STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Richland County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ZINAH DAMARIS JENNINGS,

APPELLANT

APPELLATE CASE NO. 2012-212947

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether a vague and duplicitous indictment which hid multiple offenses in one count to subvert Rule 404 and State v. Lyle violated appellant's rights to due process, notice, and a unanimous jury verdict under the Fifth, Sixth, and Fourteenth Amendments and the South Carolina Constitution?

2.

Whether appellant's right against self-incrimination under the Fifth and Fourteenth Amendments was violated when the trial judge refused to instruct the jury that appellant was under no obligation to tell the location of her child?

STATEMENT OF THE CASE

On May 9, 2012, a Richland County grand jury indicted appellant for unlawful conduct towards a child. On May 31, 2012, appellant filed a motion to quash the indictment. R.1624. A pre-trial hearing was held before the Honorable G. Thomas Cooper, Jr. on June 7, 2012, at which he took the motion under advisement and ordered further briefing. R. 1595. On June 11, 2012, the State filed a response to appellant's motion to quash the indictment. R.1642. On June 14, 2012, appellant filed a reply to the State's response. R.1647. On July 3, 2012, Judge Cooper issued an order denying the defendant's motion to quash the indictment. R.1652.

On July 19, 2012, the State obtained a new indictment, changing only the dates of the conduct. The Honorable R. Knox McMahon held pre-trial hearings on July 30, 2012, August 8, 2012, and August 15, 2012. R. 1. On August 27-September 7, 2012, appellant was tried before Judge McMahon and a jury. R. 1. K. Luck Campbell represented the State. R. 1. Also representing the State were Dolly Justice Garfield and Meghan L. Walker. R. 1. Hemphill P. Pride and Lesli B. Darwin represented appellant. R. 1. The jury convicted appellant. R. 1582, ll. 9 – 16. Judge McMahon sentenced appellant to ten years' imprisonment. Supp. R. 30, ll. 15 – 22. On September 13, 2012, appellant timely served and filed a Notice of Appeal. This appeal follows.

STATEMENT OF FACTS

Introduction

After being reported missing by her mother in early December 2011, Zinah Damaris Jennings ("Zinah") showed up at her first cousin's house on Christmas Eve wearing a paper hospital gown. R. 841, ll. 9 – 11; R. 833, ll. 11 – 12; R. 1313, ll. 6 – 9. She did not have her eighteen-month old child with her. R. 843, ll. 11 – 17. Subsequently, Zinah was arrested and refused to tell police the location of her child, but maintained that he was safe. (State's Exhibit 16). She was then prosecuted for abandoning her child. The child has not been found.

Zinah's Family Background

Zinah grew up in Columbia and graduated from Dreher High School. R. 1295, ll. 3 – 7. She was a good student and was involved in multiple extracurricular activities. R. 1295, ll. 3 – 18. She was in the youth gospel choir. R. 1295, ll. 14 – 18. She was a Girl Scout. R. 1296, ll. 4 – 5. Her mother, Jocelyn Jennings ("Jocelyn") worked for Richland County and her father was a professor at University of South Carolina. R. 99, ll. 21 – 24. Her father died just before her fourth birthday. R. 1294, ll. 12 – 13.

After high school, Zinah attended Winthrop University. R. 1297, ll. 19 – 25. After her freshman year, Zinah moved back to Jocelyn's home in Columbia and enrolled at Midlands Tech. R. 1301, ll. 15 – 19. After a stressful summer living with her mother, Zinah moved out of the house and got her own apartment. R. 1301, ll. 16 – 24.

Zinah began a relationship with Roderick Mitchell ("Mitchell"). R. 1302, ll. 9 – 14. Mitchell was married, but separated. R. 495, ll. 22 – 25. Mitchell and Zinah lived together.

R. 497, ll. 4 – 9. Zinah became pregnant by Mitchell and their baby ("Adam")[1] was born in June 2010. R. 455, ll. 23 – 24; R. 506, ll. 13 – 23. The day after Adam was born, Zinah moved out of Mitchell's apartment. R. 497, ll. 7 – 13.

According to her family and to Mitchell's family, Zinah was a good, albeit possessive, mother to Adam. R. 1319, ll. 7 – 12; R. 741, ll. 19 – 20; R. 765, ll. 7 – 18; R. 515, ll. 6 – 8. Zinah later moved back to her mother's house. R. 1307, l. 19 – 1308, l. 7. She acted possessively of Adam around her mother and went out of her way to keep Jocelyn from interfering in her parenting. R. 1306, l. 16 – 1307, l. 4. Jocelyn and Zinah's relationship grew strained and Zinah "didn't feel comfortable there." R. 1308, ll. 1 – 7.

Zinah's Mental Health Deteriorates

In September 2011, Zinah moved to Atlanta to stay with her older sister, Denise Jennings ("Denise"). R. 753, ll. 6 – 23. Denise was thirty-five years older than Zinah. R. 752, ll. 23 – 24. Adam was approximately eighteen months old when he and Zinah moved to Atlanta. R. 753, l. 24 – 754, l. 1. Denise described her sister as originally "a very doting mother." R. 765, ll. 7 – 18. Zinah had been "[f]un loving, happy… very normal." R. 790, ll. 9 – 15. But during the fall of 2011, Denise saw a change in Zinah. R. 765, ll. 7 – 18. Denise testified: "[Zinah] wasn't attentive. You couldn't communicate with her. She just kind of looked right through you, didn't answer questions." R. 790, ll. 3 – 5. The change in Zinah's behavior disturbed Denise. R. 789, ll. 12 – 16. She became so concerned that she took Zinah to the emergency room. R. 791, ll. 5 – 12. After a cursory examination, the emergency room released Zinah and gave her a referral. R. 792, ll. 18 – 23.

[1] "Adam" is not the child's real name.

Denise and Jocelyn discussed Zinah's mental health problems and Jocelyn came to Atlanta. R. 793, l. 14 – 794, l. 11. Denise worried about leaving Zinah alone in her house, especially over the holidays. R. 794, ll. 1 – 11. In November 2011, Denise and Jocelyn concocted a plan that Jocelyn would take Adam back to Columbia "until we could figure out what was going on with Zinah." R. 794, ll. 1 – 19.

Unknown to Jocelyn and Denise, Zinah learned of their plan. R. 1311, l. 22 – 1312, l. 1. Zinah packed her car before Jocelyn arrived in Atlanta. R. 1312, ll. 14 – 15. Over dinner, Jocelyn tried to convince Zinah to let her take Adam to Columbia. R. 1312, ll. 9 – 19. Zinah said, "No thanks," took Adam out of Jocelyn's arms, and left. R. 1312, ll. 14 – 19.

On November 29, 2011, Zinah went to her bank in Columbia because her credit card was not working. R. 606, ll. 7 – 607, l. 1. Adam was with her. R. 607, l. 19 – 608, l. 5. The teller described Adam as "very happy, very playful." R. 607, l. 22 – 608, l. 5. The child wandered around the bank playing and one of the tellers told Zinah that her son had started to walk out of the bank's door. R. 609, l. 24 – 610, l. 9. Zinah retrieved her son. R. 610, ll. 3 – 5. The State repeatedly and vehemently argued that this was the last time Adam was seen "alive." R. 1485, ll. 8 – 11.

Marcus Johnson ("Johnson") testified for the State. R. 641, ll. 7 – 652, l. 5. He claimed that on November 30, 2011, Zinah, whom he did not previously know, approached him at a gas station in Augusta. R. 631, l. 22 – 633, l. 14. Johnson called her "Red." R. 631, l. 22 – 633, l. 14. Johnson said that Red got his attention by pulling on the back of his hair. R. 631, ll. 14 – 25. They exchanged phone numbers. R. 632, ll. 7 – 9. Johnson claimed Red wanted to get together with him later but told him she first had to take her

brother to school. R. 633, l. 17 – 636, l. 15. He claimed that he did not see any children or a car seat in Red's car. R. 636, ll. 1 – 7. The entire encounter at the gas station lasted approximately two or three minutes. R. 634, ll. 19 – 22. He claimed that a few days later, after a few phone calls and text messages, Red came over to his apartment and they had sex. R. 637, ll. 22 – 24. Judge McMahon granted defense counsel's request to prevent Johnson from testifying that Zinah was "wearing tight-fitting clothes" and that "he thought she was crazy." R. 650, ll. 9 – 14.

In early December 2011, Zinah showed up unexpectedly at her cousin Nina Simpson's ("Simpson") home in Columbia. R. 856, l. 20 – 858, l. 13. When Simpson arrived, her daughters had already let Zinah into the apartment. R. 858, ll. 14 – 20. Zinah had never shown up without calling in advance. R. 858, ll. 21 – 24. Simpson walked into a bedroom and saw Zinah "sitting on the floor up against the wall. She had her knees up to her chest and had her arms around her knees." R. 859, ll. 10 – 13. Adam was not with her. R. 860, ll. 8 – 10. Zinah told Simpson that Adam was in Augusta, Georgia. R. 860, ll. 8 – 12. Simpson called Jocelyn's husband. R. 860, ll. 15 – 19. Zinah immediately got back into her car and left. R. 860, l. 20 – 861, l. 7.

Two Missing Persons

Jocelyn knew the Columbia Chief of Police, Randall Scott ("Scott"), on a personal basis. R. 316, ll. 14 – 24. In early December, Jocelyn met with Chief Scott concerning Zinah and Adam. R. 316, l. 25 – 317, l. 10. She reported Zinah and Adam missing. R. 317, l. 21 – 318, l. 1. Chief Scott assigned the missing person's case to investigator Colin Bailey ("Bailey"). R. 1037, l. 15 – 1038, l. 7. Investigator Bailey spoke with Jocelyn by telephone

on December 8, 2011. R. 1038, l. 19 – 1039, l. 1. After their conversation, the police entered Zinah into the NCIC database as a missing person. R. 1040, ll. 5 – 22.

Laura Beaver ("Beaver"), a former City of Columbia police officer who left in good standing, testified during the defense case. R. 1346, l. 16 – 1347, l. 16. She owned a consignment store in Lexington. R. 1349, ll. 4 – 7. Zinah and Adam came to Beaver's store on either December 22 or 23, 2011. R. 1349, ll. 13 – 14. Zinah was shopping for a gift for Adam's great aunt. R. 1349, ll. 15 – 18. Beaver described Adam as a normal child and "a wonderful baby." R. 1350, ll. 2 – 16. After the police made a public appeal for help locating Adam, Beaver called the police in January 2012 and reported her sighting of Zinah and Adam. R. 1353, ll. 10 – 12. Solicitor Campbell argued to the jury that the former police officer's testimony was not credible because "some people just want the publicity." R. 1539, ll. 7 – 12.

On Christmas Eve, Officer Christon Miller ("Miller") was dispatched to the scene of a one-car accident at the intersection of Washington and Millwood Streets in Columbia. R. 347, ll. 12 – 22. Zinah was still sitting on the driver's side when Officer Miller arrived. R. 347, ll. 16 – 348, l. 10. The car was so severely damaged that it was a total loss. R. 1158, ll. 12 – 13. Officer Miller asked her who she was but she did not answer. R. 347, l. 23 – 348, l. 10. Zinah gave him her driver's license. R. 348, ll. 2 – 6. An ambulance arrived at the scene and took Zinah to the emergency room. R. 348, ll. 11 – 18. She arrived at the hospital at approximately 4:00 AM. R. 330, l. 21 – 331, l. 3.

When Officer Miller checked the NCIC database, he discovered that Zinah was a missing person. R. 349, ll. 15 – 23. He contacted Investigator Bailey. R. 349, ll. 24 – 25. Investigator Bailey told Officer Miller to immediately go to the hospital and ask Zinah the

whereabouts of Adam. R. 350, ll. 1 – 5. Officer Miller found Zinah in the trauma bay of Richland Memorial Hospital. R. 350, ll. 9 – 15. He asked Zinah "where her child was." R. 350, ll. 16 – 18. Officer Miller claimed that Zinah replied she did not have a child. R. 350, ll. 19 – 20. Officer Miller again asked her where her child was located. R. 350, ll. 21 – 22. Zinah allegedly responded with an address of Ridge Crest Lane.[2] R. 350, l. 25 – 351, l. 2. Officer Miller was not sure whether this address was in Columbia. R. 351, ll. 3 – 5. Officer Miller claimed on direct-examination that Zinah refused to answer any further questions, but on cross-examination admitted that he did not know what other questions he tried to ask. R. 351, ll. 3 – 5; R. 357, ll. 21 – 23.

One of the nurses who attended Zinah in the hospital described her as "traumatized." R. 337, ll. 14 – 18. Zinah began hyperventilating. R. 339, l. 24 – 340, l. 3. In an attempt to calm her down, the nurse asked her several questions, one of which was whether or not she had children. R. 340, l. 4 – 341, l. 3. According to the nurse, Zinah answered "No." R. 341, ll. 4 – 6. After removing Zinah's clothes, the nurse noticed Zinah's C-section scar. R. 341, ll. 7 – 10. After noticing the C-section scar, the nurses asked her again whether or not she had any children and Zinah replied that she "had a girl." R. 342, ll. 5 – 14.

Shondala Harris ("Harris") is Zinah's first cousin and considers Zinah "a big sister." R. 833, ll. 11 – 14. On Christmas Eve, Zinah showed up unexpectedly at her house in Columbia. R. 841, ll. 1 – 8. She was wearing "hospital paper clothing." R. 841, ll. 9 – 11. Zinah's lip was cut and swollen and she had a black eye. R. 846, ll. 13 – 16; R. 847, ll. 8 – 9. She had a concussion. R. 1158, ll. 9 – 11. Zinah told Harris about her automobile accident and that she "was tired, and she wanted to sleep." R. 841, ll. 12 – 15; R. 846, ll. 9 –

[2] Denise lived on this street in Atlanta. R. 751, ll. 9 – 16.

12. Zinah spent that night and the next day with Harris. R. 841, ll. 12 – 22. Harris testified that when she asked where Adam was, Zinah told her "that he was with Denise in Atlanta." R. 843, ll. 19 – 23.

Harris also testified that she had seen Zinah approximately two weeks before Christmas and that Zinah stayed with her "off and on" during that time period. R. 838, l. 20 – 839, l. 5. Adam was not with her. R. 839, ll. 4 – 5. Harris testified that, during this time period, Zinah said Adam was with his father's girlfriend. R. 839, ll. 8 – 15. Harris claimed that Zinah told her that being a mother was hard and that she was not "mother material." R. 839, l. 16 – 840, l. 1. Harris also claimed that Zinah said that "she wasn't going to be stuck in a house with [Adam] on Saturday." R. 840, ll. 12 – 25.

Harris testified that she noticed a change in Zinah's behavior after Adam was born. R. 850, ll. 2 – 5. She claimed that Zinah was not "as reserved as she usually is." R. 850, ll. 6 – 10. Despite the change in her behavior, Harris testified that Zinah never did anything that was not in Adam's best interest and was always protective of his safety. R. 851, ll. 7 – 14.

The Police Question Zinah Regarding Adam

By December 27, Zinah was back at Jocelyn's house. R. 1047, l. 25 – 1048, l. 20. Jocelyn emailed Investigator Bailey that Zinah was at her house without Adam. R. 1047, l. 25 – 1048, l. 9. He went to Jocelyn's house to interview Zinah, but Zinah had left by the time he arrived. R. 1048, ll. 10 – 20. Later that day, Jocelyn texted Investigator Bailey that Zinah had returned. R. 1048, l. 21 – 1049, l. 6. Investigator Bailey interviewed Zinah at approximately 6:30 PM that evening at Jocelyn's house. R. 1050, l. 4 – 1051, l. 18. Investigator Bailey claimed that Zinah was not in custody and did not testify whether he

gave her warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). Investigator Bailey handwrote a "Q and A" statement. R. 1070, l. 18 – 1072, ll. 6; R.1783, State's Exhibit 78. Investigator Bailey wrote: "Q. Where is [Adam]?" R. 1783. Zinah wrote: "[Adam] is with his father Ernest Robinson. I dropped him off on December 6, 2011. He is safe and happy." R. 1783. Zinah signed the statement. R. 1783.

Investigator Bailey made an attempt to find Ernest Robinson. R. 1051, l. 4 – 1053, l. 21. He was unable to find an Ernest Robinson that fit the description in South Carolina. R. 1051, l. 4 – 1053, l. 21. Zinah then told Investigator Bailey that Robinson was from New Jersey. R. 1053, ll. 2 – 10. Zinah also gave him information about an apartment complex on Garner's Ferry Road. R. 1054, ll. 7 – 22. Investigator Bailey determined that some Robinsons lived at the complex. R. 1054, ll. 10 – 22. The police attempted to make contact with this Robinson family, "but we were just unable to make contact with them." R. 1054, l. 23 – 1055, l. 5. The police obtained a warrant for Zinah's arrest on December 29 and Zinah turned herself in at the police station in Columbia that evening. R. 1062, ll. 7 – 9. R. 1064, ll. 7 – 17. Investigator Bailey later testified that Zinah "did not give us any concrete information regarding the whereabouts of her son Adam Jennings." R. 1066, ll. 4 – 12.

She was extensively interrogated by the police during the early morning hours of December 30. R. 385, ll. 8 – 16. (State's Ex. 16). The police repeatedly and forcefully demanded that Zinah tell them Adam's location. (State's Ex. 16). Zinah refused. R. 1131, ll. 19 – 22. She stated that she did not trust Adam "with anybody or anybody else." R. 1153, l. 25 – 1154, l. 3. She told the police that Adam was fine. R. 1155, l. 23 – 1156, l. 2. As part of the arrest warrant affidavit, the police stated that "the defendant has willfully

withheld information that would implicate the defendant or others and the harm that has befallen Adam." R. 394, ll. 7 – 10.

After her arrest, Zinah was taken before the probate court who determined that she was mentally ill. R. 1598, ll. 3 – 5. An evaluation was done at the Bryan Center. R. 1599, ll. 1 – 3. Judge Cooper pressed defense counsel on whether Zinah was diagnosed with a particular mental illness. R. 1599, l. 6 – 1600, l. 10. Defense counsel told Judge Cooper that Zinah was diagnosed as a paranoid schizophrenic. R. 1600, ll. 3 – 4. Over defense counsel's objection, Judge Cooper ordered a competency evaluation. R. 1918, l. 5 – 1621, l. 25. During the competency hearing before trial, psychologist Kimberly Harrison opined that Zinah was competent. R. 256, ll. 12 – 17.

ARGUMENT

1.

The vague and duplicitous indictment which hid multiple offenses in one count to subvert Rule 404 and State v. Lyle violated appellant's rights to due process, notice, and a unanimous jury verdict under the Fifth, Sixth, and Fourteenth Amendments and the South Carolina Constitution.

Relevant Facts

Introduction

Everyone in the courtroom knew that Zinah was charged with abandoning her child. What only the State knew was that, by the end of the case, she was also going to be charged with abusing her child. The single indictment in this case was intentionally pled in a vague manner by the State. In addition to presenting evidence of abandonment, the State also presented evidence that Zinah abused or neglected her child. All of these acts were charged in one indictment and charged to the jury as a single crime. The duplicity of this indictment meant that Zinah had no notice of the abuse charges. It also meant that she likely did not receive a unanimous verdict. Some members of the jury may have convicted her because they thought she was guilty of abuse. Some members of the jury may have convicted her because they thought she was guilty of abandonment. It is impossible to tell what the jury's verdict means from the indictment, the evidence, and the court's charge. Defense counsel's multiple motions in response to the State's duplicitous strategy were all denied by the trial court.

The First Indictment and the Motion to Quash

On May 10, 2012, the grand jury returned the first indictment against Zinah. R. 1777. The indictment only quoted the statute for unlawful conduct toward a child and alleged a date range of November 24, 2011, through December 24, 2011. The indictment read in full as follows:

> At a Court of General Sessions, convened on May 9, 2012, the Grand Jurors of Richland County present upon their oath:
>
> **UNLAWFUL CONDUCT TOWARDS A CHILD**
>
> That ZINAH DEMARIS JENNINGS did in Richland County on or between November 24, 2011 through December 24, 2011, while having charge or custody, or being the parent or guardian, or being responsible for the welfare of the minor child [ADAM], place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety; or did unlawfully or maliciously caused or cause to be done bodily harm to the child so that the life or health of the child was endangered or was likely to be endangered; or did willfully abandon the child, in violation of Section 63-5-70, S. C. Code of Laws, 1976, as amended
>
> Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

R. 1778. As can be seen from the text of the indictment, no facts other than a date range and a place (Richland County) are pled. The arrest warrant and accompanying affidavit accused Zinah of lying to law enforcement about Adam's whereabouts. R. 1781. The warrant further stated that Zinah was "willfully withholding information" about Adam. R. 1781. It stated that Zinah "is unable or unwilling to establish that this child who is solely in her care

is alive and healthy." R. 1781. Nothing in the arrest warrant described any particular allegations of abuse against Zinah. R. 1781. The thrust of the arrest warrant is clear that Adam was missing and Zinah was accused of abandoning him. R. 1781.

Shortly after the indictment was returned, Zinah filed a motion to quash. R. 1624. The motion cited the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. R. 1624. It also cited Article One, Section Three and Article One, Section Fourteen of the South Carolina Constitution. R. 1624. The motion stated, "The indictment is vague and alleges no specific act of a criminal nature on the part of this Defendant." R. 1624. Appellant argued that since the only evidence against Zinah was that she refused to tell the police Adam's location, her due process and constitutional rights barred prosecution of her for exercising her Fifth Amendment right against self-incrimination. R. 1624.

On June 7, 2012, Judge Cooper held a hearing on the motion to quash. R. 1595. Zinah argued that the indictment "does not set forth, first of all, notice of conduct which would put the defendant on notice." R. 1600, ll. 15 – 20. Zinah further argued that she was entitled to notice that would describe "conduct demonstrated by the defendant which is a violation of the statute." R. 1600, l. 24 – 7, l. 1. Zinah argued that "to just repeat the statute is not sufficient." R. 1600, ll. 21 – 24. "[The indictment] does not describe any conduct on the part of Ms. Jennings which is a violation." R. 1601, ll. 14 – 18.

Judge Cooper examined the warrant and stated, "I can't find anything that they specifically accused of her other than lying to law enforcement." R. 1602, l. 25 – 1603, l. 2. Zinah's attorney then referenced her interrogation by police, summarizing the interrogation and the fact that Zinah refused to tell police where Adam was and that she was afraid that DSS would take the child. R. 1603, ll. 3 – 13, l. 8.

When given a chance to respond, the solicitor stated, "While I'd like to respond to many of the allegations Mr. Pride has made, I don't find it appropriate." R. 1607, ll. 20 – 23. The solicitor argued that all the State had to do was quote the statute. R. 1607, l. 20 – 14, l. 10. Judge Cooper expressed concern about the lack of specificity in the indictment and said, "You know, you have to say something besides quote the statute." R. 1608, l. 11 – 15, l. 1. The solicitor responded that the indictment stated the dates, the county, "and the individual that's missing which would be her son." R.1609. 15, ll. 2 – 6. The solicitor further stated, "The child has been abandoned. That's what the statute covers. That is the cloak." R. 1609, ll. 8 – 11.

Judge Cooper continued to press the solicitor and she responded, "The fact of the matter is the child is still missing, and she refuses to tell anyone where the child is. We are charging her with abandoning a child, and these are arguments that should be made before a jury or a directed verdict." R. 1612, ll. 2 – 6. The solicitor continued to argue that Zinah abandoned Adam. R. 1612, ll. 7 – 18. At no point during the hearing did the solicitor describe any illegal conduct by Zinah other than abandoning Adam.

The defense attorney responded, stating that the indictment failed to "describe the conduct." R. 1613, ll. 18 – 21. He further stated that "the indictment must be sufficient as to apprise the defendant of what the defendant must be prepared to meet. **What we're trying here is a** missing trial, **missing child case.**" R. 1613, ll. 18 – 25 (emphasis added). Judge Cooper did not rule and required the State to file a written reply to Zinah's motion. R. 1616, ll. 7 – 21. Judge Cooper gave appellant three days to respond to the State's submission. R. 1616, ll. 7 – 21.

The State's written response repeated the solicitor's argument at the hearing. R. 1642. It argued that the State need only quote the statute. R. 1642. When the State quoted the indictment in its written response, it **omitted** the portion of the indictment that stated "for did unlawfully or maliciously cause or cause to be done **bodily harm to the child** so that the life or health of the child was endangered or was likely to be endangered." R. 1644. Indictment (emphasis added). Nothing in the State's response alleged any illegal action by Zinah other than abandoning the child. R. 1642. Zinah's written reply again argued that some specific facts were necessary for the indictment to be sufficient and to provide sufficient notice. R. 1647.

The Superseding Indictment and Hearings Before Judge McMahon

On June 3, 2012, Judge Cooper signed an order denying the defendant's motion to quash. R. 1652. The order was not filed until a month later, on July 3, 2012. R. 1652. The defense attorney did not get a copy of Judge Cooper's order until another month later, on July 30, 2012, when he was handed a copy by the solicitor during a hearing in which he was again arguing his motion to quash. R. 78, ll. 11 – 16. Judge Cooper's order essentially agreed with the solicitor's position that an indictment need only quote the statute and provide a date range. R. 1652. Just like the solicitor's written memorandum, the order omitted the portion of the indictment regarding causing bodily harm to the child. R. 1654.

The hearing during which Mr. Pride received Judge Cooper's order was held before Judge McMahon. R. 1. Mr. Pride began his argument by telling Judge McMahon that Judge Cooper had not ruled on his motion to quash. R. 72, l. 21 – 73, l. 2.

Before this hearing, the State sought and received a superseding indictment on July 19, 2012.[3] R. 1779. This new indictment differed in no way from the original indictment but for one change which would later become very significant. R. 1779. It expanded the date range. R. 1779. The original indictment's date range was November 24, 2011, through December 24, 2011. R. 1777. The superseding indictment's date range was September 1, 2011, through December 24, 2011. R. 1779. Despite Judge Cooper's concerns at the hearing, and the complaints from the defendant regarding the lack of notice, the superseding indictment did not include any specific allegations of wrongdoing by Zinah. R. 1779.

During his opening remarks at the hearing before Judge McMahon, Mr. Pride recited the superseding indictment and stated that "the only part of this statute that really is applicable to this case would be the abandoning of the child." R. 73, l. 8 – 74, l. 10. He argued that the superseding indictment again only recited the statute and referred back to the arrest warrant. R. 74, l. 13 – 77, l. 4. Mr. Pride stated that he could not "take issue with the time span because indictments can allege a period of September 1st through December 24th. That's not inappropriate. But what is inappropriate is that they don't assign any particular or any definite—any set of facts showing what Zinah did in order to violate the statute." R. 76, ll. 9 – 15.

In response, the solicitor—for the first time—stated that the indictment might allege misconduct other than abandonment. Solicitor Garfield stated "We amended the indictment **to expand the time frame of unlawful conduct** towards the victim [Adam]. We expanded

3 The superseding indictment states it is an "Amended" indictment, but it also shows that the grand jury issued it.

that time frame because there may be evidence presented **that harm was done to the child in addition to the abandonment.**" R. 78, ll. 1 – 5 (emphasis added).

Mr. Pride reviewed Judge Cooper's order and argued again that the indictment contained no description of illegal conduct. R. 80, ll. 7 – 10. The solicitor's response was not to offer any further description of what they intended to prove, but instead, "We have provided Ms. Jennings notice of the statute in compliance with—the indictment is in compliance with the statute to provide her proper notice as to what she would be tried." R. 81, ll. 22 – 25. Citing S.C. Code § 17-19-20, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) and State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006), Judge McMahon denied Zinah's motion to quash.

The Second Motion to Quash and the Hearing Before Trial

Before trial, Zinah filed a motion to quash the superseding indictment. R. 1656. R. 265, ll. 15 – 19. Judge McMahon heard this motion after jury selection, but before the jury was sworn. R. 286, l. 11 (swearing of the jury). In the motion, the defendant complained that the date range had been expanded, but no additional facts were given. R. 1656. Zinah specifically argued that she had no notice of "any of the circumstances or the specific misconduct she must prepare to defend. R. 1656.

During argument before Judge McMahon, Mr. Pride argued that the superseding indictment was "a prosecutorial scheme is which the State seeks to bring in conduct starting in September." R. 272, ll. 22 – 23. He argued, "This whole case, Judge, is not about Zinah abusing the child. It's about a missing child. The abusing and the statute is a pure—it's a pretext on the part of the State." R. 274, ll. 10 – 16. He argued the new indictment did not provide notice and was insufficient because it only repeated the statute and did not describe Zinah's conduct. R. 275, l. 14 – 276, l. 1.

In response, Solicitor Campbell argued that at the time of the new indictment, the defendant "was also on notice as to various acts done by the defendant by the discovery that was provided to him several months ago." R. 277, ll. 20 – 25. Solicitor Campbell continued, "In fact, she did more acts that could be constituted under the time period which we have indicted her for, Your Honor. The defendant has had sufficient notice, and this is the first time we have heard anything about him not having notice." R. 278, ll. 21 – 25. She denied a scheme and said "the time period in which the acts that fall under this crime of unlawful neglect of a child would be appropriate to bring forth evidence before a jury." R.

279, l. 25 – 280, l. 3. Mr. Pride responded that giving discovery could not cure an insufficient indictment and that he had "raised notice all along." R. 280, ll. 6 – 25.

Judge McMahon essentially repeated his prior ruling and held the indictment was sufficient. R. 281, l. 10 – 284, l. 17. The jury was then sworn and the trial began. During her opening statement, the solicitor read the indictment and then told the jury that, "For a person to willfully abandon your child you have custody of is against the law." R. 300, ll. 23 – 25. At no point in her opening did the solicitor mention any illegal acts committed by Zinah other than abandonment.

Allegations Other than Abandonment During the Trial

The State called forty-one (41) witnesses during its case-in-chief. R. 9 – 15. It introduced eighty-one (81) exhibits. R. 17 – 20. Its seventh witness was a police officer who pulled Zinah over in November for running a red light. R. 472, l. 14 – 473, l. 3. Adam was in the car. R. 473, ll. 4 – 10. The State elicited from the officer that Adam was not in a car seat. R. 473, l. 4 – 475, l. 23. Adam was in good health, clean, and happy. R. 477, ll. 12 – 19.

The State's fourteenth witness was Christian Dickerson ("Dickerson"). Dickerson grew up with Zinah. R. 557, ll. 17 – 23. The solicitor asked Dickerson about a time Zinah brought Adam to her house. R. 560, ll. 1 – 25. Zinah told Adam, "Go play." R. 561, ll. 1 – 7. The solicitor asked the following:

> Q. When you said she sent him to play, describe that, please.
>
> A. She sat him on the floor and she kicked him and told him, Go play. He didn't move initially. She kicked him again and told him to go play.
>
> Q. How old was he?

A. He was over one but I don't know the exact month age.

Q. And he sat in the floor, was kicked in the back, and told to go play?

A. Yes.

Q. When were y'all together? When did this happen? About what time of year?

A. This happened around September 2011.

R. 561, ll. 3 – 16.

At this point, Zinah objected and the jury was excused. R. 561, ll. 17 – 25. Mr. Pride told the trial court, "I think that before unindicted bad conduct comes in on the part of Zinah Jennings, the foundation must be laid. The foundation has to be laid that the acts occurred within the time span of the indictment." R. 562, l. 24 – 563, l. 3. He stated that the solicitor must establish that the conduct fell within the parameters an indictment but then admitted that the State "can go to the bad acts." R. 563, ll. 9 – 14. Mr. Pride then referenced Rule 404(b) SCRE, but said that the bad acts must be shown "within the framework on the indictment." R. 564, ll. 2 – 17. The solicitor referenced the date range of the indictment and stated that the testimony concerning kicking Adam in the back "would be included in the indictment." R. 593, ll. 18 – 21. R. 583, ll. 9 – 10.

The jury returned and Dickerson's testimony resumed. Dickerson claimed that Zinah "brutally" kicked Adam, but after further cross-examination stated that Adam did not cry and "just made a squinting noise." R. 593, ll. 18 – 21. R. 583, ll. 9 – 10.

The State's next witness, a bank teller, testified that she saw Adam run out of the front door and they had to tell Zinah to get him. R. 605, ll. 4 – 11. She also testified that Adam frequently was not in a car seat and she saw Zinah drinking in the car. R. 606, ll. 1 –

4. Another bank teller was called to testify that Adam was frequently not in a car seat. R. 619, l. 619 – 620, l. 6.

Adrienne Alston ("Alston") testified that Zinah dropped by her house and left Adam asleep in the car while she came to the door. R. 675, l. 9 – 676, l. 12. After this witness, Mr. Pride objected to the relevance of Alston's testimony. R. 681, l. 10 – 682, l. 2. He asked, "What value in this case does it have that Zinah brought a baby by the house that was asleep in the car? I mean, what is the inference? That a good mother wouldn't leave her baby out sleeping in the car? So that makes her a bad mother?" R. 681, ll. 14 – 20. Judge McMahon responded:

> A jury could determine that leaving a 17-month-old child in the car, even asleep unattended, could be some evidence of placing the child at unreasonable risk of harming affecting the child's life, physical, or mental health or safety. I mean, obviously I don't know what the jury will do with that information. I'm not the fact finder.

R. 682, ll. 16 – 22. Mr. Pride responded, "When Ms. Garfield opened to the jury, she opened on abandonment. That's the only thing she opened on." R. 682, ll. 23 – 25. The judge then found that the evidence was that Adam was left in the car asleep and ruled, "I'm not going to strike that." R. 686, ll. 13 – 18.

The State then called Alston's boyfriend to testify that he went to the car to check on Adam. R. 690, ll. 15 – 23. He said it was "kind of hot, like warm" even though it was in November. R. 691, ll. 2 – 4. R. 692, ll. 21 – 22. He said the windows were rolled up and Adam was asleep. R. 691, ll. 3 – 24. On cross-examination, the boyfriend said Zinah was only in the house "about two or three minutes." R. 693, ll. 8 – 12.

The State's next witness was Jessica Thomas ("Thomas") who lived in Gonzales Gardens. R. 696, l. 1 – 697, l. 4. The solicitor asked her if she had ever observed Zinah "to

do anything neglectful." R. 698, ll. 2 – 4. Thomas testified that a "few times" Adam was hungry and she saw "a little mark on his forehead." R. 698, ll. 5 – 11. The solicitor asked, "Did you ever observe Ms. Jennings hit Adam?" R. 698, l. 18. Thomas responded with a story that Zinah had once squeezed Adam's hand because he would not say "momma" and the child screamed. R. 698, l. 19 – 699, l. 3. Thomas also testified she saw Adam wearing inappropriate clothing. R. 717, ll. 18 – 22.

The State's twenty-fourth witness, a friend of Zinah's, was asked whether she ever saw Zinah "do anything to harm" Adam and she replied "No." R. 823, ll. 17 – 19. She then testified that she saw Zinah in December with friends at which point Mr. Pride objected on relevancy grounds. R. 824, ll. 15 – 25. Mr. Pride renewed his objection after the witness's direct testimony and the State called her husband. R. 826, ll. 22 – 25. When questioned about the relevancy by Judge McMahon, the solicitor explained that the forthcoming testimony "would go to at the very least **to the abandonment prong** of the indictment." R. 827, ll. 8 – 12 (emphasis added).

<u>The Defense Motions</u>

After the State rested, Zinah moved for a directed verdict. R. 1219, ll. 4 – 1225, l. 4. After stating the grounds for his directed verdict motion, Mr. Pride moved, in the alternative, to require the State "to elect." R. 1225, ll. 10 – 14. He argued that during opening statements, the solicitor told the jury that Zinah "was being charged with abandonment." R. 1225, ll. 15 – 20. He stated:

> And now I would submit to you that the case is looking weak for the State, they shoot a shotgun full of pellets. They spray a mist here. I will hit over here. So now they are under the statute, under not only Section 63-5-70(3), but they want 63-5-70(a)—not (a) but (1) and (2). . . . I would submit all of these allegations that the State would point to as harm to Adam from

Zinah or affecting the child's welfare, all of those instances are remote in time, Judge. They are remote as it relates to the indictment in this case.

R. 1225, l. 21 – 1226, l. 10. He further argued:

> Number three, require the State **to elect** under the statute. **The problem in this case has been notice all along. I have complained about that all along, lack of notice.**
>
> The State is all over the place in terms of what they are prosecuting. Their answer is going to come back and say, Well, we were prosecuting unlawful conduct towards a child under Section 63-5-70.
>
> Yes, you may be and that's true, **but under what part of that section?** If you go by the opening argument made by Ms. Garfield, the argument and the charges were purely abandonment.

R. 1230, l. 19 – 1231, l. 5 (emphasis added).

In response, Solicitor Campbell argued that the statute had "three prongs," quoted the statute, and said "That is on the face of the indictment." R. 1231. l. 13 – 20. She stated "the indictment is sufficient to allow us to proceed under the three separate prongs." R. 1232, ll. 2 – 3. In an amazing display of chutzpah, Solicitor Campbell said, "We **restrained** ourselves to acts that occurred, as far as the bad acts, within the time period of the indictment, which I believe reflects September 1st through the end of December." R. 1232, ll. 4 – 9 (emphasis added). She then recited the evidence of Adam not being restrained in a car seat, Zinah kicking Adam in the back, and Zinah squeezing his hand. R. 1232, ll. 10 – 23.

When Mr. Pride responded, he said:

> Judge, you questioned me when I raised the fact that this was a prosecutorial scheme, the way they went back and got that second indictment. They didn't have enough. So what they had to do, they had to widen the avenue from the original indictment and go all the way back from September through

> December, **so that they could pick up this unindicted conduct from various witnesses.**

R. 1235, l. 21 – 1236, l. 13 (emphasis added).

After ruling that sufficient evidence existed to pass directed verdict on willful abandonment, the trial judge alternatively ruled concerning "the other prong of placing the child at unreasonable risk of harm." R. 1238, l. 22 – 1239, l. 6. Judge McMahon credited the evidence that Zinah kicked Adam, did not have Adam "properly restrained" in a car seat, left him in a car asleep, and squeezed his hand. R. 1240, l. 22 – 1241, l. 14. Judge McMahon said, "Those go to the other prongs of 63-5-70." R. 1241, ll. 13 – 14. Finally Judge McMahon ruled, "I would not require the State to elect." R. 1244, ll. 2 – 5.

Zinah renewed her motion regarding the defective indictment after the close of all the evidence. R. 1436, l. 20 – 1437, l. 3. Mr. Pride again discussed the "prosecutorial scheme" and unindicted conduct. R. 1436, l. 20 – 1437, l. 3. He handed the court a written motion asking Judge McMahon to require the state to specify all criminal acts constituting a violation of section 63-5-70. R. 1441, ll. 2 – 17. R. 1659. Solicitor Campbell replied that the State was "in compliance with all the rules of evidence as far as the indictment and everything else." R. 1441, ll. 18 – 22. Judge McMahon noted that the defendant cited the Fifth Amendment, denied the motion, and did not require the State to specify its evidence. R. 1442, ll. 5 – 20.

During her closing argument, the State urged the jury to convict based on the abuse allegations. Solicitor Campbell referenced Adam not being "properly restrained" in a car seat. R. 1517, ll. 11 – 15. R. 1519, ll. 18 – 22. She told the jury that Zinah was not "properly watching" Adam in the bank. R. 1519, ll. 23 – 25. She referred to evidence that Adam was in a car unattended with the windows rolled up as "another small cog." R. 1521,

ll. 9 – 14. She stressed that Zinah kicked Adam in the back "two times" and she "did it to hurt him." R. 1525, ll. 19 – 22. Solicitor Campbell also referred to Adam not being "dressed properly" and Zinah squeezing Adam's hand. R. 1526, ll. 3 – 17.

The jury requested a copy of S.C. Code section 63-5-70 during deliberations. R. 1580, ll. 3 – 6. They also requested a definition of the term "abandonment." R. 1580, ll. 18 – 24. The court complied with the jury's requests. R. 1580, ll. 3 – 12. Following the verdict, Zinah renewed all previous motions and moved for a mistrial. R. 1587, ll. 16 – 23. Judge McMahon denied the motions. R. 1588, ll. 12 – 15.

Discussion

Duplicity

The trial court erred in allowing the State to present multiple offenses to the jury under one indictment. "Duplicity is an ill-favored quality in both life and the law. . . ." State v. Samuels, 403 S.C. 551, 553, 743 S.E.2d 773, 774 (2013). "While commonly understood to be synonymous with deceitfulness and double-dealing, when used in the law, duplicity means the charging of the same offense in more than one count of an indictment." Id. "Duplicitous indictments implicate a defendant's rights to notice of the charge against him, to a unanimous verdict, to appropriate sentencing and to protection against double jeopardy in a subsequent prosecution." Id. at 556, 743 S.E.2d at 776 (internal quotations omitted). "For example, such indictments present the risk that a jury divided on the two separate offenses in one count could nevertheless convict through a general verdict on the one count." Id. "[D]uplicitous indictments are generally considered defective and may be dismissed on that ground." Id. "[A] defendant will prevail on appeal when he establishes

both that an indictment was duplicitous and that he was prejudiced by the duplicity." Id. at 557, 743 S.E.2d at 776.

In Samuels, the indictment alleged the defendant assaulted two women using "and/or" between their names. Id. at 555, 743 S.E.2d at 775-76 (alleging an assault against "Patricia Speaks and/or Carla Daniels"). The women were the defendant's paramours. Id. at 553, 743 S.E.2d at 775. Together they confronted the defendant with his multiple romantic attachments and began calling other women he had simultaneously wooed. Id. The defendant did not respond well. Id. He held a gun to one woman's head and knocked the other one down before he fled. Id. at 553-54, 743 S.E.2d at 775.

The Court easily reached the conclusion that for "offenses against the person, a separate offense exists for each person subjected to the criminal conduct." Id. at 557, 743 S.E.2d at 777. For this reason, the indictment was duplicitous. Id. "By including both victims in one count, the indictment charged two offenses in one count and was defective for duplicity." Id.

The indictment in this case is only marginally harder to diagnose as duplicitous. If just the language of the indictment itself is analyzed, it alleges three offenses: (1) placing the child at unreasonable risk of harm; (2) causing bodily harm to the child; and (3) abandonment. R. 1779. If the State's proof at trial is analyzed, twelve offenses were presented to the jury. During closing arguments, the solicitors presented the following as Zinah's crimes:

1. Abandonment. R. 1471, ll. 12 – 15. R. 1474, l. 19 – 1475, l. 4. R. 1478, l. 1 – 9. R. 1484, l. 21 – 1485, l. 16. R. 1487, ll. 18 – 19. R. 1488, ll. 19 – 25. R. 1511, ll.

9 – 15. R. 1513, ll. 4 – 5. R. 1516, ll. 19 – 25. R. 1522, l. 19 – 1523, l. 2. R. 1531, ll. 12 – 15.

2. Kicking Adam in the back. R. 1471, ll. 7 – 11. 1477, ll. 2 – 7. R. 1487, ll. 13 – 17. R. 1525, ll. 19 – 22. R. 1536, l. 21.
3. Not restraining Adam in a car seat at the bank. R. 1472, ll. 16 – 24. R. 1477, ll. 8 – 10. R. 1481, ll. 11 – 13. R. 1519, l. 18 – 1520, l. 3.
4. Not watching Adam at the bank. R. 1519, l. 23 – 1520, l. 3.
5. Not restraining Adam in a car seat on Two Notch Road. R. 1517, ll. 11 – 15. R. 1536, ll. 19 – 20.
6. Drinking while Adam was in the car at the bank. R. 1472, l. 17 – 1473, l. 21. R. 1477, ll. 8 – 10. R. 1519, ll. 18 – 22. R. 1536, ll. 16 – 20.
7. Squeezing Adam's hand and making him cry. R. 1477, ll. 10 – 13. R. 1487, ll. 13 – 17. R. 1526, ll. 12 – 17. R. 1536, l. 21.
8. Leaving Adam in a car "on a hot November day with the windows rolled up." R. 1486, ll. 7 – 12. R. 1521, ll. 9 – 14. R. 1536, ll. 20 – 21.
9. Not providing adequate food and shelter. R. 1480, ll. 3 – 11. R1481. 1663, ll. 11 – 18. R. 1526, ll. 3 – 7. R. 1536, ll. 22 – 23.
10. Mental injury to Adam from "being dropped off with some stranger, never seeing your mom again." R. 1481, ll. 1 – 5.
11. Letting Adam stay outside "wandering the streets." R. 1481, ll. 11 – 18. R. 1528, ll. 19 – 23. R. 1536, ll. 22 – 23.
12. Inferring that Zinah injured Adam because spots of his blood were found on a baby blanket. R. 1482, ll. 2 – 8. R. 1536, ll. 1 – 4. R. 1536, l. 23.

Each of these allegations constitutes a separate offense that, if the State wanted to try Zinah for them, should have been charged in separate indictments.

A child sex case illustrates the fact that these are separate offenses and the danger of duplicity. State v. Fonseca, 383 S.C. 640, 681 S.E.2d 1 (Ct. App. 2009) *adopted as the Supreme Court's opinion in* State v. Fonseca, 393 S.C. 229, 711 S.E.2d 906 (2011). In Fonseca, the "original indictment charged one count of a lewd act against a minor, but alleged two distinct incidents: one occurring in 2001 and another in 2003." Id. at 643, 681 S.E.2d at 2. The trial court ordered the indictment amended and the "State elected to proceed only on the 2003 lewd act." Id. Unlike Fonseca, Judge McMahon denied Zinah's motions to require the State to elect and specify the criminal acts. R. 1244, ll. 2 – 5. R. 1442, ll. 17 – 20.

But Fonseca is important for another reason. It conclusively shows the two sex allegations were not part of an ongoing abuse. After the State elected to proceed on the 2003 charge, it used the 2001 charge as a prior bad act. Id. at 647, 681 S.E.2d at 4. This Court held that the 2001 charge was not admissible under Rule 404 and was not part of a common scheme or plan. Id. at 649-50, 681 S.E.2d at 5. Fonseca's logical separation of the two sex abuse allegations applies to the separate allegations of abuse by the State in this case. It shows that the multiple allegations of abuse were separate offenses.

A recent Kentucky case presents a similar legal scenario. Johnson v. Commonwealth, 405 S.W.3d 439 (Ky. 2013). The defendant in Johnson faced charges for murder and "first-degree criminal abuse" arising from the death of her two-year-old son. Id. at 441. The child died from blunt force trauma to the abdomen. Id. at 442. The

autopsy also revealed three distinct leg fractures that occurred at different times. Id. at 443.

The Kentucky Supreme Court reviewed the defendant's unpreserved duplicity challenge under its "palpable error" standard and reversed. Id. at 448. The defendant challenged her abuse conviction because the jury could have rendered a nonunanimous verdict concerning the three leg fractures. Id. The court found a unanimity error because the jury's verdict "could have covered either of the fractures that were caused by abuse, since the time frame listed in the instruction included both of them." Id. at 449. The court stated that it did not matter that the error was not apparent from the jury instructions because it arose from the proof. Id. "Regardless of how it happens—either when the instruction explicitly includes multiple criminal offenses **or the proof demonstrates them**—when a jury instruction and resulting verdict cover multiple criminal acts, the same principles apply." Id. (emphasis added).

Johnson's logic, which is the same as Samuels, shows the application of the duplicity rule to child abuse cases. The error in this case is worse than Johnson. At least in Johnson, the prosecution split a distinct crime (the murder) from the abuse. Here, the State lumped the unquestionably distinct crime (abandonment) with other distinct crimes (the eleven abuse allegations). If the defendant in Johnson could not be convicted of child abuse because the jury was presented with three different leg fractures, then Zinah could not be lawfully convicted when the jury rendered a general verdict on abandonment and eleven other distinct abuse allegations.

In an Ohio case, the supreme court found two acts of child abuse were separate offenses even though they occurred almost simultaneously. State v. Cooper, 819 N.E.2d

657 (Ohio 2004). Ohio has a statute that protects defendants from being convicted of multiple crimes based on the same factual conduct. Id. at 660 (citing R.C. 2941.25). The defendant in Cooper shook his stepson and slammed his head against a hard surface, causing the eighteen-month old's death. Id. at 662. He was convicted of involuntary manslaughter and child endangering. Id. at 659. Even though the acts took place at almost the same time and resulted in the child's death, the Ohio Supreme Court ruled that they were separate acts and both convictions would stand. Id. at 662. Even moreso than Cooper, the multiple allegations of abuse and neglect against Zinah were spaced out over four months and therefore should be treated separately.

The State will likely argue that child abuse and neglect is a continuing offense and therefore the indictment, despite its duplicitous language and the proof at trial, only alleges one crime. That argument may be persuasive in another case with different facts, but as shown by Fonseca, Johnson, and Cooper, it cannot succeed in this case. Even if all of the allegations concerning abuse and neglect (numbered 2 - 12 above) could be lumped into one crime, these allegations would still remain distinct from the abandonment allegation. Some jurors could have found that Zinah committed any one of acts 2 – 12 but not abandonment. Other jurors could have found that Zinah abandoned Adam, but acts 2 – 12 were petty attempts to smear Zinah's character and did not rise to the level of abuse. The danger of duplicity is that even though the jurors were not unanimous on what crime Zinah committed, they could still have rendered a guilty verdict in this case.

Samuels expressly adopted the federal standard dealing with duplicity errors. Samuels at 557, 743 S.E.2d at 776. The remedies for fixing duplicity errors in Samuels and the federal cases further demonstrate the need to reverse this conviction. See, e.g.,

United States v. Sturdivant, 244 F.3d 71, 75-79 (2nd Cir. 2001). In Samuels, the defendant suffered no prejudice because the court used a special verdict form requiring the jury to make a separate finding as to each of the women who were assaulted. Samuels at 557-58, 743 S.E.2d at 777. Sturdivant notes the federal remedy of requiring "the government elect to proceed based upon only one of the distinct crimes included within a duplicitous count." Sturdivant at 79, *citing* United States v. Aguilar, 756 F.2d 1418, 1422-24 (9th Cir. 1985); Thomas v. United States, 418 F.2d 567, 568 (5th Cir. 1969).

Here, appellant asked for precisely this remedy: Requiring the State to elect. Defense counsel moved for the court to "require the State to elect under the statute." R. 1230, l. 19 – 1231, l. 5. This motion was denied after the solicitor argued the statute had "three prongs." R. 1231, ll. 13 – 20. Judge McMahon ruled, "I would not require the State to elect." R. 1244, ll. 2 – 5.

Defense counsel also handed the court a written motion asking Judge McMahon to require the state to specify all criminal acts constituting a violation of section 63-5-70. R. 1441, ll. 2 – 17. R. 1659. The State argued the indictment was sufficient. R. 1441, ll. 18 – 22. Judge McMahon did not require the State to specify its evidence. R. 1442, ll. 17 – 20. Following the verdict, defense counsel renewed all previous motions and moved for a mistrial, which was denied. R. 1587, l. 16 – 1588, l. 15. The trial court had the opportunity to correct the duplicitous indictment by requiring the State to elect, but refused to do so.

Notice, Avoiding Rule 404, and Trial by Ambush

As recognized by Samuels and the federal cases, duplicitous indictments not only defeat the right to a unanimous jury verdict, they also implicate constitutional due process concerns regarding notice. U.S. Const. amends V, VI, XIV. S.C. Const. art. I, §§ 3, 14. As shown by the Johnson court's concern over an indictment which became duplicitous because of the proof at trial, duplicitous indictments which do not provide any specific factual allegations raise serious notice problems and the prospect that a defendant will be ambushed at trial.

The Supreme Court removed the jurisdictional aspect of South Carolina indictments in State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Gentry ruled that an "indictment is a notice document." Id. at 102, 610 S.E.2d at 500. Indictments must state the offense 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. . . ." Id. Defendants must challenge the sufficiency of the indictment before the jury is sworn. Id. Here, the defendant filed two motions to quash the two indictments before the jury was sworn, so this rule from Gentry poses no obstacle to reversal in this case.

Gentry also states that "whether the indictment could be more definite or certain is irrelevant." Id. at 103, 610 S.E.2d at 500. This sweepingly broad statement would, at first glance, seem to eradicate all objections to lack of notice because an indictment failed to plead any specific facts. However, since Gentry, indictments have become problematically vague. Samuels recognized this problem and held that Gentry "did not consider duplicitous indictments which allege two distinct and separate offenses in the same count." Samuels at 555, 743 S.E.2d at 776.

What should concern this Court is the State's deliberate obfuscation of what crimes they were alleging against this defendant. It is worth noting that Samuels arose from the same solicitor's office as this case. When confronted with the first motion to quash, the solicitors hid behind the language of Gentry and arrogantly maintained they did not have to provide the defendant with anything other than the language of the statute. R. 1607, l. 20 – 14, l. 10. The solicitor patronizingly stated that it was not "appropriate" to respond to the defendant's complaints about the indictment. R. 1607, ll. 20 – 23. While Judge Cooper expressed reservations about the vagueness of this indictment, he ultimately issued an order relying heavily on Gentry and denied Zinah's motion. R. 1608, l. 11 – 15, l. 1. R. 1652.

The solicitor did not mention any of the abuse allegations during this hearing or any of their post-hearing written filings, but they did soon seek another indictment expanding the time frame. R 1779. The sole reason this indictment was amended was to include the abuse allegations. The solicitor should have asked for a second, additional indictment and set forth the allegations of abuse. Instead, the solicitor chose to hide these allegations within one indictment.

Doing so deprived Zinah of notice. Using one indictment prevented the defendant from moving to sever the charges. It also deprived the defendant of the protections of Rule 404, SCRE and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Defense counsel attempted before trial to ferret out the evidence the State intended to use and protect Zinah from inadmissible Lyle evidence. He filed a motion to quash the arrest warrant in which he argued that Zinah's Fifth Amendment rights were violated. R. 1773. He filed a motion in limine requesting the State to provide notice of other bad acts pursuant to Rule 404(b).

R.1661. He also filed a motion asking the State to disclose any evidence which could be subject to a motion to suppress. R. 1664.

The State took the position that everything Zinah did from September 1st to December 24th was charged conduct and not subject to Lyle. R. 564, ll. 20 – 25. The trial court's denial of appellant's multiple motions, including finally the motion to require the State to elect, unfairly allowed what Mr. Pride referred to as a "prosecutorial scheme" to bear fruit during closing arguments. R. 272, ll. 22 – 23. R. 1436, l. 20 – 1437, l. 3. The State was able to tell the jury that they could convict Zinah based on multiple factual allegations and, predictably, she was convicted. Since Gentry, the pendulum has swung too far in the State's direction and indictments in South Carolina are woefully devoid of any facts. Every time appellant raised this issue, the State repeatedly avoided showing its hand on the abuse allegations they intended to present to the jury.

The State took full advantage of the duplicitous indictment in their final closing argument. Solicitor Campbell told the jury, "You will have – the judge will instruct you – the indictment in this case runs from the 1st of September until the end of December. **Conduct, any and all, in that time period.**" R. 1514, l. 23 – 1515, l. 1 (emphasis added). When discussing what the State had to prove, Solicitor Campbell told the jury, "Again, the judge will instruct you. **We don't have to prove all three of these things.** We just have to prove her behavior, her criminal, intentional behavior, **falls within one;** **or** that she willfully abandoned him." R. 1542, ll. 1 – 5 (emphasis added). She again told the jury, "The State does not have to prove – listen carefully to the judge – about what it means when Zinah Jennings harmed her child. We only have to prove that he was

in harm's way **or** that she put his life and safety at risk **or** that she abandoned him." R. 1544, ll. 15 – 19 (emphasis added).

In murder and armed robbery cases, where the discrete criminal allegation is obvious, the Gentry standard makes sense. But in cases like this and other cases where the State alleges a long time frame and vague conduct, requiring more specificity from the State should not be viewed as some onerous burden. It should be viewed as part of the State's duty to provide notice and fair trials to defendants accused of these kinds of crimes. The duplicitous indictment resulted in violations of the defendant's constitutional rights. This case should be reversed.

2.

Appellant's right against self-incrimination under the Fifth and Fourteenth Amendments was violated when the trial judge refused to instruct the jury that appellant was under no obligation to tell the location of her child.

From the beginning of this case, defense counsel argued that Zinah was prosecuted for exercising her Fifth Amendment rights. Appellant requested a specific charge concerning her right not to incriminate herself, but the trial court refused to give it.

Relevant Facts

The arrest warrant stated that Zinah was "willfully withholding information" about Adam. R. 1781. It stated that Zinah "is unable or unwilling to establish that this child who is solely in her care is alive and healthy." R. 1781.

Beginning with his first Motion to Quash the Indictment, defense counsel asserted Zinah's Fifth Amendment right against self-incrimination. The lengthy procedural history of the motions filed and arguments made are recounted in great detail in Argument 1. For the sake of brevity, appellant incorporates that history into this issue.

During the arguments concerning the indictments, defense counsel argued that the prosecution of Zinah for her silence was unconstitutional. At the hearing before Judge Cooper, defense counsel argued that "a person who is a suspect in a criminal offense does not have to give—cooperate with the police department, does not have to answer questions and certainly does not have to incriminate themselves and has a constitutional right not to cooperate." R. 1601, ll. 5 – 13. Defense counsel's memorandum argued Zinah was being prosecuted for exercising her Fifth Amendment rights. R. 1630- 1631. Immediately before opening statements, the defense argued "there is no statute in South Carolina that provides

or makes it mandatory that a mother cooperate with the police and tell them where her child is." R. 273, ll. 20 – 24. He further argued that to "prosecute [Zinah] based on her silence is just a horrific violation of her Fifth Amendment [rights]." R. 277, ll. 6 – 11. Defense counsel again made a Fifth Amendment argument during his directed verdict motion. R. 1220, l. 22 – 1223, l. 9.

Defense counsel submitted a proposed jury instruction regarding a defendant's right not to incriminate herself:

> The jury should be directed that there is no law in the State of South Carolina that requires the Defendant to tell the police or any criminal law enforcement authority where the Defendant's child is located. Nor is there a law in the State of South Carolina that requires a Defendant to produce the Defendant's child for any type of inspection at the demand of the police or any criminal law enforcement authority. To require the Defendant to do so in either case violates the Defendant's Fifth Amendment right against self-incrimination. Furthermore, Defendant's refusal to comply with either request cannot be used as evidence against the Defendant.

R. 1665. Appellant cited Baltimore City Department of Social Services v. Bouknight, 493 U.S. 549 (1990) for this charge. R. 1665.

Judge McMahon refused to give this charge. R. 1446, ll. 5 – 8. During argument about the charge, the trial judge said, "I have a responsibility to charge the law that I think applies to the facts of this case. I do not have a responsibility to charge what the law is not. You may argue this." R. 1446, ll. 14 – 17. Defense counsel responded, "I don't have much meat on this bone. When you take that away from me, you are cutting right into the heart of my case." R. 1446, ll. 22 – 25. He further argued that a person in custody has the right to remain silent and not incriminate herself. R. 1447, ll. 1 – 5. The judge then found that appellant's request would be "somewhat of a charge on the facts in this specific case." R. 1447, ll. 6 – 12. Judge McMahon again said that defense counsel could argue this point but

he would not charge it. R. 1447, ll. 11 – 12. Appellant responded, "If I argue it and you don't charge it, it doesn't do me any good." R. 1447, ll. 13 – 19.

After the lunch recess, the argument regarding the Fifth Amendment charge resumed. Judge McMahon stated he "reread" Bouknight and said "The charge you request is in my opinion the defendant's theory of the case. It is a comment on the facts." R. 1452, ll. 3 – 8. He again denied the request to charge. R. 1452, ll. 9 – 22. He asked whether the State objected to the charge and Solicitor Campbell said, "The solicitor vehemently objects." R. 1453, ll. 2 – 6. After the court charged the jury, appellant renewed her request for the Fifth Amendment charge and Judge McMahon denied the request. R. 1563, ll. 10 – 16.

Discussion

The Fifth Amendment to the United States Constitution provides in relevant part that, "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." Miranda v. Arizona, 384 U.S. 436, 467 (1966). "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Id. at 473-74. "Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, **the subjects discussed**, and the duration of the interrogation." Michigan v. Mosley, 423 U.S. 96, 103-04 (1975) (emphasis added).

The jury instruction sought by appellant was based on these bedrock principles of Fifth Amendment jurisprudence. Zinah refused to tell the police Adam's location. The

State pointed to no law—nor could they—trumping Zinah's Fifth Amendment right not to incriminate herself. The trial judge turned the Fifth Amendment on its head by stating he did not have to "charge what the law is not." R. 1446, ll. 14 – 17. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but **shall declare the law.**") (emphasis added). It is rudimentary that the Fifth Amendment applies to police questioning and appellant was entitled to have the jury understand this important principle.

The solicitor quoted extensively from the interrogation of Zinah during her closing. R. 1529, l. 14 – 1533, l. 4. She described the police as "desperate" to find Adam, but claimed "they did their job. They read her her rights. They made sure she signed the waiver of rights. They did not infringe upon any of her constitutional rights." R. 1529, ll. 14 – 21. She then used the multiple questions from the interrogation concerning Adam's location to infer that Zinah abandoned Adam. R. 1529, l. 22 – 1533, l. 4. The solicitor told the jury, "You heard it on the tape. . . . You listened to the actual thing." R. 1, ll. 22 – 25.

A transcript of the interrogation was admitted as a court's exhibit. R. 1666. At the beginning of the interrogation, Investigator Thomas tells Zinah that she was the "caretaker" of Adam and they had an "obligation by law" to "place eyes" on him. R. 1671, l. 19 – 7, l. 9. In response to Investigator Thomas's first battery of demands that she tell them Adam's location, Zinah responded "Um, I don't want to." R. 1672, ll. 16 – 21. She told them "I don't want to," responded "Mm-hmm," and said, "I can't tell you," several times to demands that she tell them Adam's location. R. 1673, l. 4 – 10, l. 6. R. 1677, l. 1. R. 1686, ll. 14 - 20. R. 1695, ll. 4 - 8. When they told her to "take a ride with us, and let's go see the baby," Zinah replied "I'm not going anywhere," and "No." R. 1704, ll. 6 - 11. Investigator

Thomas told Zinah, "But I have to see the child. That's it. Bailey has to see the child." R. 1697, ll. 19 - 25.

Judge McMahon gave the jury the boiler-plate instruction that a defendant has the right to remain silent and they could not draw any conclusions against her from not testifying. R. 1554, ll. 8 – 13. When discussing whether a statement was voluntary, he told the jury that Zinah had a constitutional right to remain silent and that she could stop making a statement at any time. R. 1557, ll. 1 – 14. But the trial judge did not tell the jury that she did not have to answer questions about Adam's location or that they could not use Zinah's decision not to answer those questions against her. Without this key knowledge, the jury was left to infer that Zinah had to answer the police's questions regarding Adam's whereabouts or be guilty of abandonment. Solicitor Campbell seized on the knowledge that Judge McMahon would not charge the jury on the Fifth Amendment and said, "The defense got up here and said that there is no law that says that you can't lie to the police about where your child is, **but you have to tell the police where your child is.**" R. 1541, ll. 7 – 10 (emphasis added).

This case is analogous to an improper comment on a defendant's silence. See Doyle v. Ohio, 426 U.S. 610 (1976). The State cannot, through evidence or the solicitor's argument comment on the accused's exercise of his right to remain silent. State v. Woods, 282 S.C. 18, 20, 316 S.E.2d 673, 674 (1984). Nor can the State elicit testimony that an accused declines to comment on an allegation when questioned by the police. State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 693-94 (1986). The State may not infer that certain evidence is uncontradicted and the only person who could provide a contradiction would be the defendant. State v. Sweet, 342 S.C. 342, 347-48, 536 S.E.2d 91, 93-94 (Ct.

App. 2000). In Sweet, the solicitor stated that no one knew what happened except the defendant and "those two girls" and then immediately stated that no testimony conflicted. Id. at 348, 536 S.E.2d at 94. The repeated emphasis of Zinah's refusal to disclose Adam's location combined with the evidence that no one else knew where he was is very similar to the problem that caused the reversal in Sweet. A jury charge like the one requested by appellant would be much like a curative instruction given after a Doyle violation. See State v. Myers, 301 S.C. 251, 259, 391 S.E.2d 551, 555 (1990) (noting that trial judge gave a curative instruction after solicitor committed a curative instruction after solicitor committed a Doyle violation).

Appellant repeatedly cited the United States Supreme Court decision Bouknight as authority for the requested charge. Bouknight is a complicated opinion. The reasoning in Bouknight supports appellant's argument, but, at first glance, the outcome does not. The mother in Bouknight had her child removed by Maryland social services. Bouknight, 493 U.S. at 552. The child was later returned to the mother, but only under the auspices of a court order requiring certain things of the mother. Id. Social services became again concerned for the child and petitioned the state juvenile court to require the mother to produce the child. Id. at 552-53. The mother refused. Id. at 553. The juvenile court held her in contempt. Id.

The United States Supreme Court upheld the contempt finding against a Fifth Amendment challenge. Id. at 561. The Court based its decision on very narrow reasoning. Id. at 554-61. Since the mother only had custody of the child pursuant to a court order subjecting her to social services' oversight, the Court found that the mother "submitted to the routine operation of the regulatory system and agreed to hold [the child]

in a manner consonant with the State's regulatory interests and subject to inspection by [social services]." Id. at 559. The Court cited a line of cases holding "the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purpose **unrelated to the enforcement of its criminal laws.**" Id. at 556.

In this case, Zinah was the subject of a criminal investigation. She was not subject to any court orders or DSS involvement. No regulatory exception to the Fifth Amendment applies because the State was attempting to enforce its criminal laws when it interrogated Zinah and when it prosecuted her. Bouknight makes this distinction very clear and specifically stated that it was not addressing the Fifth Amendment's application to a criminal case involving the same facts. "We are not called upon to define the precise limitations that may exist upon the State's ability to use the testimonial aspects of Bouknight's act of production in subsequent criminal proceedings." Id. at 561. "But we note that imposition of such limitations is not foreclosed." Id. "In a broad range of contexts, the Fifth Amendment limits prosecutors' ability to use testimony that has been compelled." Id. at 562. The Bouknight Court quoted Adams v. Maryland, 347 U.S. 179, 181 (1954): "'[A] witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute.'" Bouknight at 562. The reasoning of Bouknight that the Fifth Amendment would apply in a criminal context supports the giving of appellant's requested charge.

A case from the Court of Appeals of New York shows the primacy of Bouknight's reasoning over its result. People v. Havrish, 866 N.E.2d 1009 (N.Y. 2007).

In Havrish, the defendant was ordered to turn in his firearms as part of a civil order of protection. Id. at 1011. One of his firearms was unlicensed. Id. at 1011-12. When he complied with the order of protection and turned in the unlicensed firearm, he was prosecuted for its criminal possession. Id. The court rejected the rote application of Bouknight's result upholding the contempt and instead focused on the criminal aspect of the case and the Fifth Amendment's basic application. Id. at n.3. It held that under the Fifth Amendment, "evidence is deemed testimonial when it reveals defendant's subjective knowledge or thought processes—when it expresses the contents of defendant's mind." Id. at 1014. The court found that requiring the defendant to produce the unlicensed firearm compelled testimonial evidence and suppressed it under the Fifth Amendment. Id. at 1015-16.

The jury should have heard that the Fifth Amendment was broader in scope than merely requiring police to read Zinah her Miranda rights. The jury should have heard that the Fifth Amendment allows a defendant to refuse to answer any question posed by police and no law existed requiring Zinah to forego the Fifth Amendment's protections because the police were asking the location of a child. The trial court's failure to give such a charge prejudiced Zinah because the jury could have convicted her for refusing to tell the police Adam's location. The solicitor, by telling the jury that "you have to tell the police where your child is," compounded this prejudice. R. 1541, ll. 7 – 10.

Far from a charge on the facts, such a charge is basic Fifth Amendment law. The facts of this case warranted the charge. Appellant's requested charge was required because a trial court has a duty to craft its charge based on the facts of the case. See State v. Fuller, 297 S.C. 440, 444-45, 377 S.E.2d 328, 331 (1989) (holding that trial court had a duty to

craft self-defense instruction to the facts of the case). Without such a charge, the jury could have convicted Zinah because they believed that the law required her to speak when the Fifth Amendment allowed her to remain silent. For these reasons, this Court should find that the failure to give the Fifth Amendment charge was error, reverse, and remand for a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand the case for a new trial.

Respectfully submitted,

David Alexander
Appellate Defender

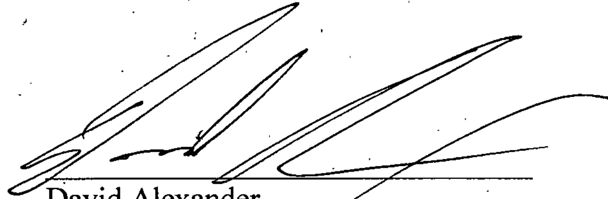
ATTORNEY FOR APPELLANT

This 18th day of December, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 18th, 2014



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Richland County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

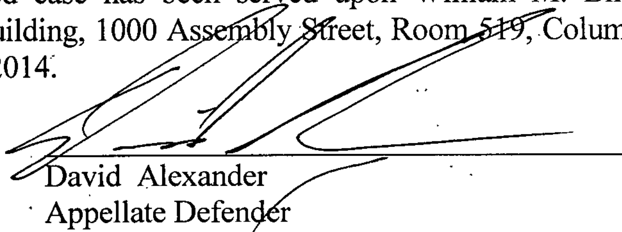
V.

ZINAH DAMARIS JENNINGS,

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 William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of December 2014.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of December, 2014.

_______________________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.