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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Supreme Court Appellate Case No. 2022- _____
Court of Appeals Appellate Case No.: 2018-000825

The State, ... Respondent,

v.

Matthew Jamie Bryant, ... Appellant.

PETITION FOR WRIT OF CERTIORARI

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PETITION

I. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A DIRECTED VERDICT.

Appellant was charged with criminal sexual conduct in the first degree under S.C. Code Section 16-3-652(a). The indictment alleged: "That MATTHEW JAMIE BRYANT did in Pickens County, on or about the 5th day of April, 2016, engage in sexual battery, with K.R.C., and used aggravated force to accomplish this sexual battery. This in violation of South Carolina Code of Laws Section 16-3-652 of the South Carolina Code of Laws (1976) as amended." At the conclusion of the State's case the defense moved for a directed verdict on the grounds that the State had failed to establish the use of aggravated force as charged in the indictment.

The record shows that the trial court denied the motion for a directed verdict based on evidence of forcible confinement under Section 16-3-652(b): "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. Although 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. It was therefore irrelevant to the directed verdict analysis.[1]

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[1]S.C. Code Secton 16-3-653(b) provides: "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."

In State v. Green the 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 conduct with a minor 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 was still required as the Bryant 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. As a result, Green being the law at the time of trial, it was error for the lower courts to rely on forcible confinement as a basis for denying the defense motion for a directed verdict.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT EVIDENCE OF FACTORS RELEVANT TO ABHAN SUPPORTS THE TRIAL COURT'S DENIAL OF THE DEFENSE MOTION FOR DIRECTED VERDICT FOR THE OFFENSE AS CHARGED UNDER 16-3-653(a).

In affirming the denial of the defense motion for a directed verdict the court of appeals relied specifically on the type of evidence this Court has expressly held irrelevant under 16-3-652(a). The opinion of the court of appeals states: "Accordingly, the trial court did not err in denying Bryant's motion for directed verdict because the evidence presented at trial - Bryant's size compared to Victim's, that he forced her into the bedroom, that he ignored her pleas to stop, and that he would not allow her to get off the bed - established Bryant used aggravated force and aggravated coercion to accomplish the sexual battery." This Court has expressly held that this exact type of evidence fails to rise to the level of "aggravated force" under 16-3-652(a):

> "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).

While the testimony offered may have established factors relevant to ABHAN, under Brown they do not equate to "aggravating force" under (a). The decision of the court of appeals is therefore in direct conflict with this Court's decision in Brown.

In order to convict a defendant of first-degree criminal sexual conduct under sub-section (a) of 16-3-652 the State must present evidence the defendant committed a sexual battery and actually used aggravated force at the time of the assault. 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). In affirming the trial court the court of appeals relies on testimony that Bryant grabbed the prosecutrix by the arm, pulled her into a bedroom, and threw her on the bed, and that he placed his hand on her shoulder while committing a sexual battery. The facts cited by the court of appeals fail to establish a *prima facia* case for criminal sexual conduct in the first degree under 16-3-652(a) as charged in the indictment.

Criminal sexual conduct in the first degree under sub-section (a) requires that "[t]he actor

uses aggravated force to accomplish sexual battery." S.C. Code Ann. § 16-3-652(a). "'Aggravated force' requires that the actor use 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). The force or violence must therefore be substantially elevated to reach the measure of "aggravated" under S.C. Code Ann. Section 16-3-652(a). 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 or physical violence* of a high and aggravated nature, or the threat of the use of a deadly weapon. The evidence must also 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* Brown and State v. Green, 327 S.C. 581, 586, 491 S.E.2d 263, 265 (Ct. App. 1997). At trial the prosecutrix testified only that the Appellant grabbed her and led her down the hall by the arm into the bedroom where at some point he "had an open palm on my shoulder to keep me lying on the bed." While the evidence shows some force, it fails to show the requisite level of force or violence necessary to constitute aggravated force. The court of appeals is therefore in error.

II. THE COURT OF APPEALS ERRED IN RELYING ON FACTS RELATING TO THE ELEMENTS OF CRIMINAL SEXUAL CONDUCT IN THE SECOND DEGREE IN ITS DIRECTED VERDICT ANALYSIS.

The court of appeals cited Criminal Sexual Conduct in the Second Degree in its directed verdict analysis on the charge of Criminal Sexual Conduct in the First Degree. As cited S.C. Code Ann. § 16-3-651(1) provides: "A person is guilty of criminal sexual conduct in the second

degree if the actor uses aggravated coercion to accomplish sexual battery." 16-3-653(1). "'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. As with forcible confinement, the court again relied on an offense that was not charged in the indictment. This was error as the directed verdict analysis is confined to the offense charged: "On the other hand, a defendant is entitled to a directed verdict when the State fails to produce evidence *of the offense charged*. State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003); State v. McCluney, 357 S.C. 560, 593 S.E.2d 509 (Ct. App. 2004); State v. Padgett, 354 S.C. 268, 580 S.E.2d 159 (Ct. App. 2003)." State v. Crawford, 362 S.C. 627, 633, 608 S.E.2d 886, 889 (Ct. App. 2005) (*emphasis added*). Here, the indictment charged only "aggravated force" under S.C. Code Ann. § 16-3-652(a). The evidence failed to rise to that level. Evidence relating to elements of 16-3-653 that are outside of the offense as charged are irrelevant:

> "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 facts relating to elements and offenses 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. Similarly, Bryant was indicted for the use of aggravated force to commit a sexual battery. He was not charged with the use of aggravated coercion to commit the sexual battery. The lower courts' consideration of S.C. Code Ann. Section 16-3-652(a) in the directed verdict analysis was therefore error.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE RECORD SUPPORTED A JURY CHARGE ON CRIMINAL SEXUAL CONDUCT IN THE SECOND DEGREE.

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 this 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* that 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 moves this Court to grant his petition and review the case.

Respectfully submitted,

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