STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions
Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2018-000825

THE STATE, ...RESPONDENT,

v.

MATTHEW JAMIE BRYANT, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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I. The trial judge properly denied Appellant's motion for a directed verdict because of the direct evidence of Appellant's guilt of first-degree CSC.

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STATEMENT OF THE CASE

On July 29, 2016, the Pickens County Grand Jury indicted Appellant on the charge of criminal sexual conduct (CSC) in the first-degree. On April 17–19, 2018, Appellant proceeded to a jury trial before the Honorable Letitia H. Verdin. Daniel E. Hunt, Esquire, represented Appellant; Assistant Solicitor Megan Owen, Esquire, represented the State. The jury found Appellant guilty of second-degree CSC and the trial judge sentenced him to fifteen years' incarceration.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Victim testified she, her then-boyfriend Billy Reynolds, and their several-month-old son (Son) moved in with Dirk Van Holland, Reynold's coworker, a few months prior to her sexual assault. At that time, she was unaware that another individual, Appellant, had previously lived in the home and still retained a key to it, which he would use on occasion to retrieve his remaining possessions in the home. Victim stayed at home with Son while Reynolds and Holland went to work each day. The first time she encountered Appellant, she heard him entering the home so she grabbed Son and hid in a room until he left. When she informed Van Holland about the event, he informed her of Appellant's situation. (Tr.p.88, line 23–Tr.p.93, line 24).

On April 4, 2016, Appellant stopped by the home while Victim and Van Holland were there. Appellant asked Victim her age, and after she refused to respond he grabbed her buttocks. The following day, Victim was at home with Son when Appellant stopped by the home. Victim was preparing a bottle for Son when Appellant approached her from behind, grabbed her arm, pulled her into Van Holland's bedroom, and sat her down on the bed. He attempted to shove his penis into her moth, but she clenched her jaw shut. Victim refused Appellant's advanced, stating such things as: "No"; "What are you doing?"; "My son is in the other room"; and "Let me go get my son." Appellant stripped naked, then, using "an open palm on [Victim's] shoulder to keep [her] laying on the bed," he took Victim's shorts off her and began vaginal intercourse with her. After realizing Appellant was not acknowledging her verbal refusal, Victim stopped talking. (Tr.p.93, line 25–Tr.p.99, line 4).

After he completed the assault, Appellant went to the bathroom while Victim grabbed her son. Before he left, Appellant claimed he would return in twenty minutes. As soon as he exited the building, Victim called 9-1-1. Officers arrived and took a statement from Victim. They also

took her to the hospital for medical treatment and to gather evidence of the crime. (Tr.p.99, line 5–Tr.p.105, line 25).

On cross-examination, Victim admitted that in her statement to police, she claimed Appellant grabbed her by the arm and "led" her to the bedroom. She also noted that in her statement, she explained: (1) she was "thrown" onto Van Holland's bed, (2) she kept trying to get up and off the bed, but Appellant stopped her. (Tr.p.110, line 16–Tr.p.119, line 9).

After obtaining a search warrant, officers found a paystub belonging to Appellant, which included his full name. Officers went over to Appellant's then-residence and questioned him about the events of that day. Appellant claimed he had not been to Victim's home that day and had not seen her since the night prior, when he dropped Van Holland off at home. Van Holland told officers had visited the home the night before, and confirmed Appellant had touched Victim's buttocks on that occasion. (Tr.p.141, line 23–Tr.p.156, line 6; Tr.p.197, line 25–Tr.p.218, line 18).

Pamela Belkevitz, a sexual assault forensics coordinator, performed the sexual assault exam on Victim and collected the physical evidence of the CSC. Belkevitz found an abrasion and bruising in Victim's vaginal area, consistent with a sexual assault and the details provided by Victim as to how the assault occurred. Alicia Breland, a forensic scientist employed by SLED, analyzed the various DNA samples collected in the case and found DNA collected from Victim's sexual assault exam matched Appellant. (Tr.p.219, line 15–Tr.p.239, line 20; Tr.p.284, line 2–Tr.p.294, line 24).

During Appellant's testimony, he admitted a sexual encounter occurred between him and Victim on April 5, 2016. However, he claimed said encounter was consensual. He claimed Victim approached him on the night of April 4, 2016, stuck her hands down the front of his

pants, and said: "I want this tomorrow." When he went to the home the following day, he and Victim began kissing. She grabbed his hand and led him to the living room where they continued "making out." They soon moved to the bed and had vaginal intercourse. Afterwards, she requested Appellant pick up formula for Son. When Appellant denied the request, Victim became agitated with him. Before long, officers contacted him regarding the encounter. (Tr.p.325, line 14–Tr.p.346, line 24).

Motions

At the conclusion of the first day of the trial, the trial judge asked the State whether it planned on requesting any lesser-included charges. The State informed the trial judge it planned to request charges on both second and third degree CSC. The parties all agreed to work on researching proposed charges overnight. (Tr.p.255, line 1–Tr.p.258, line 2).

At the conclusion of the State's case, the defense moved for a directed verdict on the charged crime, claiming there was no "evidence of aggravation" in the record; trial counsel believed the lack of inflicted injuries, grabbing, physical restraints, strangulation, and verbal threats of harm. In response, the State argued the evidence, viewed in the light most favorable to its case, supported the charged crime; Victim testified Appellant grabbed her arm, led her down the hall to the bed, pushed her down when she tried to get up, tried to force his penis into her mouth, held her down, and forced his fingers and penis into her vagina. Based on this testimony, the jury could find Victim was subject to forcible confinement and/or kidnapping. After reviewing the first-degree CSC statute on the record, the State's case presently at least "some" evidence of forcible confinement, and denied the motion. (Tr.p.304, line 16–Tr.p.314, line 3).

At the close of the defense's case, trial counsel renewed its motion for a directed verdict of acquittal. The trial judge, citing the lack of the change in evidence, again denied the motion.

Trial counsel also lodged a general objection to charging first, second, and third-degree CSC, and requested the trial judge charge second and/or third-degree assault and battery. The trial judge denied the request for the assault and battery charges, noting it was uncontested that sexual contact occurred. Ultimately, the jury found Appellant guilty of second-degree CSC. (Tr.p.348, line 3–Tr.p.401, line 14).

STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

ARGUMENT

I.

The trial judge properly denied Appellant's motion for a directed verdict because of the direct evidence of Appellant's guilt of first-degree CSC.

Appellant argues the trial judge erred denying his motion for a directed verdict because the State indicted him for first-degree CSC based on evidence he used aggravated force to commit his sexual assault; forcible confinement or other methods of force specified in the first-degree CSC statute were not specified in the indictment and thus not a proper basis to deny his motion. The State disagrees with this allegation of error. Initially, the State notes this issue is not preserved for appellate review because Appellant failed to raise this argument to the trial judge. Further, even if this issue were preserved, the trial judge did not err because Appellant was indicted under the entire first-degree CSC statute, including the forcible confinement provision he now disputes. Finally, any alleged error in denying his motion is harmless because Appellant was not convicted of first-degree CSC, but a lesser-included offense which was not properly objected to at trial.

Error Preservation

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "If a party fails to

properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

Regarding the requirement that a timely objection be raised, a defendant must make a **contemporaneous** objection to a perceived error during trial in order to preserve the issue for further review. State v. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003); see State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."). Thus, when a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); see also State v. King, 349 S.C. 142, 157, n.1, 561 S.E.2d 640, 647 (Ct. App. 2002) ("[N]o objection was made contemporaneously with this testimony so as to preserve the issue for review. King's belated objection to subsequent testimony came too late.").

As an initial matter, the State notes that Appellant's argument that the indictment failed to put him on notice that the State would pursue a conviction for first-degree assault and battery under theories of both aggravated force and forcible confinement is not preserved for Appellate review. Trial counsel failed to argue such a point at trial, depriving the trial judge of the opportunity to rule on the issue and rendering it improper for review by this Court. See Rogers, 361 S.C. at 183, 603 S.E.2d at 912–13.

Analysis

In determining whether an indictment is sufficient, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances. State v. Wade, 306 S.C. 79, 83, 409 S.E.2d 780, 782 (1991); State v. Tumbleston, 376 S.C. 90, 97, 654 S.E.2d 849,

853 (Ct. App. 2007), cert. denied, November 7, 2008 (citing, inter alia, State v. Means, 367 S.C. 374, 383, 626 S.E.2d 348, 353-54 (2006)). An indictment generally passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood. Id. at 98, 654 S.E.2d at 853 (citing State v. Reddick, 348 S.C. 631, 635, 560 S.E.2d 441, 443 (Ct. App. 2002)).

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

In the instant case, Appellant's claim that the ground on which the trial judge denied the motion for a directed verdict, forcible confinement, was outside the scope of his indictment, is without merit. The indictment informed Appellant he was charged with first-degree CSC pursuant to S.C. Code Ann. Section 16-3-652. It did state that he used aggravated force to accomplish the sexual battery, but did not limit its scope to S.C. Code Ann. § 16-3-652; rather, it

cited to the entirety of the statute. Further the State, through discovery, indicated to the defense that both aggravated force and forcible confinement were alleged. It is clear the State proceeded under section 16-3-652(1)(a) and (b):

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

S.C. Code Ann. § 16-3-652(1)(a)–(b) (Supp. 2013). Under section 16-3-651(c), "aggravated force means that the actor uses physical force or physical violence of a high and aggravated nature to overcome the victim or includes the threat of the use of a deadly weapon." S.C. Code Ann. § 16-3-651(c) (Supp. 2013).

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

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

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

> Therefore, under section 16-3-652(1)(a), a sexual battery constitutes first-degree CSC only if it was accomplished through the use of force and the force constitutes aggravated force. Thus, while the "aggravation" necessary for an ABHAN conviction may not be related to the force used in the attack, but, instead, to the general circumstances surrounding the attack, section 16–3–651 clearly requires that the "aggravation" necessary for a first-degree CSC conviction be associated with the degree of force used.

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

In State v. Lindsey, the South Carolina Supreme Court found aggravated force was used. The Court explained the assailant "[confined] his victim in the automobile, Lindsey grabbed her hands, got on top of her and was holding her down with his body and hands." State v. Lindsey, 355 S.C. 15, 21, 583 S.E.2d 740, 743 (2003). The Court in Lindsey noted its case was similar to State v. Frazier, 302 S.C. 500, 397 S.E.2d 93 (1990), in which the Supreme Court upheld an assault with intent to commit criminal sexual conduct in the first degree[1] conviction on evidence the defendant grabbed victim, forced her into the woods and ripped her clothes off in an effort to commit a sexual battery.

This case is much more similar to Lindsey and Frazier than it is to Green. Victim testified Appellant grabbed her arm, pulled her into a bedroom, and threw her onto the bed. Appellant attempted to for his penis into her mouth and when she tried to get off the bed, he restrained her; Victim specifically recounted Appellant using his open palm to pin her shoulder

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

to the bed. While she was restrained, he removed her shorts and began vaginal intercourse. Further, Victim possessed injuries to her vaginal area consistent with forced intercourse. Clearly, this testimony is similar to the testimony in Lindsey and Frazier and supported the trial judge's decision to submit the case to the jury as well as supported a reasonable juror's decision Appellant committed a sexual battery using forcible confinement and/or aggravated force.

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

Harmless Error

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008).

In the instant case, even if the Court erred in denying Appellant's motion for a directed verdict on the charge of first-degree CSC, such alleged error is harmless because the jury found Appellant guilty of second-degree CSC, not first-degree CSC. Thus, even if the trial judge had directed a verdict in Appellant's favor on the first-degree charge, it would have not impacted the jury's finding of guilt on the lesser charge; reaching the lesser-included charge involved the jury

acquitting Appellant of the first-degree offense. See id., 379 S.C. at 25, 664 S.E.2d at 484. Accordingly, it would be inappropriate for this Court to grant relief on this issue.

II.

The trial judge did not err in charging second-degree criminal sexual conduct because trial counsel failed to raise a specific objection to the charge.

Appellant argues the trial judge erred in charging the jury on second-degree CSC. However, Appellant failed to lodge a specific objection to the charge at trial, rendering any appellate challenge to it improper. Further, even if this Court determines Appellant preserved this issue, the appropriate remedy would be to remand the case for sentencing on third-degree CSC, an offense supported by the evidence at trial.

Error Preservation

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004); see also State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 765–66 (1997) (stating a general objection which does not specify the particular ground on which it is based is insufficient to preserve an issue for appellate review); JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

In the instant case, Appellant failed to object to the State's request to charge the jury on second-degree and third-degree CSC on any specific grounds. Accordingly, Appellant's general, vague objection to inclusion of the lesser-included charges is not preserved for review by this Court. See Patterson, 324 S.C. at 17, 603 S.E.2d at 765–66.

Remand

Pursuant to S.C. Code Ann. Section 16-3-652, a person is guilty of first-degree criminal sexual conduct if the actor engages in sexual battery with a victim and one or more of the following are proven: (1) the assailant used aggravated force to accomplish the sexual battery; (2) the victim submitted to the sexual battery due to forcible confinement, kidnapping, trafficking in persons, robbery, or other similar offenses or acts; or (3) the assailed used a controlled substance, analogue of a controlled substance, or any intoxicating substance to accomplish the sexual battery. Under S.C. Code Ann. Section 16-3-654, third degree criminal sexual conduct, a lesser-included offenses of first-degree criminal sexual conduct, occurs when an actor engages in sexual battery with a victim and the State proves: (1) the actor used force or coercion to accomplish the sexual battery in the absence of aggravating circumstances; or (2) the actor knew or had reason to know the victim was mentally defective, mentally incapacitated, or physically helpless and aggravated force or coercion were not used to accomplish the sexual battery.

In State v. Brown, 360 U.S. 581, 602 S.E.2d 392 (2004), the Supreme Court of South Carolina found the trial court failed to direct a verdict in the defendant's favor on three counts of first-degree CSC because the State failed to present evidence that aggravated force accompanied any sexual acts specified in the indictments. The court further found a remand to the trial court for an entry of judgment and sentencing on the lesser-included offense of second-degree CSC inappropriate because that offense was not instructed to the jury. However, the court clarified such a remand for resentencing on a lesser-included offense is appropriate in cases in which: (1) the evidence adduced at trial failed to support one or more of the elements of the offense for which a defendant was convicted; (2) the jury was explicitly instructed on the lesser-included

offense, including the elements of said offense, for which remand is sought; (3) the record on appeal contains "sufficient" evidence supporting each element of the lesser-included offense; (4) the State seeks sentencing remand on appeal; (5) the defendant will not be unfairly or unduly prejudiced; and (6) the court remanding is convinced, after carefully considering the record along with the interests and concerns of both the defendant and victim of the crime, justice will be served by the remand. Id. at 597–98, 602 S.E.2d at 401.

Should this Court find preserved Appellant's objection to the charge of second-degree CSC, the appropriate remedy would be to remand for resentencing on the offense of third-degree CSC. In the instant case, the jury found Appellant was guilty of a sexual assault, a fact supported by the evidence in the record. The only issue with the jury's ruling is that second-degree CSC requires evidence of aggravated coercion, and none such evidence was presented at trial. However, the State did present evidence that Appellant used force and restrained Victim during the assault and the jury was charged on the third-degree offense. Further, a new trial on the charge would lead to the State and Appellant presenting identical cases to those at trial. Given the strength of the State's case, and the trauma of forcing Victim to relive her sexual assault yet again, the interest of justice are best served by remanding. See id. at 597–98, 602 S.E.2d at 401.

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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April 10, 2019

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
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Honorable Letitia H. Verdin, Circuit Court Judge

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THE STATE, ...RESPONDENT,

v.

MATTHEW JAMIE BRYANT, ...APPELLANT.

PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

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I further certify that all parties required by Rule to be served have been served this 10th day of April, 2019.

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ALAN WILSON
ATTORNEY GENERAL

April 10, 2019

J. Falkner Wilkes, Esquire
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Greenville, South Carolina 29601

RE: State v. Matthew Jamie Bryant – Appellate Case No. 2018-000825

Dear Mr. Wilkes:

I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

William F. Schumacher
Assistant Attorney General
Bar Number 100231

WFS/ssm
Enclosures

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