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.

PETITION FOR REHEARING

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PETITION

The Court's opinion fails to address all of the issues raised in the Appellant's brief or to point out with specificity the evidence on which it's opinion is based. This Court's opinion further misperceived the Appellant's arguments. Wherefore the Appellant moves this Court to reconsider its opinion and grant a rehearing in this case.

1) Appellant raised the issue on appeal of whether he was entitled to a directed verdict where the state failed to prove the allegation of aggravated force as alleged in the indictment. 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). While the Court's opinion refers generally to the testimony of several witnesses, it fails to identify the specific evidence or testimony that establishes the actual use of aggravate force as alleged in the indictment and required under the statute and relevant case law as argued in Appellant's briefs on appeal. The lack of specificity in the Court's opinion prejudices the Appellant's ability in any further appeal as the Appellant can't formulate an effective argument without knowing the specific facts on which this Court's opinion relies in establishing the element of aggravated force.

2) This Court's opinion fails to directly address the issue of whether the trial court could deny the Appellant's motion for a directed verdict based on facts relating to elements under

separate subsections of the offense that were not charged in the Appellant's indictment. The indictment in the Appellant's case specifically alleged the use of aggravated force under 16-3-651(1)(a). The indictment failed to allege any other grounds to support the charge. If the facts in record fail to establish the actual use of aggravated force, then the issue is whether the trial court could rely on evidence under other subsections of the statute that were not charged in the indictment as a basis for denying the Appellant's motion for a directed verdict. The Court's opinion fails to address the issue raised in the Appellant's briefs that 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.

Although the Court's opinion refers to other subsections of 16-3-651(1), which were not

alleged in the indictment, it is unclear as to whether these other subsections are the basis of the Court's opinion. Because the Court's opinion fails to specify the specific testimony on which its opinion is based, it is impossible to tell whether the Court has affirmed based on grounds which were not charged in the indictment. To the extent that it has, that would be contrary to the Court's holding in Green.

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." From the record it appears that the trial court denied the motion for direct verdict based not on the use of aggravated force, but rather forcible confinement, which was not charged in the Appellant's indictment. The Court's opinion fails to address the issue of whether a defendant can be convicted of an offense on a ground for which he is not indicted which, under Green, would be impermissible.

3) This Court's opinion fails to address the issue that the second-degree CSC jury charge added an element that was not charged in the indictment nor an element of first-degree criminal sexual conduct. This Court opinion misperceived the Appellant's argument to rely on McFadden for the proposition that "second-degree CSC is no longer a lesser included offense of first-degree CSC." This is not the Appellant's argument. The Appellant's argument is that the holding of McFadden, along with numerous other cases, prohibit a defendant's conviction on a lesser-included charge when the lesser-included charge contains an element that was not charged in the indictment or an element of the charge for which the defendant was indicted. Here, to the extent that this Court's opinion finds that second-degree CSC based on the threat of the use of force is a lesser included offense of the Appellant's first-degree CSC as charged in the indictment, it is in error. As charged to the jury in the Appellant's case, 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 coercion charged in the Appellant's 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 trial court's jury charge on second-degree CSC failed the essential elements test necessary to be considered a lesser included offense of the first-degree.

CONCLUSION

Based on the foregoing the Appellant's moves this Court to grant a rehearing in the case and reverse the conviction and sentence and enter a verdict of acquittal.

Respectfully submitted,

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December 9, 2021.

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CERTIFICATE OF SERVICE

I certify that I served the Appellant's Petition for Rehearing on the Respondent, and others if so indicated, this 9th day of December, 2021, by delivering a copy of same as indicated below:

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