THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No.: 2018-000825

The State, ... Respondent,

v.

Matthew Jamie Bryant, ... Appellant.

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

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2. Did the court err in charging the jury with second-degree criminal sexual conduct over the objection of the defense?
3. Where the defendant was charged with one ground for conviction under a statute may the court deny a motion for directed verdict based on evidence of a second and additional statutory ground that ground was not included in the indictment?
4. Is second-degree criminal sexual conduct (S.C. Code Ann. § 16-3-543) a lesser and included offense of first-degree criminal sexual conduct (S.C. Code Ann. § 16-3-542) as a matter of law or does it depend on the particular facts of each case?
5. Can a conviction on a lesser included offense not charged in the indictment stand where the case should have ended with a directed verdict?
6. Is there sufficient evidence in record to support the conviction in this case?
7. Does error below require reversal of the Appellant's conviction?

STATEMENT OF THE CASE

Appellant Matthew Jamie Bryant was indicted by grand jury in Pickens County on July 29, 2016. The indictment alleged that the Appellant "did in Pickens County, on or about the 5th day of April, 2016, engage in a sexual battery, with [the prosecutrix] and used aggravated force to accomplish this sexual battery."

A jury trial was held April 17, 2018 through April 19, 2018, in Pickens County, the Hon. Letitia H. Verdin, presiding. After the close of the state's case the defense made a timely motion for a directed verdict arguing the lack of evidence as to aggravated force. The motion was denied. The defense renewed its motion at the close of evidence. That motion was denied and the case submitted to the jury. Over an objection by the defense the court charged the jury on second and third-degree criminal sexual conduct as lesser included offenses of first-degree criminal sexual conduct. The jury returned a verdict of guilty on second-degree criminal sexual conduct. The Appellant sentenced to fifteen years in the South Carolina Department of Corrections. A notice of appeal was timely served and filed on April 27, 2018. The Appellant is presently in state custody.

At trial the state was represented by Megan Moricle Owens, Assistant Solicitor for the Thirteenth Judicial Circuit. The Appellant was represented by Daniel E. Hunt of Easley. Subsequent to the filing of the notice of appeal J. Falkner Wilkes, of Greenville, joined Daniel E. Hunt on behalf of the Appellant. J. Benjamin Aplin, Senior Assistant Deputy Attorney General represents the Respondent on appeal.

STATEMENT OF FACTS

The Appellant was indicted for first-degree criminal sexual conduct based on the use of aggravated force. R. p. 415. The offense is alleged to have occurred in 2016 at trailer belonging to Dirk Van Holland in Easley, South Carolina. R. p. 91. Van Holland was a friend of the Appellant and Billy Reynolds, the prosecutrix's boyfriend. R. p. 199. The prosecutrix, Reynolds, and their four month old child moved in Holland's trailer a few months before the offense is alleged to have occurred. R. p. 89-91; 199. Prior to their moving in the Appellant had lived at the same trailer with Van Holland. R. p. 198-199. At the time of the alleged offense the Appellant still had furniture and belongings at the trailer. R. p. 198-201. Although staying mostly at his girlfriend's house around that time the Appellant still had a key to the trailer and would stop by occasionally to pick up some of his belongings. R. p. 198. The prosecutrix testified that she had seen the Appellant "a handful of times" but had never had any interaction with him until the day before the alleged offense when he stopped by to pick up some of his things and "grabbed her butt". R. p. 93-96. Van Holland described it to the police as being a playful thing. R. p. 154.

The prosecutrix testified that when the Appellant returned on the following day he came in the trailer, took her by the arm and led her to a bedroom where he laid her on the bed, took her pants off, and had sex with her. R. p. 97-98. While claiming to have said "no" to having sex, the prosecutrix testified that when she realized "no" wasn't going to stop him she stopped talking, just so she could get it over with. R. p. 99. The prosecutrix also testified that the Appellant had put his palm on her shoulder to keep her laying on the bed. R. p. 98. It was unclear from her testimony at what point or for how long the Appellant had his palm on her shoulder. In her statement to the police the prosecutrix didn't describe any particular aggravated force. R. p. 117-

118. Nor did she describe any threat of aggravated force, or fear of aggravated force, or the threat of the use of a deadly weapon, or any other threat of harm. R. p. 117-118. Officer Torrance Jackson testified that he was first on the scene and saw no evidence of resistance, a struggle, aggravation, or that aggravated force was used in the alleged sexual battery. R. p. 137-139. None of the photos or other evidence offered at trial showed any evidence of a struggle. R. p. 139. The prosecutrix testified only that the Appellant led her down the hall by the arm into the bedroom and that he "had an open palm on my shoulder to keep me lying on the bed. He took my shorts off of me." R. p. 98, l. 22-23. The record shows no evidence of aggravated force used to accomplish the alleged sexual battery.

ARGUMENT

1) THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR DIRECTED VERDICT.

Standard of Review

In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict. State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004). During trial, "[w]hen ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *Id.* at 593, 606 S.E.2d at 477–78 (*citing* State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002)); *see also* Rule 19(a), SCRCrP. The trial court should "grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty, as '[s]uspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Cherry, 361 S.C. at 594, 606 S.E.2d at 478 (*citations omitted*). On the other hand, "a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *Id.* (*emphasis removed*).

On appeal, "[w]hen reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the state." *Id.* (*citing* State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)); *see also* State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000) (finding that when ruling on cases in which the state has relied exclusively on circumstantial evidence, appellate courts are likewise only concerned with the existence of the evidence and not its weight). If the state has presented "any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," this

Court must affirm the trial court's decision to submit the case to the jury. Cherry, 361 S.C. at 593–94, 606 S.E.2d at 478; *cf.* Mitchell, 341 S.C. at 409, 535 S.E.2d at 127 ("The trial judge is required to 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.' ") (*emphasis removed*) (*citation omitted*).

Discussion

The Appellant was indicted for criminal sexual conduct in the first degree. Specifically, the indictment alleged *only* that the Appellant did "engage in sexual battery, with [the prosecutrix], and used aggravated force to accomplish this sexual battery." The indictment therefore alleged only the element of aggravated force under S.C. Code Ann. § 16-3-652(1)(a). Forcible confinement, kidnaping, trafficking or other elements under sub-section (b) were not charged. Nor was incapacitation or other elements under sub-section (c). The Appellant was only indicted based on the allegation that aggravated force had been used to effectuate a sexual battery under sub-section (a). After the close of the state's case the defense timely moved for a directed verdict arguing that the state had failed to offer evidence of aggravated force under sub-section (a). A review of the record shows that the defense's motion for a directed verdict should have been granted.

By statute criminal sexual conduct in the first degree is defined as:

> (1) 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.
> (c) The actor causes the victim, without the victim's consent, to become mentally

> incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance.

S.C. Code Ann. § 16-3-652.

"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).

In order to convict a defendant of first-degree criminal sexual conduct under sub-section (a) 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. *See* State v. Green, 327 S.C. 581, 586, 491 S.E.2d 263, 265 (Ct. App. 1997). Here the state failed to offer any evidence as to the use of aggravated force.

The lack of any evidence of aggravated force in the present case is evident. During the state's case Officer Torrance Jackson testified that he was first on the scene and saw no evidence that aggravated force was used in the alleged sexual battery. Jackson testified that there was no sign of a struggle. At trial the prosecutrix testified only that the Appellant led her down the hall by the arm into the bedroom and that at some point "had an open palm on my shoulder to keep me lying on the bed." In moving for a directed verdict the defense argued the lack of evidence to show the use of aggravated force. In response the solicitor argued facts that although might have been relevant under the common-law charge of ABHAN, fell short of being proof of aggravated

force necessary to prove first-degree criminal sexual conduct:

> "The presence of an aggravating circumstance necessary to sustain a prosecution for assault and battery of a high and aggravated nature (ABHAN) is insufficient to sustain a conviction for first-degree criminal sexual conduct. Lindsey, 355 S.C. at 21, 583 S.E.2d at 742; Green, 327 S.C. at 585–586, 491 S.E.2d at 264–265. Such aggravating circumstances include the infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in the sexes, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority. *E.g.* State v. Foxworth, 269 S.C. 496, 238 S.E.2d 172 (1977). "[A] sexual battery constitutes first-degree CSC under Section 16–3–652(1)(a) only if it was accomplished through the use of force **and** the force constitutes aggravated force." Lindsey, 355 S.C. *at* 21, 583 S.E.2d at 743 (2003) (*quoting* Green, *supra*) (**emphasis in original**).

State v. Brown, 360 S.C. 581, 589, 602 S.E.2d 392, 397 (2004)

Here the solicitor was unable to argue any facts sufficient to establish aggravated force. Accordingly, the court found that even if the facts constituted aggravating factors under the common law crime of ABHAN, they were still insufficient to establish aggravating force as contemplated under S.C. Code Section 1-3-652(1)(a). Yet despite clearly recognizing the lack of evidence as to aggravated force under sub-section (a) as indicted, the court nevertheless denied the motion for a directed verdict, basing its decision instead on a finding of "forcible confinement" under S.C. Code Ann. § 16-3-652(1)(b), which was not specifically charged in the indictment. R. p. 307-308. The court's sudden focus on forcible confinement clearly stemmed from the solicitor's hodgepodge argument of ABHAN factors when the solicitor stated that the prosecutrix was "confined to that room." R. p. 309, l. 13. Based on that comment the court immediately asked the solicitor: "So you're saying there is at least some evidence to support the second part of the statute under CSC first degree, the victim submitted to the sexual battery while the victim was also a victim of forcible confinement, kidnapping, robbery or a similar act?" R. p.

309, l. 17-23. To which the solicitor responded: "Yes, you Honor. I don't believe she believed she could leave that bedroom, even if she wanted to." R. p. 309, l. 24-R. p. 310, l. 1. 312-314. The Court then denied the motion for directed verdict specifically on a finding that there was "at least some evidence presented, how ever small" of forcible confinement. 313. This was error.

Although undoubtably an alternative ground for first-degree criminal sexual conduct under the statute, forcible confinement under sub-section (b) was not charged in the indictment, nor announced by the court at the beginning of the trial as a ground upon which Bryant must defend. R. p. 77; R. p. 415. As a result, a material variance existed between the particular offense charged in the indictment and the charges as presented to the jury and upon which the Appellant was convicted.

> "In South Carolina, '[i]t is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment.' " State v. Gunn, 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993) (*quoting* State v. Cody, 180 S.C. 417, 423, 186 S.E. 165, 167 (1936)). "A material variance between charge and proof entitles the defendant to a directed verdict; such a variance is not material if it is not an element of the offense." *Id.* (*citation omitted*); *see* 41 Am.Jur.2d Indictments & Informations § 252 (2005) (stating that one of the two ways an indictment can be improperly modified is through "a variance, whereby the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment").

Bailey v. State, 392 S.C. 422, 433, 709 S.E.2d 671, 677 (2011).

Here the court denied the motion for a directed verdict based on an element not charged in the indictment. In Green this Court reversed a conviction for first-degree criminal sexual conduct where the evidence failed to show aggravated force. State v. Green, 327 S.C. 581, 491 S.E.2d 263 (Ct. App. 1997). Although the Court in Green noted that there were facts in record establishing first-degree criminal sexual based on the age of the victim under S.C. Code Ann. §

16-3-655(1), it nevertheless reversed finding that Green had not been indicted under that section. Therefore, applying Green, even if there was evidence of forcible confinement, a directed verdict would still be required as the Appellant was not charged in the indictment with forcible confinement under S.C. Code Ann. § 16-3-652(1)(b). *See also* State v. King, 211 S.C. 1, 6, 43 S.E.2d 596, 598 (1947) as to a fatal variance between the indictment and proof.

Assuming arguendo that the court could somehow consider the element of forcible confinement even though it was not charged in the indictment, the court still erred in finding that the state had produced evidence of forcible confinement as contemplated in S.C. Code Ann. § 16-3-652(1)(b). And as an initial matter it is important to note that the trial court appears to have failed in applying the proper standard of proof required in deciding a motion for directed verdict. "In ruling on a directed verdict motion, the trial court is concerned with the existence of evidence, not its weight." State v. Smith, 359 S.C. 481, 490, 597 S.E.2d 888, 893 (Ct.App.2004) (*citing* Kelsey, 331 S.C. at 62, 502 S.E.2d at 69). "If the State presents any evidence which reasonably tends to prove the defendant's guilt or from which his guilt could be fairly and logically deduced, the trial court must send the case to the jury." *Id.* (*citing* State v. Jarrell, 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct.App.2002)); State v. Lewis, 403 S.C. 345, 353, 743 S.E.2d 124, 128 (Ct. App. 2013). In finding that there was evidence of forcible confinement in the present case the trial court stated: "I think, based on what I heard in the State's case and the standard being so extremely low for me to submit it to a jury, I do find that there has been some evidence – at least some evidence presented, *how ever small amount of evidence presented*, that there is a forcible confinement." R. p. 313, l. 23. The stated "how ever small amount of evidence" is clearly a lesser standard than the required "reasonably tends to prove the defendant's

guilt or from which his guilt could be fairly and logically deduced" standard. Here the trial court failed to require that the evidence reach the proper threshold before denying the defense motion for a directed verdict.

When applying the proper standard, a review of the record shows that the state failed to offer any evidence that reasonably tends to prove forcible confinement or from which forcible confinement could be fairly and logically deduced. Sub-section (b) provides in pertinent part: "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)(b). Taken in context, a plain reading of forcible confinement under sub-section (b) requires evidence that the victim of a sexual battery be forcibly confined within some certain space and that the confinement be more than the prosecutrix being unable to get up and leave during the actual sexual battery.

In State v. Lindsey the court found forcible confinement where the victim was locked in a car such that she could not escape during the sexual battery. Lindsey, 355 S.C. at 21, 583 S.E.2d at 743 (2003). Applying Lindsey, being locked in a car, room, or other enclosure would constitute a forcible confinement that is separate and distinct from the immediate act of a sexual battery. Here, there is no evidence that the prosecutrix was locked in the trailer, or the bedroom, or that the bedroom door was locked in a way that prevented her from getting out, or that the bedroom door was even closed. Other than the allegation that the Appellant at some point had his open palm on her shoulder during the sexual battery there was no evidence of a separate confinement, much less a forcible confinement. The trial court's interpretation of the statute in

this case is such that any sexual battery where the victim could not simply get up and walk during the battery automatically equates to forcible confinement, and thus would constitute first-degree criminal sexual conduct under sub-section (b). As in Green, such an interpretation would effectively turn every sexual battery into a first-degree criminal sexual conduct. Clearly this was not what was intended by the legislature.

When the term forcible confinement is read in context of the other distinct crimes and offenses enumerated under sub-section (b) it is clear that the legislature intended a forcible confinement separate from the sexual battery itself. So even if the trial court as a matter of law could somehow consider an un-indicted forcible confinement as an alternative basis for first-degree criminal sexual conduct, there was still insufficient evidence to prove a forcible confinement as contemplated under sub-section (b). The court therefore erred in denying the defense motion for directed verdict.

II. THE COURT ERRED IN CHARGING SECOND-DEGREE CRIMINAL SEXUAL CONDUCT.

Standard of Review

"'In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.' " State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (*quoting* State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct.App.2003)). "'A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.' " *Id.* (*quoting* Adkins, 353 S.C. at 318, 577 S.E.2d at 464). "A jury charge that is substantially correct and covers the law does not require

reversal." *Id.* "The trial court is required to charge only the current and correct law of South Carolina." *Id.* at 479, 697 S.E.2d at 583. "'The law to be charged must be determined from the evidence presented at trial.'" *Id.* (*quoting* State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). "'A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused.' " *Id.* (quoting State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989)).

Discussion

The Appellant was indicted under first-degree criminal sexual conduct for the use of aggravated force to effectuate a sexual battery. Over the defense's objection the court also charged the jury on aggravated coercion under second-degree criminal sexual conduct as a lesser included offense of first degree. The Appellant was subsequently convicted of second-degree criminal sexual conduct.

As charged to the jury, second-degree criminal sexual conduct added the element of aggravated coercion into the case. This was error as aggravated coercion is not an element of first-degree criminal sexual conduct. Nor was aggravated conversion charged in the indictment. "The test for determining if a crime is a lesser included offense is whether the greater of the two offenses includes all the elements of the lesser offense." State v. McFadden, 342 S.C. 629, 632, 539 S.E.2d 387, 389 (2000). If the lesser offense includes an element which is not included in the greater offense, then the lesser offense is not included in the greater offense. Hope v. State, 328 S.C. 78, 81, 492 S.E.2d 76, 78 (1997). Here the court's charge on second-degree failed the essential elements test necessary to be considered a lesser included offense of the first-degree.

In State v. Summers this Court held that the offense of criminal sexual conduct in second

and third degrees are lesser included offenses in a charge of criminal sexual conduct in first degree. State v. Summers, 276 S.C. 11, 274 S.E.2d 427 (1981). However, in State v. McFadden our supreme court reversed Summers holding that third degree criminal sexual conduct was not a lesser included offense of first degree criminal sexual conduct where the mental defect element specified in part (1)(b) was charged to the jury. State v. McFadden, 342 S.C. 629, 633, 539 S.E.2d 387, 389 (2000), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). McFadden stands for the proposition that the court can not charge any lesser included offense in a way that adds an element not included in the charge for which the defendant is indicted. McFadden's analysis is applicable here.

Under McFadden, whether second and third-degree criminal sexual conduct are lesser included offenses of first-degree criminal sexual conduct is dependent upon whether the second and third-degree offenses as charged to the jury include elements that were not included in the first-degree, especially as charged in the indictment. Here, as in McFadden and Summers, the trial court charged second-degree criminal sexual conduct in a way that added an element not included in the first-degree, nor charged in the indictment. The indictment charged first-degree criminal sexual conduct based only on the use of aggravated force. The court's charge on second-degree removed aggravated force and added the element of aggravated coercion. In pertinent part the court charged:

> "Second degree criminal sexual conduct contains all the elements of first degree criminal sexual conduct, except the circumstances of aggravation. *Instead, the State must prove beyond a reasonable doubt that the defendant used aggravated coercion to accomplish the sexual battery.*"

(*Emphasis added*). 393, l. 9-15.

> "If you find that a sexual battery did occur, you must then decide whether the State has proven beyond a reasonable doubt that the defendant used aggravated coercion to accomplish the sexual battery. Aggravated coercion means that the defendant *threatened to use force or violence of a high and aggravated nature to overcome the victim or another person*, if the victim reasonably -- reasonably -- reasonably believed the defendant had the present ability to carry out the threat. Aggravated conversion coercion may also exist if the defendant *threatened to retaliate in the future by the infliction of physical harm, kidnapping, or extortion, or under circumstances of aggravation, against the victim or any other person.*"

R. p. 393, l. 25-394,l. 12. (*emphasis added*).

As it was defined by the court in its charge, aggravated coercion would not be an element of first-degree criminal sexual conduct. As charged to the jury, second-degree criminal sexual conduct changed both the nature and amount of force, as well as the timing of that force, required for a conviction. Aggravated force under first-degree criminal sexual conduct must be near in time or contemporaneous with, and used to effectuate, the sexual battery. *See* Brown, *supra.* Second-degree criminal sexual conduct requires only aggravated coercion which includes threats to retaliate in the future by the infliction of physical harm, kidnapping, or extortion, or under circumstances of aggravation, against the victim or any other person. S.C. Code Ann. 16-3-653. The court's charge on second-degree therefore added unindicted elements as an additional basis for conviction.

> "[A] sexual battery constitutes first-degree CSC under Section 16–3–652(1)(a) only if it was accomplished through the use of force and the force constitutes aggravated force." Lindsey, 355 S.C. at 21, 583 S.E.2d at 743 (*quoting* Green, *supra*) (*emphasis in original*).
>
> In contrast, the threat of the use of force or violence of a high and aggravated nature, *either during the assault or in the future*, may constitute aggravated coercion and is sufficient to sustain a conviction of second-degree CSC under Section 16–3–653. It is true that criminal sexual conduct, regardless of which form it takes under the statutory scheme, is inherently a crime of violence. See State v. Green, 336 N.C. 142, 443 S.E.2d 14, 30 (1994) (recognizing inherently

> violent nature of rape). Nevertheless, degrees of violence exist in such crimes, as recognized in Lindsey, *supra*, and Green, 327 S.C. 581, 491 S.E.2d 263. The definitions of aggravated force and aggravated coercion, along with the different maximum penalties, reveal the Legislature intended to draw a distinction between the actual use of force or violence during an assault and the threat of force or violence during or after an assault, with the former resulting in a conviction of greater degree and a harsher maximum penalty. *See e.g.* State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (it is well established that court's primary function in interpreting a statute is to ascertain the intention of the legislature, and when the terms of statute are clear and unambiguous, court must apply them according to their literal meaning).

State v. Brown, 360 S.C. 581, 588–91, 602 S.E.2d 392, 396–98 (2004) (*emphasis added*). Thus the trial court committed reversible error by adding unindicted elements to the case for which the Appellant was subsequently convicted.

Even assuming arguendo aggravated coercion is an element of criminal sexual conduct first-degree under the facts of this case, and that it could be added even though not charged in the indictment, the court's charge on second-degree remains erroneous as the facts fail to support the charge. The proper jury charge in any case is dependent upon the facts in each case. "The trial court is required to charge only the current and correct law of South Carolina." *Id.* at 479, 697 S.E.2d at 583. "'The law to be charged must be determined from the evidence presented at trial.'" *Id.* (*quoting* State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). "'Aggravated coercion' means that the actor threatens to use force or violence of a high and aggravated nature to overcome the victim or another person, if the victim reasonably believes that the actor has the present ability to carry out the threat, or threatens to retaliate in the future by the infliction of physical harm, kidnapping or extortion, under circumstances of aggravation, against the victim or any other person." S.C. Code Ann. § 16-3-651(b). Here the prosecutrix testified that the Appellant led her down the hall by her arm and at some point he placed his open

palm on her shoulder to keep her lying on the bed. While that may be construed as "force" under third-degree criminal sexual conduct, it fails to meet the definition of aggravated coercion under S.C. Code Ann. § 16-3-651(b) and thus constitute second-degree criminal sexual under S.C. Code Ann. § 16-3-653. The jury charge and conviction as to second-degree criminal sexual conduct are therefore unsupported by the facts in this case.

A reversal of the Appellant's conviction is required. "It is a fundamental concept of criminal law that the State must prove beyond a reasonable doubt all the elements of the offense charged against the defendant. When the State fails to present sufficient proof of all the elements, a conviction must be reversed and a judgment for the defendant must be rendered under the principles of Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)." State v. Brown, 360 S.C. 581, 602 S.E.2d 392 (2004).

CONCLUSION

Based on the foregoing the Appellant's conviction and sentence should be reversed, set aside and verdict of acquittal entered.

Respectfully submitted,

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