STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Pickens County
Hon. Letitia H. Verdin, Circuit Court Judge
Appellate Case Tracking No. 2022-000387

The State, Respondent,

v.

Matthew Jamie Bryant, Petitioner.

Opinion No. 2021-UP-396 (S.C. Ct. App. Refiled March 2, 2022)

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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ATTORNEYS FOR RESPONDENT

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II. The Court of Appeals properly affirmed the trial court's decision to charge the lesser included offense of second-degree criminal sexual conduct.

STATEMENT OF THE CASE

Procedural History

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

Petitioner filed a timely Notice of Appeal. After briefing, the Court of Appeals, without argument, issued an opinion affirming the conviction and sentence on November 10, 2021. Petitioner served and filed a Petition for Rehearing. The Court of Appeals denied the Petition but withdrew its original opinion and substituted an Opinion dated March 2, 2022. State v. Bryant, 2021-UP-396 (S.C. Ct. App. Refiled March 2, 2022).

Petitioner served and filed a Petition for Writ of Certiorari, and this Return follows.

Factual Background

Victim testified she, her then-boyfriend Billy Reynolds, and their several-month-old 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, Petitioner, 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. (App.164). Victim stayed at home with her son while Reynolds and Van Holland went to work each day. The first time she encountered Petitioner, she hid with her son in a room until he left. When she informed Van Holland about the event, he told her it was Petitioner. (App.165-166).

On April 4, 2016, Petitioner stopped by the home while Victim and Van Holland were there. Petitioner asked Victim her age and after she refused to respond, he grabbed her buttocks.

(App.169). Victim asked Van Holland if he saw Petitioner grab her buttocks, and he said no, "we ain't going to have that." (App.169).

The following day, Victim was at home with her son when Petitioner stopped by the home. Victim was preparing a bottle for Son when Petitioner 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 mouth, but she clenched her jaw shut. (App.170). Victim refused Petitioner's advances, stating such things as: "No"; "What are you doing?"; "My son is in the other room"; and "Let me go get my son." (App.170-171). Petitioner 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 raped her, "even with [her] saying no." (App.171-172). After realizing Petitioner was not acknowledging her verbal refusal, Victim stopped talking to get it over with so she could get back to her son. (App.172).

Victim indicated Petitioner "forced himself inside of [her] for what felt like forever." (App. 172). After he completed the assault, Petitioner went to the bathroom while Victim grabbed her son. Before he left, Petitioner claimed he would return in twenty minutes. He turned back around "and smiled a smile [Victim will] never get out of [her] dreams." (App. 172). 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.

On cross-examination, Victim admitted that in her statement to police, she claimed Petitioner grabbed her by the arm and "led" her to the bedroom. (App.183-184; 187). Her statement was read into evidence in which she indicated:

> He came . . . through the front door as I was in the kitchen making a bottle. He came up from behind me and started to grab

> my butt. I tried to move away. I asked him what he was doing. He said, I know you want to fuck me. I said no. Then, he grabbed my arm and led me to my other roommate's bedroom and threw me on the bed. He tried to take off my shorts. I tried to stop him. I kept saying no, but he wouldn't stop. I tried getting up, but he stopped me. I told him no over and over again. He kept saying, I know you want to. No one has to know it. You will be – this will – it will be a one-time thing. I said no.
>
> He started to kiss me. He stuck his tongue in my mouth. He took my shorts off and took his clothes off and got on top of me and forced himself inside of me. I seemed - - It seemed to last forever. But when he finished, he threw - - before he finished, he finished himself off. I got up and put my shorts back on and left the room to get to my son.

(App.190-191).

After obtaining a search warrant, officers found a paystub belonging to Petitioner, which included his full name. (App.219; 223). Officers went over to Petitioner's then-residence and questioned him about the events of that day. (App.225). Petitioner 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. (App.226). Van Holland confirmed to officers that Petitioner had visited the home the night before and confirmed Petitioner had touched Victim's buttocks on that occasion. Van Holland described it as "playing grab ass with [Victim] and that she became uncomfortable and went to her room and locked herself in her room." (App.227-228). He testified similarly at trial. (App. 276-277). Van Holland also confirmed that Petitioner left him and another person at Petitioner's house listening for a little girl that was asleep during the time when the Victim was raped. (App.228; 279-280).

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. (App.300-302). Alicia Breland, a forensic scientist employed by SLED, analyzed the various DNA samples collected in the case. In the DNA found in the vaginal swab, she found DNA matching the Victim and Petitioner. The probability of randomly selecting a nonrelated individual having a DNA profile matching to the mixture was 1 in 6.4 octillion. (App. 362).

ARGUMENT

I. The Court of Appeals properly affirmed the trial court's denial of Petitioner's motion for a directed verdict related to the first-degree criminal sexual conduct charge because the State presented ample evidence of aggravated force, also established additional grounds for the charge, and any error would be entirely harmless since the jury acquitted of first-degree and convicted of the lesser included offense of second-degree criminal sexual conduct.

The Court of Appeals correctly found the State presented evidence from which a jury could reasonably find Petitioner guilty of first-degree criminal sexual conduct and, as a result, the trial court properly denied Petitioner's motion for a directed verdict. Additionally, the State presented evidence of aggravated force, forcible confinement, and kidnapping sufficient to establish the charge of first-degree criminal sexual conduct. Finally, any error is entirely harmless because the jury acquitted Petitioner of first-degree criminal sexual conduct and convicted him of the lesser included offense of second-degree criminal sexual conduct.

Standard of Review

"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 this 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.

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. See State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding "any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt" in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)).

Merits

Initially, Petitioner claims that the ground on which the trial judge denied the motion for a directed verdict, forcible confinement, was outside the scope of his indictment. This argument is without merit. The indictment informed Petitioner he was charged with first-degree CSC pursuant to S.C. Code Ann. Section 16-3-652. It did not limit the charge to only one subsection of the statute, but made it clear he was charged with first-degree CSC based on the entirety of the statute. While the indictment does state that he used aggravated force to accomplish the sexual battery, it did not limit its scope to solely that claim. Further the State, through discovery, indicated to the defense that it intended to proceed under section 16-3-652(1)(a) and (b). See, e.g., State v. Lewis, 434 S.C. 158, 173–74, 863 S.E.2d 1, 9 (2021) (finding the Court can refer to the discovery materials and evidence provided for further clarification of an indictment).

In any event, the State presented ample evidence of both aggravated force and forcible confinement to justify sending the charge of first-degree CSC to the jury:

> 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 the instant case did not rely on general characteristics as can be done with an ABHAN charge, but instead related the aggravating factors directly to the force used by Petitioner in accomplishing his rape of the Victim.

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, this 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 this 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 Petitioner grabbed her arm, pulled her into a bedroom, and threw her onto the bed. Petitioner attempted to force his penis into her mouth. When she tried to get off the bed, he restrained her; Victim specifically recounted Petitioner using his open palm to pin her shoulder to the bed. While she was restrained, Petitioner removed her shorts and began vaginal

[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).

intercourse. Further, Victim possessed physical injuries to her vaginal area consistent with forced intercourse. This testimony is similar to the testimony in Lindsey and Frazier and supports a denial of the motion for a directed verdict because it constitutes evidence from which a reasonably jury could determine Petitioner used aggravated force in order to accomplish the rape of the Victim. The same evidence supports a claim of forcible confinement or kidnapping under subsection (b), both of which were also charged to the jury.

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 Petitioner's motion for directed verdict.[2]

[2] Additionally, any error in denying the motion for directed verdict is entirely harmless as the jury convicted Petitioner of the lesser included offense of second-degree CSC and acquitted him of first-degree CSC.

II. The Court of Appeals properly affirmed the trial court's decision to charge the lesser included offense of second-degree criminal sexual conduct.

The Court of Appeals correctly found second-degree criminal sexual conduct is a lesser included offense of first-degree criminal sexual conduct and the trial court did not err in charging the jury on the proper lesser included offense.[3] Initially, the argument made to the appellate courts is not preserved for review on appeal because Petitioner made only a very generic objection and did not specify the nature of the objection to the second-degree CSC charge. Significantly, this Court has specifically found second-degree CSC is a lesser included offense of first-degree CSC, and there is no reason to alter that decision.

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).

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[3] It is important to note Petitioner does not assert there was no evidence in the record to support the charge of second degree criminal sexual conduct to the jury. Instead, he solely maintained in his Petition for Rehearing and in his Petition for Writ of Certiorari that it did not meet the strict elements test as a lesser included offense.

In the instant case, Petitioner failed to object to the State's request to charge the jury on second-degree and third-degree CSC on any specific grounds. His only objection amounted to: "Please the Court, Your Honor. If we - - if the State - - I would object to those." (App.421). He never made any specific objection related to the failure to constitute a lesser included offense based strictly on the elements test. Accordingly, Petitioner'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.

Merits

This Court has found second-degree CSC to be a lesser included offense of first-degree CSC. In analyzing the various degrees of criminal sexual conduct, this Court explained:

> All of the . . . statutes deal with only the offense of criminal sexual conduct, and divides or classifies that offense into three grades according to the circumstances attending its commission. All of the statutes (degrees of the offense) require the common element of a sexual battery which is defined in Code Section 16-3-651(h). The only difference in the degrees of the crime is in the nature of the circumstances surrounding the commission of the sexual battery. The first degree requires the affirmative use of aggravated force, either upon the victim, or submission by the victim from the forceful, simultaneous commission of another designated offense or act; while the second degree only requires a threat of force or violence of a high and aggravated nature. In the third degree of the offense, the use of force or coercion to accomplish the sexual battery is unaccompanied by aggravating circumstances. It seems evident that the statutes simply determine the degree of the offense by the level or presence of aggravation.

State v. Summers, 276 S.C. 11, 14, 274 S.E.2d 427, 429 (1981), *overruled on other grounds by* State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000). While the varying degrees may not fit the strict elements test as lesser included offenses, as argued by Petitioner, this Court in Summers examined the legislative intent behind the statutory scheme and found the legislature intended the varying degrees to constitute lesser included offenses. See, e.g., Garrett v. United

States, 471 U.S. 773, 779, 105 S. Ct. 2407, 2411, 85 L. Ed. 2d 764 (1985) ("We have recently indicated that the Blockburger rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history."); Matthews v. State, 300 S.C. 238, 241, 387 S.E.2d 258, 259–60 (1990) (analyzing section 44-53-37, finding Blockburger analysis is unnecessary, and ultimately concluding based solely on the legislative intent found in the structure of the statute: "Under this legislative scheme, we conclude that the legislature intended possession with intent to distribute to be a lesser-included offense of trafficking based upon possession.").

As in Matthews, based on the legislative intent from the statutory scheme, this Court in Summers explained:

> We conclude that the offense of criminal sexual conduct in the second and third degrees are lesser included offenses in a charge of criminal sexual conduct in the first degree and, if the facts warrant, the lesser degrees of the offense may be submitted to the jury under a charge of the first degree.

Id. at 14–15, 274 S.E.2d at 429. This Court restricted its holding in Summers after a more thorough review of third-degree CSC in McFadden. This Court specifically found third-degree CSC under § 16–3–654(1)(b)[4] is not a lesser included offense of first-degree CSC. McFadden, 342 S.C. at 633, 539 S.E.2d at 389. It did not change its prior decision that second-degree CSC and third-degree CSC under subsection (1)(a) are both intended to be lesser included offenses.

This Court had a chance to review its decision in Summers as it related to second-degree CSC in State v. Brown. This Court reiterated without analysis: "Second-degree CSC is a lesser included offense of first-degree CSC." State v. Brown, 360 S.C. 581, 588, 602 S.E.2d 392, 396

[4] Finding a person is "guilty of criminal sexual conduct in the third degree if the actor engages in sexual battery with the victim" and "[t]he actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish sexual battery." S.C. Code Ann. § 16-3-654(1)(b) (Supp. 2013).

(2004). It is important to note that the legislature has ratified this Court's interpretation that second-degree CSC should be considered a lesser included offense of first-degree CSC because it has taken no steps to amend section 16-3-653 since its inception in 1977. See Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) ("The Legislature is presumed to be aware of this Court's interpretation of its statutes. When the Legislature fails over a forty-year period to alter a statute, its inaction is evidence the Legislature agrees with this Court's interpretation.").

As a result, this Court has conclusively determined based on the legislative intent expressed through the statutory scheme of sections 16-3-652 through 16-3-654 that second-degree CSC and third-degree CSC under (1)(a) are lesser included offenses of first-degree CSC and may be properly charged as such when warranted. The trial court properly found second-degree CSC was a lesser included offense and properly charged the jury. Accordingly, this Court should affirm Petitioner's conviction and sentence under the lesser included offense of second-degree CSC.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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May 25, 2022

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May 25 2022
SC Court of Appeals

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PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals on Petitioner by emailing a copy to his counsel of record, J. Falkner Wilkes and Daniel E. Hunt, at their primary email addresses as provided by the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.
This 25th day of May, 2022.

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Caroline Collins

From: Caroline Collins
Sent: Wednesday, May 25, 2022 9:49 AM
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Cc: William Blitch
Subject: The State v. Matthew Jamie Bryant (2022-000387)
Attachments: BRYANT Matthew - Return to Petition for Writ of Certiorari - 2022-000387 (02989934xD2C78).PDF

Good Morning Mr. Wilkes and Mr. Hunt,

Attached please find a copy of the Return to Petition for Writ of Certiorari to the Court of Appeals in The State v. Matthew Jamie Bryant (2022-000387). This return will be submitted to the South Carolina Supreme Court today via the AIS One Drive System.

If you will, please reply to confirm receipt of this email.

Thank you!

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