a Georgia conviction for false imprisonment, does not contain the same elements as the South Carolina offense for kidnapping.

STATEMENT OF THE CASE

Lucius Simuel Jr. was indicted by the Beaufort County grand jury for 2 counts assault and battery with intent to kill, possession of a handgun by a prohibited person, possession of the weapon during a violent crime, and burglary, 1st degree. He was tried before the Hon. Thomas W. Cooper, Jr. and a jury between November 16 -- 20th, 2009. Appellant was represented by Ian D. Deysach, Esquire. He was convicted, and sentenced to life in prison pursuant to *S.C. Code Ann.* §17-25-45.

This appeal timely follows.

ARGUMENT

The trial court judge erred by sentencing appellant to life without parole, pursuant to *S.C. Code Ann.* §17-25-45, when the predicate offense, a Georgia conviction for false imprisonment, does not contain the same elements as the South Carolina offense for kidnapping.

Appellant was convicted of events alleged to have occurred on July 28, 2008. On that date, two drug dealers in Bluffton, South Carolina, were shot. Appellant and his co-defendant were tried for the crimes together. Both drug dealers identified appellant's co-defendant, Demetrius Price, as being the shooter on that day. According to the drug dealers' version of events, they were at their apartment in Plantation Point Apartments, playing video games with their brother, when two men approached the door of the apartment. These men asked if the drug dealers were interested in purchasing pills and cocaine from them. According to the dealers' testimonies, they were not interested. At some point, the two men were shot by the men who arrived at the apartment. Both survived, but one victim is now paralyzed. The drug dealers have never been charged with any crimes in connection with these events, although significant amounts of drugs, and four guns, were found in the apartment. R. 298- 392; 414- 508; 551- 606; 610- 650.

At the conclusion of trial, appellant was sentenced to life in prison pursuant to *S.C. Code Ann.* §17-25-45. Appellant objected to the State's assertion that appellant's conviction in Georgia for false imprisonment qualifies as kidnapping under South Carolina law. R. 951- 952. Respectfully, the trial court judge erred in sentencing appellant to a mandatory term of life imprisonment because appellant's Georgia conviction for false imprisonment does not qualify as a predicate offense for the imposition of a life term under our statute.

S.C. Code Ann. § 17-25-45 states:

> Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has either:
>
> (1) one or more prior convictions for:
>
> (a) a most serious offense; or
>
> (b) a federal or out-of-state conviction for an offense that would be classified as a most serious offense under this section . . .. (emphasis added).

The South Carolina offense of kidnapping, *S.C. Code Ann.* § 16-3-910, proscribes the following:

> Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed 30 years unless sentenced for murder as provided in section 16 -- 3 – 20.

In Georgia, the following statutes are relevant:

Ga. Code Ann. § 16-5-40 Kidnapping:

> (a) A person commits the offense of kidnapping when such person abducts or steals away at another person without lawful authority or warrant and holds such other person against his or her will.
>
> (b)(1) For the offense of kidnapping to occur, slight movement shall be sufficient; provided, however, that any such slight movement of another person which occurs while in the commission of any other offense shall not constitute the offense of kidnapping if such movement is merely incidental to such other offense.
>
> (2) Movement shall not be considered merely incidental to another offense if it:
>
> (A) Conceals or isolates the victim;

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(B) Makes the commission of the other offense substantially easier;

(C) Lessens the risk of detection;

(D) Is for the purpose of avoiding apprehension.

In Georgia, the offense of kidnapping qualifies for imprisonment of not less than 10, nor more than 20 years, if the kidnapping involves a victim who was 14 years of age or older. If the victim is less than 14 years of age, the penalty is imprisonment for life or by a split sentence for not less than 25 years. Id.

Ga. Code Ann. § 16-5-41. False imprisonment.

> (a) A person commits the offense of false imprisonment when, in violation of the personal liberty of another, he arrests, confines, or detains such person without legal authority.

False imprisonment is punishable by imprisonment for not less than one, nor more than 10 years. Id.

Appellant's conviction for false imprisonment in Georgia does not qualify as a predicate offense for imposition of our mandatory life provisions because the elements of false imprisonment do not match the elements of kidnapping. For example, the South Carolina statute carves out an exception for parental type kidnappings. In other words, one could be guilty of false imprisonment in Georgia, but not guilty of kidnapping in South Carolina.

Additionally, our kidnapping statute, and Georgia's kidnapping statute both contain the words "kidnap", "abduct" and either "steal away" or "carry away" suggesting these two

statutes are more analogous than South Carolina's kidnapping and Georgia's false imprisonment statutes.

The State did not provide any information regarding the underlying offenses for which appellant pleaded guilty in Georgia, relying instead solely on the semantic similarities between the two statutes.

> THE COURT: I don't know what the facts of the Georgia case were that he pled to. And thankfully under the law, we don't have to do that, and we're not required to do that. We simply look at the elements of the offense and ask ourselves. In Georgia, these are the elements of the offense. Do we have a South Carolina statute that, under the same elements, would qualify as a most-serious offense and make the comparison that way."

R. 962.

The trial court judge erred because the statutes require different elements, even simply looking at the language of the statutes themselves. Specifically, the South Carolina statute carves out an exception for parental-type issues which the Georgia statute does not. Also, the language of our two kidnapping statutes is so similar as to suggest that these two statutes are more analogous than our kidnapping and Georgia's false imprisonment statute. And lastly, the Georgia false imprisonment statute only calls for an imposition of 10 years suggesting that it is not an appropriate predicate offense for our state's imposing a mandatory life term. See Hinton v. South Carolina Dep't of Probation, Parole and Pardon Services, 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004).

The trial court judge believed that the imposition of this harsh sentence was not appropriate, but believed his hands were tied:

> THE COURT: Mr. Deysach, I am sensitive to the concerns that you have raised about the comparisons of Georgia statute, quite frankly. The fact that the Georgia statute under which Mr. Simuel was convicted apparently carries only up to 10 years in jail; hours carried out to 30. Obviously, there is

> a distinction they are, and so I'm aware of the fact that they have looked at that crime in certain respects differently from the way we look at kidnapping.
>
> But I don't think the law, as I have indicated, indicates that it has to be totally similar. Has the same elements, then they qualify. And I could stand to be wrong on that. And if the Court of Appeals tells me I'm wrong -- and they have before -- you know, I would not feel that an injustice has been done, quite frankly, if Mr. Simuel gets resentenced to the sentence imposed by law this particular case. But I have reached a decision based on the things that I've told you, and I feel that's what the law mandated that I do.

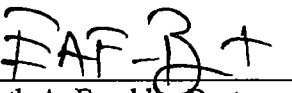
R. 971.

It is far from clear that appellant's conviction for false imprisonment would be classified as kidnapping in this state. It was therefore error to use the Georgia conviction as a predicate offense for purposes of imposing a mandatory life sentence in this state. The trial court judge abused his discretion, and appellant respectfully asks this Court for a re-sentencing.

CONCLUSION

For the preceding reason, appellant respectfully asks this Court to remand his case for re-sentencing.

Respectfully submitted,



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

This 19th day of August, 2011.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

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THE STATE,

RESPONDENT,

V.

LUCIUS SIMUEL,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19th day of August, 2011.

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 19th day of August, 2011.

(L.S.)
Notary Public for South Carolina
My Commission Expires: May 16, 2021.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Thomas W. Cooper, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

LUCIUS SIMUEL, JR.,

Appellant.

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STATEMENT OF ISSUE ON APPEAL

The trial judge properly sentenced Appellant to life imprisonment without the possibility of parole under S.C. Code Ann. § 17-25-45 for his assault and battery with intent to kill and first-degree burglary convictions because Appellant had a prior out-of-state conviction for an offense that would be classified as a "most serious" offense under South Carolina's recidivist offender statute.

STATEMENT OF THE CASE

In August of 2008, Appellant Lucius Simuel, Jr., was arrested after surrendering to law enforcement following an investigation into a home invasion and shooting. In September of 2008, the Beaufort County grand jury indicted Appellant for assault and battery with intent to kill, possession of a weapon during a violent crime, and first-degree burglary. In June of 2009, the Beaufort County grand jury additionally indicted Appellant for possession of a handgun by a prohibited person. Prior to trial, the solicitor served timely notice on Appellant indicating the State would seek a life sentence without the possibility of parole upon conviction. On November 16, 2009, a jury trial was commenced in the Beaufort County court of general sessions with the Honorable Thomas W. Cooper, Jr., circuit court judge, presiding.[1] At the conclusion of trial, the jury convicted Appellant as indicted. Pursuant to S.C. Code Ann. § 17-25-45, the trial judge sentenced Appellant to life imprisonment without the possibility of parole for the burglary and assault and battery with intent to kill convictions. Additionally, the trial judge sentenced Appellant to concurrent terms of imprisonment of five years for each of the firearm convictions. Subsequently, Appellant filed a timely notice of appeal.

[1] Appellant's co-defendant, Demetrius Undreus Price, was jointly tried with Appellant during the trial. Price was also convicted of the same offenses as Appellant and received identical sentences for those convictions.

STATEMENT OF FACTS

Following an investigation into a home invasion and shooting incident in Bluffton, South Carolina, Appellant Lucius Simuel, Jr., was arrested and indicted for first-degree burglary, assault and battery with intent to kill, possession of a weapon during the commission of a violent crime, and possession of a handgun by a prohibited person. (Tr. pp. 41-42; Indictments). Based on Appellant's prior conviction for the offense of false imprisonment in Georgia, the solicitor served timely notice on Appellant prior to trial of the State's intention to seek a sentence of life imprisonment upon conviction pursuant to S.C. Code Ann. § 17-25-45. (Tr. p. 958; p. 960). Subsequently, Appellant proceeded to trial.

During trial, the solicitor introduced certified copies of Appellant's out-of-state convictions, which included the indictments and sentencing sheets. (Tr. pp. 455-456; pp. 960-961; St. Ex. # 19; St. Ex. # 20). One of the certified copies of Appellant's out-of-state convictions established Appellant had been previously indicted in Georgia for the offenses of armed robbery, aggravated assault, possession of a firearm during the commission of a crime, wearing a mask to conceal identity, and kidnapping with bodily injury. (St. Ex. # 19). The kidnapping with bodily injury indictment alleged:

> [Appellant and his co-defendants], in the County and State aforesaid, on or about November 7, 1996, did abduct/steal away Alvan Mable, a person, without lawful authority and hold said person against his will and cause said person to receive bodily injury, to wit: did strike Alvan Mable in the head with a gun and place Mable inside a cooler.

(St. Ex. # 19). The other counts of the indictments alleged Appellant committed the crimes during the armed robbery of a restaurant. (St. Ex. 19). According to the certified copy of Appellant's sentencing sheet for the charges, Appellant pled guilty to the crime

of wearing a mask to conceal identity and to the lesser-included offenses of robbery and false imprisonment, with the two remaining charges being nolle prossed. (St. Ex. # 19).

At the conclusion of trial, Appellant was convicted of each offense for which he was indicted, including the "most serious" offenses of assault and battery with intent to kill and first-degree burglary. (Tr. p. 948). During sentencing proceedings, the solicitor noted Appellant had a prior Georgia conviction for false imprisonment, which he argued was an offense comparable to kidnapping in South Carolina based on the similarities between the elements of each offense. (Tr. pp. 958-959). In response, defense counsel argued the elements of false imprisonment in Georgia and the elements of kidnapping in South Carolina did not match. (Tr. pp. 963-964). Defense counsel additionally noted false imprisonment in Georgia was only punishable by a maximum ten-year sentence. (Tr. p. 966). Defense counsel further asserted the South Carolina kidnapping statute contained an exception for kidnappings involving parents while Georgia's false imprisonment statute did not. (Tr. pp. 964-965). Therefore, defense counsel contended a person could commit a false imprisonment in Georgia that would not constitute a kidnapping in South Carolina, which he argued meant the Georgia offense did not qualify as a predicate offense under South Carolina's recidivist offender statute. (Tr. p. 965; pp. 966-967).

After considering the issue and reviewing the relevant statutes, the trial judge ruled Appellant's Georgia false imprisonment conviction could be used to enhance Appellant's sentence because the prior offense would be classified as the "most serious" offense of kidnapping in South Carolina. (Tr. pp. 971-972). The trial judge noted Georgia's kidnapping statute was narrower than the statute in South Carolina, with South Carolina's kidnapping statute covering a broader range of misconduct. (Tr. pp. 970-971).

Relying on the language of S.C. Code Ann. § 17-25-45, the trial determined Appellant's prior out-of-state conviction was for an offense that would be classified as a "most serious" offense under that statute. (Tr. pp. 972-973). Based on this ruling, the trial judge sentenced Appellant to an aggregate sentence of life imprisonment without the possibility of parole pursuant to the recidivist offender statute. (Tr. p. 984).

ARGUMENT

The trial judge properly sentenced Appellant to life imprisonment without the possibility of parole under S.C. Code Ann. § 17-25-45 for his assault and battery with intent to kill and first-degree burglary convictions because Appellant had a prior out-of-state conviction for an offense that would be classified as a "most serious" offense under South Carolina's recidivist offender statute.

Appellant asserts the trial judge committed reversible error by sentencing him to life imprisonment without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45. Appellant contends his prior Georgia conviction for false imprisonment should not have been used to enhance his sentence for his most recent convictions because false imprisonment in Georgia allegedly did not contain the same elements as the offense of kidnapping in South Carolina. To the contrary, the trial judge properly enhanced Appellant's sentence under the recidivist offender statute because Appellant's prior out-of-state false imprisonment conviction was the legal equivalent of the statutory offense of kidnapping in South Carolina, which is a "most serious" offense encompassing the common law offenses of false imprisonment and kidnapping. Therefore, as Appellant was previously convicted of a crime that would be classified as a "most serious" offense in South Carolina, the trial judge was required to sentence Appellant to life imprisonment without the possibility of parole for his first-degree burglary and assault and battery with intent to kill convictions. Appellant's convictions and sentence should be affirmed.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs where the trial court's conclusions lack evidentiary support or are

controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

Generally, the trial judge has broad discretion in imposing a sentence within the statutory limits. State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974). "A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008). Appellate courts typically only interfere in a trial judge's discretionary sentencing decision in rare and unusual circumstances. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952).

However, under S.C. Code Ann. § 17-25-45(A), a trial judge has no sentencing discretion and must sentence a defendant to a term of imprisonment of life without the possibility of parole where the defendant was convicted of a "most serious" offense and has either one or more prior convictions for a "most serious" offense or two or more prior convictions for a "serious" offense. When determining whether a defendant has a prior "most serious" conviction for sentencing enhancement purposes, a defendant's prior criminal record expressly includes "a federal or out-of-state conviction for **an offense that would be classified as a most serious offense under this section**[.]" S.C. Code Ann. § 17-25-45(A)(1)(b) (emphasis added). Therefore, if a defendant was convicted of a prior out-of-state offense that would have constituted a "most serious" offense in South Carolina, that earlier conviction can be used to enhance the defendant's sentence under our recidivist offender statute. Id. Kidnapping is classified as a "most serious" offense under the statute. S.C. Code Ann. § 17-25-45(C)(1).

Turning to the case sub judice, the trial judge properly sentenced Appellant pursuant to S.C. Code Ann. § 17-25-45 based on his prior Georgia conviction for false imprisonment because the elements of the Georgia offense equate to the "most serious" offense of kidnapping in South Carolina. In South Carolina, the offense of kidnapping can be committed in a broad variety of ways. State v. Berntsen, 295 S.C. 52, 54, 367 S.E.2d 152, 153 (1988). Pursuant to South Carolina's kidnapping statute, a person commits the crime of kidnapping by "unlawfully seiz[ing], confin[ing], inveigl[ing], decoy[ing], kidnap[ping], abduct[ing] or carry[ing] away any other person by any means whatsoever without authority of law[.]" S.C. Code Ann. § 16-3-910; see State v. Owens, 291 S.C. 116, 118, 325 S.E.2d 474, 475 (1987) ("The crime of kidnapping requires proof that the defendant: (1) unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted or carried away; (2) any other person; (3) by any means whatsoever; (4) without authority of law."). Thus, the offense may be established through proof of any one of a number of unlawful criminal acts taking a variety of forms. State v. East, 353 S.C. 634, 637, 579 S.E.2d 748, 750 (Ct. App. 2003). "Kidnapping is a continuous offense that commences when one is wrongfully deprived of freedom and continues until freedom is restored." State v. Porter, 389 S.C. 27, 39, 698 S.E.2d 237, 243 (Ct. App. 2010).

Formerly under the common law in South Carolina, the crime of false imprisonment "was the unlawful restraint or detention of another against his will, without authority of law, by actual force or reasonably apprehended force." Berntsen, 295 S.C. at 54, 367 S.E.2d at 153. However, now, the statutory offense of kidnapping in South Carolina "is broad enough to include, yet not require, proof of the elements constituting false imprisonment." Id. Therefore, following the enactment of S.C. Code Ann. § 16-3-910, the crime of false imprisonment was incorporated as merely one of the ways to

commit the statutory offense of kidnapping in South Carolina. Id. For that reason, South Carolina no longer distinguishes between the two offenses and now treats conduct that previously would have constituted the crime of false imprisonment as a kidnapping.

Conversely, Georgia distinguishes between the offenses of kidnapping and false imprisonment and treats each as a separate crime warranting disparate treatment under the law. Compare Ga. Code Ann. § 16-5-40 (1994) (outlining the offense of kidnapping) with Ga. Code Ann. § 16-5-41 (1994) (outlining the offense of false imprisonment). In Georgia, "[a] person commits the offense of false imprisonment when, in violation of the personal liberty of another, he arrests, confines, or detains such person without legal authority." Ga. Code Ann. § 16-3-41(a) (1994). "[The Georgia false imprisonment] statute on its face does not require that the imprisonment be for a specific length of time; all that is required is there be an arrest, confinement or detention of the person, without legal authority, which violates the person's personal liberty (i.e., against his or her will)." Herrin v. State, 229 Ga. App. 260, 262, 493 S.E.2d 634, 637 (Ga. Ct. App. 1997).

Likewise, in Georgia, "[a] person commits the offense of kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such other person against his will." Ga. Code Ann. § 16-5-40(a) (1994). The crime of kidnapping is complete in Georgia when the victim has been seized **and** asported to some degree. Garrett v. State, 285 Ga. App. 282, 285, 645 S.E.2d 718, 721 (Ga. Ct. App. 2007). Critically, "[t]he only difference between false imprisonment and kidnapping is that kidnapping requires asportation." Shue v. State, 251 Ga. App. 50, 51, 553 S.E.2d 348, 349 (Ga. Ct. App. 2001); see also Ellis v. State, 181 Ga. App. 630, 634, 353 S.E.2d 822, 827 (Ga. Ct. App. 1987) ("The only difference between the two offenses is asportation, since false imprisonment involves holding a person unlawfully against his

will, which is also an essential element of the offense of kidnapping. Thus, false imprisonment was an integral part of the kidnapping charge, requiring the same evidence except asportation.").

Looking to the essential elements of the false imprisonment offense Appellant pled guilty to in Georgia, Appellant was previously convicted of arresting, confining, or detaining another person without lawful authority and against that person's will. Correspondingly, the South Carolina offense of kidnapping is complete when: (1) a defendant wrongfully deprives another person of his freedom in some manner; and (2) the defendant does not have lawful authority to do so. Therefore, comparing Appellant's prior conviction to the criminal laws in this state, if Appellant had committed his prior Georgia offense in South Carolina through identical acts resulting in proof of the same elements as his false imprisonment conviction in Georgia, Appellant would have been guilty of the "most serious" offense of kidnapping under S.C. Code Ann. § 16-3-910, which similarly prohibits seizing or confining any other person by any means whatsoever without authority of law. As a result, Appellant's prior out-of-state conviction was for an offense that would be classified as a "most serious" offense in South Carolina. See, e.g., State v. Washington, 338 S.C. 392, 397-398, 526 S.E.2d 709, 711 (2000) (finding Washington was properly sentenced under the recidivist offender statute where the elements of his prior offense of common law burglary now constituted the offense of first-degree burglary, meaning his prior conviction was the legal equivalent of a "most serious" offense and would have constituted a "most serious" offense pursuant to the statute). For that reason, the trial judge was required to sentence Appellant to life imprisonment without the possibility of parole under the recidivist offender statute based on the existence of his prior conviction.

In opposition to the enhancement of his sentence, Appellant contends his Georgia false imprisonment conviction should not have been used for enhancement purposes because false imprisonment only carries a maximum possible punishment of a ten-year sentence in Georgia. However, when determining whether a defendant is subject to sentencing enhancement based on an earlier out-of-state conviction, the relevant inquiry is not how the out-of-state jurisdiction chooses to classify the out-of-state offense or what the potential punishment for that offense is in another jurisdiction. Instead, pursuant to S.C. Code Ann. § 17-25-45, the relevant inquiry is whether or not the out-of-state offense would be classified as a "most serious" offense in South Carolina. See S.C. Code Ann. § 17-25-45(A)(1)(b) (requiring a sentence of life imprisonment following conviction for a "most serious" offense if the defendant has a prior "out-of-state conviction for an offense that would be classified as a most serious offense **under this section**[.]" (emphasis added)); see, e.g., Daniels v. State, 621 So. 2d 335, 342 (Ala. Crim. App. 1992) ("In determining whether an out-of-state conviction will be used to enhance punishment pursuant to the [Habitual Felony Offender Act], the conduct upon which the foreign conviction is based must be considered and not the foreign jurisdiction's treatment of that conduct.").

Therefore, the fact the sentencing range for false imprisonment in Georgia is lower than the sentencing range for kidnapping in South Carolina has no bearing on whether or not a Georgia false imprisonment conviction can be used for sentencing enhancement purposes in South Carolina. Because the Georgia offense of false imprisonment would constitute the offense of kidnapping in South Carolina, Appellant's prior Georgia conviction for false imprisonment would be classified as the "most serious" offense of kidnapping in our state. Thus, the trial judge was required to enhance

Appellant's sentence pursuant to the recidivist offender statute based on Appellant's prior Georgia conviction.

Additionally, Appellant maintains the fact the South Carolina statute contains an exception for kidnappings involving parents while the Georgia false imprisonment statute does not means the Georgia offense cannot be used for sentencing enhancement purposes. Because of this exception, Appellant alleges a defendant potentially may be guilty of false imprisonment in Georgia and not guilty of kidnapping in South Carolina. Initially, although Georgia's false imprisonment and kidnapping statutes do not contain any explicit exceptions regarding parental kidnappings, a parent in Georgia could not be guilty of either offense in relation to their child so long as they had not lost their parental rights because they would not be acting without legal authority towards their child, which is a required element of each offense. See Adams v. State, 218 Ga. 130, 131, 126 S.E.2d 624, 625 (Ga. 1962) ("As between the mother and father, where parental control has not been lost, and in the absence of a decree of court awarding custody, the general rule is that a parent does not commit the crime of kidnapping by taking exclusive control of the child."); see also Hunt v. Hunt, 94 Ga. 257, ___, 21 S.E. 515, 515 (Ga. 1894) ("King Hunt being the father of these children, and it not being alleged or otherwise appearing that he had ever parted with his paternal right to their custody, the [kidnapping] warrant was a mere nullity[.]"). Thus, the parental exception in South Carolina's kidnapping statute would not preclude the use of a prior Georgia conviction for false imprisonment to enhance a recidivist offender's sentence in South Carolina because the Georgia offense would be the legal equivalent of a kidnapping conviction in South Carolina.

Furthermore, even if a parent could be guilty of falsely imprisoning or kidnapping their child in Georgia and not in South Carolina, this particular exception has no

relevance to or bearing on Appellant's case. Looking to the circumstances of Appellant's prior Georgia convictions derived from the certified copies of those out-of-state convictions, Appellant did not plead guilty to falsely imprisoning his child.[2] Instead, by pleading guilty to false imprisonment as a lesser-included offense of his Georgia indictment for kidnapping with bodily injury, Appellant admitted all the material allegations and facts alleged in the indictment, including that he held a restaurant employee against his will without lawful authority and forced him into a cooler during the commission of a robbery. See State v. Allen, 261 S.C. 448, 451, 200 S.E.2d 684, 686 (1973) ("A plea of guilty is an admission or a confession of guilt, and is as conclusive as the verdict of a jury; **it admits all matter of fact averments of the accusation.**" (emphasis added)); Shelnut v. State, 247 S.C. 41, 45-46, 145 S.E.2d 420, 422 (1965) ("By their voluntary submission to a verdict of guilty, the defendants **admitted all material allegations of the indictment, including those relating to the situs of the crime**, thus waiving a trial and the presentation of evidence. These admissions are as conclusive upon them as the verdict of a jury would be." (emphasis added)); see also Neslein v. State, 288 Ga. App. 234, 236, 653 S.E.2d 825, 827 (Ga. Ct. App. 2007) (" 'A plea of guilty admits the facts set forth in an accusation or indictment.' " (citations omitted)); see, e.g., Kemp v. Simpson, 278 Ga. 439, 439, 603 S.E.2d 267, 268 (Ga. 2004) ("Here, the indictment alleged Simpson was the victim's uncle and that he had sexual intercourse with her. When Simpson pled guilty, he admitted these facts[.]").

Based on Appellant's admission of guilt during his Georgia guilty plea, it is clear Appellant's false imprisonment conviction was for an offense that would have constituted

[2] Appellant contends the State did not provide any information regarding his prior offenses in Georgia. (App. Br. p. 8). However, the State introduced certified copies of Appellant's Georgia convictions, which included the indictments containing the material allegations of those offenses along with the sentencing sheets. (St. Ex. # 19).

a kidnapping in South Carolina because Appellant pled guilty to wrongfully depriving another of his freedom and that person was unquestionably not his child. Therefore, regardless of whether a parental exception applies only to South Carolina kidnappings and not to Georgia false imprisonments or kidnappings, Appellant's earlier out-of-state conviction nonetheless would have been classified as the "most serious" offense of kidnapping in South Carolina. Thus, the trial judge properly used Appellant's prior conviction to enhance his sentence.

Additionally, to the extent Appellant is contending our courts cannot look beyond the elements of an out-of-state offense to determine whether a prior conviction would have been classified as a "most serious" offense in South Carolina, this interpretation would lead to absurd results. Due to the diversity of criminal statutes in differing jurisdictions all over the country, it would be virtually impossible to use an out-of-state conviction for sentencing enhancement purposes if the sole factor the sentencing judge could consider was the elements of the offense because few statutes in one jurisdiction identically mirror those from another. For this reason, the sentencing judge must logically be permitted to instead look to any and all available information to determine whether the out-of-state conviction was for an offense that would be classified as a "most serious" offense under S.C. Code Ann. § 17-25-45 in order to ensure a criminal defendant is appropriately sentenced. See Hicks, 377 S.C. at 325, 659 S.E.2d at 500 ("A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and **must be permitted to consider any and all information that reasonably might bear on the proper sentence** for the particular defendant, given the crime committed." (emphasis added)). Otherwise, if the only factor that could be considered was the elements of the out-of-state offense, a defendant with an out-of-state

conviction in Georgia for the most heinous of kidnappings clearly not involving a parent or child could not be sentenced in South Carolina as a recidivist offender merely because of the existence of an exception in the South Carolina statute not explicitly codified in the Georgia statute. This absurd result, which was clearly not intended by our legislature and which would be in direct conflict with the underlying purpose behind the sentencing enhancement requirements of S.C. Code Ann. § 17-25-45, should not and cannot be allowed.

Furthermore and notably, our courts historically have looked to evidence beyond just the elements of the earlier offense to determine whether a prior conviction would qualify as a "most serious" offense under the recidivist offender statute. See State v. Lindsey, 355 S.C. 15, 19-20, 583 S.E.2d 740, 742 (2003) ("Here, there is no evidence in the record concerning Lindsey's 1976 rape conviction. The only indication concerning that conviction is a form indictment, which gives no details of the facts or circumstances concerning the rape. . . . [W]e find Lindsey's 1976 rape conviction, **absent evidence it involved aggravated force or coercion**, insufficient to warrant application of the recidivist statute." (emphasis added)); State v. Phillips, Op. No. 4833 (S.C. Ct. App. filed May 25, 2011) (Shearouse Adv. Sh. No. 17 at 73-74) (looking to the indictment from the prior conviction to determine whether the prior conviction would have constituted a "serious" offense for sentencing enhancement purposes and finding in Phillips' case that the State failed to meets its burden of showing the prior conviction was for a "serious" offense because the earlier indictment did not provide enough information for the reviewing court to determine whether the burned building would have satisfied a required element of a degree of arson constituting a "serious" offense). Additionally, this approach is followed in numerous other jurisdictions with similar recidivist offender

statutes, including in Georgia. See Nelson v. State, 277 Ga. App. 92, 100-101, 625 S.E.2d 465, 473 (Ga. Ct. App. 2005) ("Nelson argues that conduct that would constitute a burglary in the third degree under New York law may not qualify as the felony of burglary under Georgia law. While Nelson's argument is correct in the abstract, it is not true with regard to the 1995 New York conviction at issue here. The certified indictment introduced by the State shows the one of the burglary counts to which Nelson pled guilty was predicated on his unauthorized entry into a private residence where he stole currency, food stamps, and tokens. This conduct clearly would be a felony in Georgia – burglary with the intent to commit theft. As such, the trial court was authorized to rely on the prior 1995 New York conviction in sentencing Nelson." (citations omitted)); see, e.g., People v. Miles, 43 Cal. 4th 1074, 1082, 183 P.3d 1236, 1241 (Cal. 2008) ("Where, as here, the mere fact of conviction under a particular statute does not prove the offense was a serious felony, otherwise admissible evidence from the entire record may be examined to resolve this issue. . . . Such evidence may, and often does, include certified documents from the record of the prior proceeding and commitment to prison." (citations omitted)); State v. Sublett, 156 Wash. App. 160, 287, 231 P.3d 231, 245-246 (Wash. Ct. App. 2010) ("If the elements of the Washington crime and the foreign crime are not substantially similar, the trial court may 'look at the defendant's conduct, as evidenced by the indictment or information, to determined if the conduct itself would have violated a comparable Washington statute.' " (citations omitted)). Thus, it is appropriate to consider the information contained in Appellant's Georgia indictments to determine whether his out-of-state conviction was for an offense that would have been classified as a "most serious" offense in South Carolina, and an application of that analysis to Appellant's case establishes Appellant's prior conviction would have been so classified.

In Appellant's case, Appellant had a prior out-of-state conviction for false imprisonment after entering a guilty plea to that offense in Georgia. In South Carolina, the crime of false imprisonment has been incorporated and subsumed by the statutory offense of kidnapping, which is classified as a "most serious" offense. Therefore, Appellant's prior false imprisonment conviction was for an out-of-state offense that would be classified as a "most serious" offense in South Carolina. As a result, the trial judge was required to sentence Appellant to life imprisonment without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45 following his "most serious" convictions in this case. The trial judge did not err in sentencing Appellant under the recidivist offender statute, and there was no basis to ignore his prior conviction for sentencing enhancement purposes. Appellant's convictions and sentence should be affirmed.

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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ATTORNEYS FOR RESPONDENT

July 5, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Thomas W. Cooper, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

LUCIUS SIMUEL, JR.,

Appellant.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent proposes the following matter to be included in the Record on Appeal:

(1) Trial Transcript, Pages 41-42, 455-456, 948, and 957-984;

(2) Indictments;

(3) Sentencing Sheets;

(4) State's Exhibit # 19 (Certified Copy of Appellant's Prior Out-of-State Conviction); and

(5) State's Exhibit # 20 (Certified Copy of Appellant's Prior Out-of-State Conviction).

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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PROOF OF SERVICE

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

Elizabeth A. Franklin-Best, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 5th day of July, 2011.

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Lucius Simuel, Appellant.

Appellate Case No. 2009-147528

Appeal From Beaufort County
Thomas W. Cooper, Jr., Circuit Court Judge

Memorandum Opinion No. 2012-MO-031
Heard May 23, 2012 – Filed July 25, 2012

AFFIRMED

Appellate Defender Dayne C. Phillips, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Mark Reynolds Farthing, all of Columbia, and Solicitor Isaac McDuffie Stone III, of Bluffton, for Respondent.

PER CURIAM: Because the Georgia crime of false imprisonment would be categorized as the "most serious" offense of kidnapping under South Carolina law, we affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: S.C. Code Ann. § 17-25-45(A)(1)(b) (Supp. 2011) (providing enhancement is appropriate where a defendant is convicted of a most serious offense and has either one or more prior convictions for an out-of-state offense that "would be classified as a most serious offense" under this section 17-25-45(C)(1)); Ga. Code Ann. § 16-5-41(A) (West 2011) ("A person commits the offense of false imprisonment when, in violation of the personal liberty of another, he arrests, confines, or detains such person without legal authority."); S.C. Code Ann. § 16-3-910 (Supp. 2011) ("Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law . . . is guilty of a felony . . . ."); *State v. Washington*, 338 S.C. 392, 397–98, 526 S.E.2d 709, 711 (2000) ("Since Defendant had pled guilty to common law burglary in 1982, the trial court properly ruled that this prior conviction would constitute a 'most serious' offense because it contained the same legal elements as burglary, first degree that section 17-25-45(C)(1) declares a 'most serious' offense."); *State v. Phillips*, 393 S.C. 407, 414–15, 712 S.E.2d 457, 461 (Ct. App. 2011) (citation omitted) (When a prior conviction is for an offense not contemplated by section 17-25-45, the trial court should examine the elements of the offense and determine whether they are equivalent to any current offense classified as "serious" or "most serious."); *Hinton v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 357 S.C. 327, 339, 592 S.E.2d 335, 342 (Ct. App. 2004) (noting under the "same-elements" test, when comparing the elements of the offenses, a court "looks to whether the particular actions taken by the defendant which satisfy the elements of the crime in the other state would satisfy the elements of one of the enumerated crimes").

AFFIRMED.

PLEICONES, ACTING CHIEF JUSTICE, BEATTY, KITTREDGE and HEARN, JJ., and Acting Justice James E. Moore, concur.