

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County

John C. Hayes, III, Circuit Court Judge

RECEIVED
MAY 23 2013
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DOUGLAS BRET BISHOP,

APPELLANT

Appellate Case No. 2012-212240

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial court's refusal to charge the jury pursuant to the traditional circumstantial evidence definition and explanation as provided in State v. Edwards violated Appellant's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable doubt because the charge given confused the jury regarding how to evaluate circumstantial evidence.

STATEMENT OF THE CASE

On June 9, 2011, a Union County grand jury indicted Appellant for two counts of sexual exploitation of a minor in the second degree and two counts of sexual exploitation of a minor in the third degree (2011-GS-44-0552 & 2011-GS-44-553). R. * (Indictments). The prosecution called the case for trial on May 14, 2012 before the Honorable John C Hayes, III and a jury. John Anthony represented the state, and Kenneth Sowell represented Appellant. Tr. 1. The jury found Appellant guilty of two counts of sexual exploitation of a minor in the third degree. Tr. 538, lines 3 – 6. Judge Hayes sentenced Appellant to ten years on each charge, to run concurrently. Tr. 545, lines 12 – 14; R. * (Sentence sheets). On May 18, 2012, Appellant moved the court for reconsideration. R* (Motion for Reconsideration). By order dated May 22, 2012. Judge Hayes denied Appellant's motion. R* (Order).

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

The trial court's refusal to charge the jury pursuant to the traditional circumstantial evidence definition and explanation as provided in *State v. Edwards* violated Appellant's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable doubt because the charge given confused the jury regarding how to evaluate circumstantial evidence.

Relevant facts

Investigator Roxie Belue testified that on May 6, 2010, she seized two computer towers, a flash drive, a camera, external hard drives, and personal data devices from Appellant's residence pursuant to a search warrant. Tr. 53, lines 7 – 14; Tr. 57, lines 4 – 22; Tr. 61, lines 18-19; Tr. 63, lines 5-10; Tr. 69, lines 20-24. She returned several items, including two personal data devices, a VHS tape, and an external reader with a disc because the items lacked evidentiary value. Tr. 70, line 22 – Tr. 71, line 18. After the seizure of the items, measures were taken by the South Carolina Law Enforcement Division (SLED) for analysis of the items. Bart Cave, an employee of SLED, testified that he created mirror images of the hard drives submitted by the local sheriff's office. Tr. 127, lines 6 – 7; Tr. 131, lines 6 – 9. Tr. 132, line 23 – Tr. 133, line 3.

Collin Duncan, another employee of SLED, testified that he analyzed the imaged hard drives. Tr. 154, lines 9 – 12. On one of the imaged hard drives, Duncan located approximately thirty images of “graphic, and explicit nature with what appeared to be young teens, young children prepubescent, males, females, involved in sexual acts with other children or other adults.” Additionally, he testified that he found approximately the same

number of the videos that were of the same nature on the imaged hard drive. Tr. 157, lines 3 – 15; Tr. 224, line 24 – Tr. 225, line 6.

Duncan testified that the computer did not require a password for access. He also testified he had no evidence that Appellant actually downloaded the pornographic images or even knew the images were present on the hard drive. Tr. 198, lines 3-25; Tr. 219, line 8 – Tr. 220, line 20. According to Duncan's analysis, it appeared someone had tried to delete the pornographic images from the hard drive. Tr. 221, lines 11-17; Tr. 222, lines 18-21; Tr. 224, lines 13-15; Tr. 233, line 25 – Tr. 234, line 5.

Destiny Cipriano, who was eighteen-years old at the time of trial, testified that she and her sister, Denise Cipriano, frequently visited Appellant's stepdaughters at Appellant's home. According to Destiny, she, Denise, Appellant's stepdaughters, and Appellant used the computer, which was identified by Duncan as having downloaded images of child pornography. Tr. 86, lines 22-23; Tr. 87, lines 8-15; Tr. 88, lines 4-6; Tr. 88, line 24 – Tr. 89, line 2; Tr. 89, lines 3-11; Tr. 90, line 20 – Tr. 91, line 6; Tr. 91, lines 13-19. Nevertheless, Destiny testified she never saw child pornography on the computer. Tr. 91, lines 20-24.91. Denise, who was fourteen-years old at the time of trial, testified that she, Destiny, Appellant's stepdaughters, and Appellant used the computer. She also recalled seeing an unidentified man use the computer previously. Tr. 93, lines 1-2; Tr. 93, lines 12-19; Tr. 94, lines 9-22; Tr. 95, lines 5-7; Tr. 96, lines 15-16; Tr. 97, lines 1-8; Tr. 98, lines 2-13.

Appellant presented testimony from Chance Williams, who was seventeen-years old at the time of trial. Chance testified that he frequently visited Appellant and used the computer. He further testified that a large number of teenagers used the computer. He

identified the computer as belonging to Appellant's stepdaughters and testified Appellant did not use it. Tr. 256, lines 3-4; Tr. 256, line 21 – Tr. 257, line 3; Tr. 257, line 20 – Tr. 258, line 21; Tr. 259, lines 1-19; Tr. 278, line 18 – Tr. 279, line 24. Dennis Tucker, Appellant's neighbor and friend, testified that he saw Appellant's stepdaughters using the desktop computer at issue in the case. Appellant, on the other hand, used a laptop. Additionally, he testified to observing approximately nine different teenagers using the desktop computer. Tr. 286, lines 9-21; Tr. 289, lines 14-25; Tr. 290, lines 1-23; Tr. 295, lines 5-7; Tr. 296, lines 9-13. Another neighbor, Robert Warr, testified that he never saw Appellant use the desktop computer. He only observed Appellant use the laptop. Additionally, he testified there were teenagers at Appellant's home almost every day using the computer. Tr. 301, lines 11-15; Tr. 302, line 17 – Tr. 303, line 13; Tr. 304, lines 11-23; Tr. 305, lines 1-6; Tr. 305, lines 11-19; Tr. 307, line 6 – Tr. 308, line 3.

Finally, Appellant testified that the two desktop computers were for his stepdaughters. He testified that everyone in his family and his stepdaughters' friends had access to the computer. He further testified that the Cipriano sisters stayed at his home for weeks at a time and had unlimited access to the computer. Additionally, he listed numerous individuals who had access to the computer and used the computer. Tr. 326, line 6 – Tr. 334, line 20. He testified he did not use the desktop computer, except on rare occasions when his laptop was not working. He explained he had no reason to use the desktop computer. Neither Appellant nor his wife restricted access or use of the computer. He did not monitor what his stepdaughters or their friends were doing on the computer. Tr. 341, line 20 – Tr. 342, line 9; Tr. 355, line 22 – Tr. 356, line 6; Tr. 357, lines 6-24; Tr. 395, line 1

– Tr. 398, line 11. Appellant had no idea there was any pornography on the computer. Tr. 339, lines 23-25; Tr. 340, lines 20-22.

In closing, Appellant admitted the images were of child pornography. He argued the question for the jury was who downloaded the images. He argued the state presented no evidence Appellant downloaded the images or was aware of the presence of the images. Repeatedly, Appellant emphasized the lack of evidence that Appellant actually downloaded the images or was even aware the images were on the computer's hard drive. Appellant's closing argued the reasonable inference that one of the teenagers who had unlimited and unmonitored access to the desktop computer downloaded the images of child pornography. Tr. 486, line 6 – Tr. 488, line 7; Tr. 490, line 18 – Tr. 492, line 3; Tr. 494, line 2 – Tr. 495, line 2; Tr. 497, line 14 – Tr. 499, line 2.

At the conclusion of the trial, the judge charged the jury as follows concerning circumstantial evidence:

There are two types of evidence which are generally presented in a trial such as this. Those two types are direct and circumstantial evidence. Direct evidence is testimony of someone who claims to have actual knowledge of the facts such as an eyewitness. It is evidence which establishes the main fact sought to be proven.

Circumstantial evidence is proof of a chain of facts and circumstances which indicate the existence of a fact. Circumstantial evidence is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or personal observation. Our law makes absolutely no distinction between the weight or value to be given either direct or circumstantial evidence, our law does not require a greater degree of certainty to circumstantial, as opposed to direct evidence what you should do in this case is weigh all of the evidence. If you are not convinced of [Appellant]'s guilt beyond a reasonable doubt after weighing all the evidence, you would find him not guilty.

Tr. 525, line 8 – Tr. 526, line 4. At the conclusion of the court’s jury instructions, Appellant asked that the jury be instructed that in order to be convicted of a crime based on circumstantial evidence, the state must disprove all the other possible facts which could lead to a finding of innocence. Tr. 533, lines 15 – 18.

In his motion for reconsideration, Appellant argued the trial court failed to charge the jury properly concerning circumstantial evidence. He explained the error deprived him of a fair trial. R.* (Motion for Reconsideration). As to this argument, the trial court found the proper circumstantial evidence instruction was given. R. * (Order).

Discussion

Our Supreme Court approved the circumstantial evidence charge requested by Appellant in 1955 in State v. Littlejohn, 228 S.C. 324, 324, 89 S.E.2d 924, 926 (1955). In 1989, the Court explained the instruction found in Littlejohn was the appropriate instruction for juries when the state relied upon circumstantial evidence to prove its case. State v. Edwards, 298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989). Specifically, the Edwards charge provides that a jury must not convict unless:

every circumstance relied on by the state is proven beyond a reasonable doubt; and ... all of the circumstances so proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that the circumstances create a probability, even if it is a strong one and if, assuming them to be true they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

Id. (quoting Littlejohn, 228 S.C. at 324, 89 S.E.2d at 926).

Subsequently, the Court held a jury instruction omitting the “reasonable hypothesis” phrase, as a whole, adequately conveyed the level of proof required to find a defendant guilty. State v. Grippon. 327 S.C. 79, 82-83, 489 S.E.2d 462, 463 (1997). The Court’s

holding was based upon the trial court repeatedly charging the jury that the state had the burden to prove the defendant guilty beyond a reasonable doubt and properly defining reasonable doubt. Id. at 83, 489 S.E.2d at 463-464. Although the Court decided the dispositive issue in the case, the Grippon Court went on to recommend another jury instruction. Specifically, the Court recommended:

There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

Id. at 83-84, 489 S.E.2d at 464.

Chief Justice Finney and then-Justice Toal concurred in the result, but wrote separately to explain trial judge should not abandon South Carolina’s traditional jury charge found in Edwards. The concurrence explained the majority posited no “reasoned rejection of the longstanding rule.” Looking to other jurisdictions, the concurrence explained that the Edwards language emphasized the need for careful reasoning, provided ““sharpened clarity”” to the meaning of reasonable doubt, and explained necessary information for jurors to accurately analyze circumstantial evidence. The concurrence concluded:

This Court should retain the Edwards charge because juries need more detailed information about the relation of circumstantial evidence to determination of guilt than the majority’s suggested instruction provides. The question is not whether circumstantial evidence carries the same probative weight as direct evidence; of course it does. Rather, the question is the proper means for evaluating circumstantial and how trial courts may best help juries understand their responsibilities.

Grippon, 327 S.C. at 84-88, 489 S.E.2d at 464-467 (J. Toal concurring).

In 2004, the Court revisited the circumstantial evidence charge. The Court held the language recommended in “Grippon is the sole remaining charge to be utilized by the courts of this state in instructing juries in cases relying, in whole or in part, on circumstantial evidence.” State v. Cherry, 361 S.C. 588, 597, 606 S.E.2d 475, 480 (2004). In their dissent, Chief Justice Toal and Acting Justice Lloyd, explained that although circumstantial and direct evidence are equally valid and convincing, circumstantial evidence, by definition, establishes collateral facts from which main facts may be inferred. Thus, a juror’s evaluation of circumstantial evidence requires the juror to connect collateral facts in order to reach a conclusion, which is not a process required when evaluating direct evidence. Id. at 603, 606 S.E.2d at 483 (C.J. Toal, dissenting). Rather than creating confusion or changing the standard for examining circumstantial evidence, the traditional charge “clarifies the jury’s responsibility to evaluate circumstantial evidence carefully and gives jurors more detailed information about the relation of circumstantial evidence to the determination of guilt.” Id. In fact, the lack of instruction for jurors concerning how to evaluate circumstantial evidence may result in jurors “reach[ing] illogical conclusions based on emotion or intuition instead of a rational, deliberative process.” Id. at 604, 606 S.E.2d at 483.

The Court, in evaluating a directed verdict motion, recognized the utility of the traditional charge when examining and analyzing circumstantial evidence. State v. Hernandez, 382 S.C. 620, 626 n. 2, 677 S.E.2d 603, 606 n. 2 (2009). After quoting the traditional circumstantial evidence charge and noting the abandonment of the charge, the

Court explained “it nonetheless illustrates the lack of evidence against [Hernandez, Guerrero, and Avila-Arjona].” Id.

Two years later in State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011), the South Carolina Supreme Court provided a more detailed explanation of how the traditional charge guides the evaluation and analysis of circumstantial evidence in relation to the role of a juror in finding the facts and determining guilt or innocence. The Court acknowledged its abandonment of the traditional circumstantial evidence charge, but noted “the definition illustrates the lack of evidence against [Odems].” Id. at 590, 720 S.E.2d at 52. The Court provided further insight on this issue in footnote four:

However, the evaluation of circumstantial evidence requires the connection of collateral facts in order to reach a conclusion, and this process is not required when evaluating direct evidence. Thus, the traditional circumstantial evidence definition provides more detailed information about the relation of circumstantial evidence to the determination of guilt. The definition does not, however, change the standard evaluating evidence: every circumstance must be proved beyond a reasonable doubt.

Id. at 591 n.4, 720 S.E.2d at 53 n.4 (internal citations omitted).

Without question, a proper evaluation of circumstantial evidence requires connection of collateral facts to reach a conclusion, which is not required for evaluating direct evidence. According to our Supreme Court, the traditional circumstantial evidence language informs jurors regarding how to analyze circumstantial evidence – inferring main facts by making connections among collateral facts. The trial judge’s refusal to charge the jury pursuant to the traditional circumstantial evidence charge announced in Edwards, supra, violated Appellant’s right to require the prosecution to prove his guilt beyond a reasonable doubt.

The state’s weak case against Appellant exemplified why Appellant was entitled to the Edwards charge regarding circumstantial evidence. The statute required the prosecution

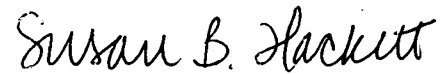
to prove Appellant possessed material that contained a visual representation of a minor engaging in sexual activity and knew the content of the material. S.C. Code Ann. § 16-15-410(A). Although Appellant admitted the material found on the hard drive satisfied the statute's definition of child pornography, Appellant denied possessing the material or having knowledge of the content of the material. The prosecution presented absolutely no direct evidence that Appellant downloaded the material or was aware the material had been downloaded. Even the prosecution's witnesses denied observing child pornography on the computers and testified that multiple people had unfettered access to the computer. The issue of who downloaded the materials was the only issue before the jury. It was imperative that the jury not make its decision based on "emotion or intuition instead of a rational, deliberative process," and the way to accomplish this goal was through a clear and concise jury charge, such as the one announced in Edwards.

Due to the state's lack of direct evidence and the fact that the circumstantial evidence indicated that at least four other people had access to the computer and the knowledge required to download materials at the time the prohibited materials were downloaded, justice required the trial judge to instruct the jury that the circumstantial evidence must "point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis." Here, the evidence against Appellant was the same as the evidence against his stepdaughters and their friends. None of the circumstantial evidence conclusively pointed to Appellant's guilt to the exclusion of the others.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and sentences based upon the trial judge's erroneous ruling concerning the instructions to the jury.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of May, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County

John C. Hayes, III, Circuit Court Judge

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments;
- (2) Sentence sheets;
- (3) Trial transcript pages: 1, 49-76; 86-117; 119-133; 150-244;
256-314; 316-414; 430-461; 485-502; 520-532; 538; 545;
- (4) Motion for Reconsideration;
- (5) Order Denying Motion for Reconsideration.

I certify that this designation contains no matter which is irrelevant to this appeal.

May 21st, 2013

Susan B. Hackett

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Douglas Bret Bishop, #350914, at Tyger River Correctional Institution, 200 Prison Road, Enoree, SC 29355, this 21st day of May, 2013.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of May, 2013.

Emily Byrnes (L.S.)

Notary Public for South Carolina

My Commission Expires: November 16, 2022.