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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable Grace Gilchrist Knie, Circuit Court Judge
Appellate Case Tracking No. 2021-000599

The State, Respondent,

vs.

Mark Anthony Gilbert, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court properly refused to quash the four indictments because each alleges a separate and distinct crime.

II. The trial court did not err in sentencing Appellant to a consecutive five-year sentence.

STATEMENT OF THE CASE

Appellant was arrested in October 2018. He was initially charged with one count of criminal sexual conduct with a minor in the second degree. (Indictment 2019-GS-42-1035; R.515-516). The original indictment was amended and three additional charges of criminal sexual conduct with a minor in the second degree were true-billed by the Spartanburg County Grand Jury in January 2020. (Indictments 2019-GS-42-1035; 2020-GS-42-0001 through -0003; R.517-524). He proceeded to trial before the Honorable Grace Gilchrist Knie and a jury. The jury found him guilty on all four counts as charged. Judge Knie sentenced him to concurrent twenty-year sentences for each conviction related to Indictments 2020-GS-42-0001 through -0003. She sentenced him to a consecutive sentence of five years on Indictment 2019-GS-42-1035. Appellant served and filed a timely Notice of Appeal.

STATEMENT OF FACTS

Appellant is the biological father of the Victim. At the time the abuse began, Victim was around eleven or twelve years old and lived with Appellant, her mother, and siblings. (T.147; 149; R.147; 149). Victim had a nightmare and went to her parents' bedroom to spend the rest of the night. She was lying in between them, and during the night, her father reached over her and began touching her genitals both over and under her clothes. (T.150-151; R.150-151). Appellant told his daughter he believed he was touching his wife, even though she was a much larger woman than the victim and the two had been together for sixteen years by that time. (T.152; R.152).

Less than a couple of weeks later, Appellant continued sexually assaulting the Victim. He began by touching her "everywhere" which included her breasts, vagina, and buttocks. (T.153; R.153). Later, Appellant digitally penetrated the Victim before moving on to inserting sex toys such as vibrators and dildos into the Victim's vagina. (T.154; R.154).

Appellant then escalated the sexual abuse again by raping his twelve-year-old daughter. She indicated the rapes began when she was twelve and in the seventh grade. Appellant would occasionally use a condom, but not every time. (T.155; R.155). Appellant would also hold the Victim's head and make her perform oral sex on him. (T.155-156; R.155-156). She indicated all of the various types of sexual assault occurred more than one time. (T.156; R.156). The Victim also detailed how Appellant would watch pornography and make her watch with him. She would pretend to be asleep, but he would make her watch. He also tried to make her do what was happening in the videos. (T. 160-161; R.160-161). She indicated the abuse occurred multiple times a week. (T.162-163; R.162-163).

The Victim ultimately told her older brother what Appellant was doing to her. (T.164; R.164). Her brother confronted Appellant about the sexual abuse in March 2018. After the

confrontation, Appellant moved out of the house. (T. 165; R.165). After he moved out, the Victim disclosed to her mom what Appellant had done to her. (T.165-166; R.165-166).

In June 2018, DSS came out to investigate the conditions of the home in which the Victim, her brothers, and her mom lived. They had to move out until it got cleaned and then were allowed to move back in. While investigating, the DSS caseworker asked the Victim if she had been abused. She told them no because she did not want to get taken away. In July 2018, DSS returned to ask about possible sexual abuse that was reported by the Victim's aunt. This time, the Victim disclosed the abuse to the DSS caseworker. (T.167-170; 181; R.167-170; 181).

ARGUMENT

I. The trial court properly refused to quash the four indictments because each alleges a separate and distinct crime.

Appellant contends the trial court erred in failing to dismiss the four indictments because they were mutliplicitous. Additionally, he asserts the indictments charged only one crime and not four separate crimes because they covered the same time period and only alleged a different means of sexual battery. However, our legislature clearly intended to punish each sexual act committed by the Appellant upon the victim and not allow the absurd result that someone can only face one charge for sexual assaults when he commits those sexual assaults against a child numerous times and in numerous ways.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003).

Merits

The Double Jeopardy Clause of the United States Constitution provides: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. v. South Carolina's Constitution has a similar provision: "No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . ." S.C. Const. art. I, § 12. Relevant to the consideration of this appeal, the provision "protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969); Ex parte Lange, 85 U.S. 163, 168, 21 L. Ed. 872 (1873) ("If there is anything settled in the

jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence.").

Multiplicity is defined as "[t]he improper charging of the same offense in more than one count of a single indictment." Black's Law Dictionary (11th ed. 2019). In the instant case, Appellant contends the charging of four counts of criminal sexual conduct with a minor in the second degree based on the four different types of sexual battery committed by the Appellant on the minor is impermissible as all four charge the same offense.

Under South Carolina law:

> (B) A person is guilty of criminal sexual conduct with a minor in the second degree if:
> (1) the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age . . . .

S.C. Code Ann. § 16-3-655(B)(1) (Supp. 2018). Sexual battery as used in the provision is defined as:

> (h) "Sexual battery" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.

S.C. Code Ann. § 16-3-651 (Supp. 2018). The question at issue is whether Appellant could be charged with four separate counts of criminal sexual conduct when the evidence presented by the Victim indicates that at different times Appellant: 1) digitally penetrated the Victim; 2) inserted an object into the twelve-year-old's vagina; 3) forced her to perform fellatio on him; and 4) had sexual intercourse with his daughter.

A similar question was asked and answered in State v. Smith, 276 S.C. 484, 280 S.E.2d 56 (1981). The case arose after the appellant was charged and convicted based on two separate indictments for criminal sexual conduct in the first degree. "The indictments arose from an incident

in which appellant sexually attacked the prosecutrix, forcibly performing an act of sexual intercourse upon her and then within minutes forcing her to accomplish the act of fellatio upon him." Id. at 485, 280 S.E.2d at 56. The appellant argued the trial court erred in refusing to quash one of the two indictments because he was subjected to double punishment for a single act. He asserted the incident was "but a single violation of Section 16-3-652, Code of Laws of South Carolina (1976)." Id.

The South Carolina Supreme Court began by noting: "The view is well settled that successive acts of rape are multiple crimes separately punishable." Id. Citing the Supreme Court of Wisconsin, our Supreme Court noted: "with each intrusion upon the body of a victim in a sexual assault, 'a different legislatively protected interest is invaded.'" Id. (quoting State v. Eisch, 291 N.W.2d 800, 806 (Wis. 1980)). The Court also explained: "Equally compelling is the logic of the California court on this point: 'A defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act.'" Id. at 485-486 (quoting People v. Perez, 591 P.2d 63, 68 (Cal. 1979).

Significantly, the appellant in Smith made a similar argument to the argument made in this case. The appellant maintained the fact section 16-3-651(h) brings numerous acts within the definition of "sexual battery" and criminal sexual conduct first degree requires only proof of a "sexual battery" it acted as a "merger of otherwise distinct acts into a single criminal violation which cannot be separated for purposes of separate indictment." Smith, 276 S.C. at 486, 280 S.E.2d at 57. The Supreme Court noted "[t]he argument is novel but neither persuasive nor based upon

authority." Id.[1] After noting cases from around the country reaching a similar conclusion, the Court ultimately decided: "Under Section 16-3-651, et seq., Code of Laws of South Carolina (1976), successive acts of "sexual battery", as therein defined, are properly chargeable as separate offenses." Id. at 486–87, 280 S.E.2d at 57.[2]

Other states have reached a similar decision and provide excellent analysis for why a person who commits multiple sexual assaults should be able to be held responsible for all of their acts. Many analyze similar statutory schemes to the ones in South Carolina where the various sex acts committed are listed in a definition of "sexual battery," "sexual acts," or "sexual intercourse."

In finding separate acts of rape could be severally punishable, the Tennessee Court of Criminal Appeals explained:

> [W]e do not agree that a man who has raped a woman once may again assault and ravish her with impunity, at another time and at another place, as was done here. An intent was formed to rape her again. The evidence of the second rape is entirely additional to that of the first. . . . Certainly there was separate and additional fear, humiliation and danger to the victim.

Lillard v. State, 528 S.W.2d 207, 211 (Tenn. Crim. App. 1975). Certainly the legislature, people of South Carolina, and Courts of this state would agree that a defendant should not be able to continue to sexually assault the same victim time and time again and in any manner he desires with impunity. Each time Appellant made the conscious decision to rape or sexually abuse his daughter he should be accountable.

The Court of Appeals of Wisconsin in analyzing a similar prosecution stated:

> Important here is the concern of the Lillard court and this court for the victim's safety. Repeated acts of forcible sexual intercourse are

[1] The State notes that nothing in the statutes has changed since this time, so while the argument is no longer novel, it is also no more persuasive.
[2] It should also be noted that Smith received consecutive sentences and the Court did not take issue with the propriety of his sentence.

> not to be construed as a roll of thunder, an echo of a single sound rebounding until attenuated. One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed. Each act is a further denigration of the victim's integrity and a further danger to the victim.

Harrell v. State, 88 Wis. 2d 546, 565, 277 N.W.2d 462, 469 (Ct. App. 1979). The Victim in this case suffered innumerable instances of harm, humiliation, and injury. She had sex toys designed for women inserted into her vagina. Appellant held her head and forced her to perform oral sex on him. She was repeatedly raped by her father. Appellant should be responsible for all of the damage caused and not escape liability because once he assaulted her he could no longer be held responsible.

The Missouri Court of Appeals explained: "Generally rape is not a continuing offense, but each act of intercourse constitutes a distinct and separate offense." State v. Dennis, 537 S.W.2d 652, 654 (Mo. App. 1976). The Court specifically found "germane to the question" of whether being charged with multiple charges of rape of the same woman violated double jeopardy "is the fact the defendant formed the intent to again assault the victim . . . and again applied the force necessary to accomplish his purpose and thereupon completed a separate and distinct act." Id. The Court rejected his claim that being charged for a second rape of the same victim constituted double jeopardy. Here is it clear Appellant repeatedly formed the intent to again assault his daughter, applied the force necessary to carry out his desires, and completed a separate and distinct act every time he sexually assaulted her in one of the four ways.

In determining two acts of sodomy constituted two separate crimes and were separately punishable, the Court of Appeals of Oregon found: "The victim was exposed to additional fear, humiliation and danger during the second sodomy. We see no reason why we should hold that a

man who commits one sodomy may do so again and again to the same victim with impunity." State v. Steele, 33 Or. App. 491, 499, 577 P.2d 524, 528 (1978).

In a very similar case which was relied on by the South Carolina Supreme Court in Smith, the Supreme Court of Wisconsin considered whether four counts of second degree sexual assault, each based on a different act listed within the definition of sexual intercourse, could be properly charged. The Court explained:

> Initially, it should be noted that the acts of cunnilingus, fellatio, anal intercourse, and intrusion of an object into a genital opening are separately enumerated . . . as types of sexual intercourse encompassed . . . . It is apparent, therefore, that although the legislature concluded that these different acts were to be deemed to be the same in law, they were so different in fact that a specific incorporation in the definition of sexual intercourse was required to make them applicable to the substantive crime of second degree sexual assault. This legislative manifestation is, of course, no more than a recognition given to facts and circumstances as they are commonly known to exist. Each of these methods of bodily intrusion is different in nature and character.

State v. Eisch, 291 N.W.2d 800, 805 (Wis. 1980). The Court continued:

> In addition to the fact that the crimes are different in nature, it is apparent that each requires a separate volitional act. The act of forced fellatio, forced anal intercourse, forced vaginal intercourse, and forced intrusion of the bottle required a new volitional departure in the defendant's course of conduct.

Id. at 36, 291 N.W.2d at 805.

In People v. Perez, 591 P.2d 63 (Cal. 1979), another case previously cited by the South Carolina Supreme Court, the Supreme Court of California addressed whether a person can be charged, convicted, and punished for numerous sexual acts all arising out of forty-five minute brutal attack. During the attack, the defendant committed multiple acts of vaginal intercourse, cunnilingus, anal intercourse, fellatio, and forced an object into the victim's vagina. The California Court found:

> Assertion of a sole intent and objective to achieve sexual gratification is akin to an assertion of a desire for wealth as the sole intent and objective in committing a series of separate thefts. To accept such a broad, overriding intent and objective to preclude punishment for otherwise clearly separate offenses would violate the statute's purpose to insure that a defendant's punishment will be commensurate with his culpability. It would reward the defendant who has the greater criminal ambition with a lesser punishment.

Id. at 68 (internal citations omitted). The Court continued: "None of the sex offenses was committed as a means of committing any other, none facilitated commission of any other, and none was incidental to the commission of any other." Id. at 69. As a result, the Court concluded California's statutory scheme does not preclude punishment for each of the sex offenses committed by the defendant. Id. Appellant asks this Court to reward him for finding a victim he can repeatedly assault by only allowing him to be charged with one count of criminal sexual conduct with a minor no matter how many times he chooses to rape or otherwise assault his daughter.

The Eighth Circuit Court of Appeals addressed a question of "how many sex crimes a defendant commits when he inflicts a series of distinct sexual offenses on the victim during a single incident." United States v. Two Elk, 536 F.3d 890, 898 (8th Cir. 2008) (cleaned up). In this case, the defendant committed both vaginal and anal intercourse. The Court analyzed the federal statutory scheme, which is very similar to this state's scheme listing multiple types of sexual acts under the definition of "sexual act" and premising the crime on knowingly engaging in "a sexual act." The Court found:

> We conclude that § 2241(c)'s language confirms that aggravated sexual abuse is a separate-act offense. The plain language of § 2241(c) states that a person commits aggravated sexual abuse by "engag[ing] in *a sexual act* with another person." The statute does not say "sexual act or acts," or "sexual course of conduct." Each of the permutations enumerated in § 2246(2) constitutes *a* sexual act and they are linked in the disjunctive. It follows, then, that engaging in multiple sexual acts (as listed in § 2246(2)) would amount to

> multiple violations of § 2241(c) and would leave the perpetrator susceptible to multiple punishments thereunder.

Id. at 899 (emphasis in original).

The Court of Appeals of North Carolina considered an appeal when "[t]he jury convicted defendant of separate counts of indecent liberties for touching and sucking K.K.'s breasts, performing oral sex on her, and committing sexual intercourse with her." The appellant maintained he could not be convicted of each separately under double jeopardy because these convictions arose from the same assault. State v. James, 643 S.E.2d 34, 37 (N.C. App. 2007). The Court found:

> [M]ultiple sexual acts, even in a single encounter, may form the basis for multiple indictments for indecent liberties. Here, there was both touching and two distinct sexual acts in a single encounter. The indictments each spelled out a separate and distinct fact needed to be proven by the State in order to gain a conviction, and the three acts were distinct acts each constituting the crime of indecent liberties. The distinctive character of the acts is not altered because all three occurred within a short time span.

Id. at 38.

Clearly, other states have had no difficulty finding various sexual acts committed against the same victim, even when they occur all in one violent attack, can form the basis of multiple charges. Our Supreme Court had no difficulty in Smith coming to the same conclusion. Here, the Victim endured repeated sexual assaults of varying types. Appellant digitally penetrated her vagina. He inserted sex toys into her vagina. He forced her to perform fellatio on him. Appellant vaginally raped his twelve-year-old daughter. All of these acts occurred multiple times over the course of a little over two years.[3] It is absurd to think the people of South Carolina and our

[3] Appellant asserts it is significant that each indictment covers the same two-year time frame. As this Court has explained: "The stealth and repetitive nature of the alleged conduct compels identification of the broader time period. The victim is a young child, whom one cannot reasonably

legislature would intend for Appellant to only face one charge for his repeated sexual assaults of the Victim. The trial court in this case properly refused to quash any of the indictments because they each alleged a separate and distinct volitional act. Appellant chose to repeatedly assault his daughter and was properly held accountable for each type of sexual battery he perpetrated against her. As a result, the trial court did not err in denying Appellant's motion to quash the indictments.[4]

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expect to recall the exact dates of the sexual abuse." State v. Tumbleston, 376 S.C. 90, 102, 654 S.E.2d 849, 855 (Ct. App. 2007).

[4] There is no question the indictments were sufficient and provided the requisite notice required to Appellant. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

II. The trial court did not err in sentencing Appellant to a consecutive five-year sentence.

Appellant maintains the trial court erred in sentencing him a consecutive sentence for his conviction on one of the sexual assaults. As discussed above, Appellant was properly charged with and punished for multiple crimes committed against the Victim. Additionally, the imposition of a consecutive sentence was appropriate.

Standard of Review

"A judge is allowed broad discretion in sentencing within statutory limits." Garrett v. State, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995). "Absent partiality, prejudice, oppression, or corrupt motive, this Court lacks jurisdiction to disturb a sentence that is within the limit prescribed by statute." State v. Barton, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997). When reviewing a sentencing issue on appeal, an appellate court will only interfere with a sentencing judge's sentencing decisions in rare and unusual circumstances in light of the broad discretion afforded to sentencing judges on such matters. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952); see State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974) ("A broad discretion is allowed the trial judge in imposing sentence within the legal limits."); see also State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) ("A trial judge generally has wide discretion in determining what sentence to impose. It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come.").

Merits

Initially, much of Appellant's argument is premised on his argument he could not be prosecuted for the separate charges. As discussed above, the South Carolina Supreme Court

concluded in Smith that prosecution and consecutive sentences are appropriate for multiple sex acts committed against a victim. The same analysis should apply in this case allowing Appellant to be properly sentenced and punished based on the four convictions.

Additionally, he cites to cases such as Matthews v. State, 300 S.C. 238, 241, 387 S.E.2d 258, 259–60 (1990), an example of when multiple sentences are inappropriate. Matthews is distinguishable because the Court concluded: "the legislature intended possession with intent to distribute to be a lesser-included offense of trafficking based upon possession." Id. at 241, 387 S.E.2d at 259–60. As a result, it was not appropriate for Matthews to be sentenced for convictions of both PWID and trafficking. In this case, each type of sexual act he committed against the Victim properly resulted in a separate and distinct conviction. As a result, sentences are properly issued for each conviction and nothing in the legislative scheme indicates consecutive sentences are not appropriate.

As the United States Supreme Court has explained:

> The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.
>
> . . . .
>
> Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.

Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225, 53 L. Ed. 2d 187 (1977). As found in Smith, the legislature intended Appellant to face multiple charges and multiple punishments. As a result, the trial court did not abuse her discretion in the imposition of a consecutive sentence.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed June 29, 2022, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 607, 757 S.E.2d 421 (2014) (requiring redaction of social security numbers, names of minor children, financial account numbers, home addresses, and date of birth).

This 29th day of June, 2022.

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