ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Saluda County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LUTHER TOLLIE NORRIS,

APPELLANT

Appellate Case No. 2012-212431

INITIAL BRIEF OF APPELLANT

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The trial judge erred in sentencing Appellant to life without the possibility of parole where one of the prior convictions used to enhance the penalty imposed was a 1974 conviction for rape and the record contained insufficient evidence to establish the rape involved aggravated force to equate it with criminal sexual conduct in the first degree.

STATEMENT OF THE CASE

A Saluda County Grand Jury indicted Appellant for distribution of crack cocaine and distribution of crack cocaine with intent to distribute within proximity of the school and or part. Indictments. The prosecution represented by H Franklin Young, the 3rd called the case for trial on May 21, 2012 before the Honorable Clifton Newman and a jury. Charles E Johnson represented Appellant. Tr. one. The jury found Appellant guilty as charged. Tr. 134, line 25 – Tr. 135, line 5. Judge Newman sentenced Appellant to life imprisonment without the possibility of parole on the proximity conviction. Tr. 151, lines 15 – 18; sentence sheet. Additionally, judge Newman sentenced Appellant to 15 years imprisonment on the distribution conviction. Tr. 154, lines 21 – 22; sentence sheet.

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

STATEMENT OF FACTS

The prosecution presented the testimony of Patricia Rauch, a known drug addict and felon, against Appellant. Rauch testified that she voluntarily worked as a confidential informant in March 2011 for the Saluda Police Department. She approached an officer with about "setting up" Appellant. She explained that she was angry with Appellant for what she perceived as his maltreatment of her. She elaborated that she did not like the way Appellant talked to her. She wanted to "get back at him." She believed that by setting him up, he would go to jail and she would not have to put up with him any longer. Tr. 64, line 21 – Tr. 65, line 24; Tr. 74, lines 9 – 21; Tr. 75, lines 6 – 9. Specifically, she told the police officer she could set him up by purchasing drugs from Appellant. Tr. 66, lines 3 – 15. The officer provided her with a $20 bill to purchase crack and a small digital audio recorder. Tr. 68, lines 14 – 23.[1] Rauch testified that she entering Appellant's residence, she went to the back bedroom. Tr. 70, lines 14 – 20; Tr. 70, lines 23 – 25. Rauch asked Appellant for $20 worth of crack cocaine. She received the crack and provided Appellant with the $20 bill. Tr. 71, lines 1 – 12. Thereafter, Rauch provided the crack to the police. Tr. 73, lines 15 – 16.

Willie Smith, a special agent assigned to the drug analysis department of the South Carolina Law Enforcement Division (SLED), testified that he weighed and analyzed the drugs provided by Rauch to the police. Tr. 92, lines 6-9; Tr. 95, lines 8-9. He concluded the substance was cocaine base, commonly called crack cocaine. Tr. 97, lines 4-19. He further testified the drug weighed less than 0.1 grams. Tr. 98, lines 14-17; Tr. 100, lines 9-11; Tr. 100, lines 16-21; Tr. 102, lines 1-2.

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[1] The audio recording was admitted as an exhibit and played for the jury. Tr. 59, line 22 – Tr. 62, line 16.

ARGUMENT

The trial judge erred in sentencing Appellant to life without the possibility of parole where one of the prior convictions used to enhance the penalty imposed was a 1974 conviction for rape and the record contained insufficient evidence to establish the rape involved aggravated force to equate it with criminal sexual conduct in the first degree.

Relevant facts

After the jury returned its verdicts of guilty, the parties proceeded into the sentencing phase. The prosecutor explained that he had served notice of the state's intent to seek life imprisonment without the possibility of parole based upon an Appellant's prior record of convictions of two most serious offenses. Specifically, the prosecutor relied upon the prior convictions of armed robbery and rape. Tr. 136, lines 16 – 21.[2] The prosecutor provided the trial judge with certified copies of those convictions. Tr. 136, lines 22 – 24.[3] According to the judge,

> in 1971, Greenwood County, the defendant did beat, bruise, and ill treat with the intent to violently injure, feloniously to ravish, carnally know, and other said things against the victim, Moselle Jackson Williams. He was sentenced as a youthful offender at that time based on his age of [seventeen] as a result of an indictment for rape.

Tr. 136, line 25 – Tr. 137, lines 6. The second conviction was for an armed robbery out of North Carolina occurring in 1974, for which Appellant was sentenced to not less than ten years. Tr. 137, lines 7 – 11.

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[2] The state's notice specifically provided that the prior convictions relied upon for its seeking a life without parole sentence for Appellant were armed robbery and rape. Tr. 137, line 25 – Tr. 138, line 3.

[3] Neither the state's notice of intent to seek life imprisonment without the possibility of parole nor the certified copies of convictions was made exhibits at the trial.

Appellant informed the court that he was only charged with accessory to rape when he was seventeen-years old. He explained that he was with others who engaged in the rape and that the victim testified in court that Appellant had nothing to do with the rape. He further explained that he was sentenced to one-year imprisonment for his participation and completed eight months of the sentence. Tr. 148, lines 4 – 17. The trial judge explained that he would entertain a motion for reconsideration of the sentence based upon Appellant's claim that the first conviction was not a rape conviction, but "something else." However, trial counsel failed to file an action for reconsideration. Tr. 151, line 15 – Tr. 152, line 6.

The trial judge rejected Appellant's argument concerning his prior conviction and sentenced Appellant to life imprisonment without the possibility of parole. Tr. 146, line 17 – Tr. 147, line 21; Tr. 151, lines 15 – 25.[4]

Discussion

Appellant was convicted of distribution of a controlled substance within proximity of a park in violation of section 44-53-455(B)(2) of the South Carolina Code, which is a serious offense as defined by South Carolina's recidivist statute. See S.C. Code Ann. § 17-25-45(C)(2)(b). Thus, pursuant to section 17-25-45(B) of the South Carolina Code, Appellant was eligible for a life sentence if he had two or more prior convictions for a serious offense, a most serious offense, an out-of-state offense that would be classified as serious or most serious under our recidivist statute, or any combination of those. One offense relied upon by the prosecution – armed robbery – clearly fell within the recidivist

[4] Although the trial judge afforded trial counsel an opportunity to research the issue and present supporting authority, the record indicates trial counsel provided no additional research or argument to the court. Tr. 147, lines 23-25; Tr. 151, line 15 – Tr. 152, line 6.

statute's definition of a most serious offense. See S.C. Code Ann. Ann. § 17-25-45(C)(1). However, the recidivist statute does not classify the offense of rape.

Our Supreme Court examined the use rape as a prior conviction for purposes of the recidivist statute in State v. Lindsey, 355 S.C. 15, 583 S.E.2d 740 (2003). Lindsey was convicted of criminal sexual conduct in the first degree. The prosecution sought a life sentence based upon Lindsey's prior guilty plea to rape in 1976. Id. at 17, 583 S.E.2d at 741. Although the issue in Lindsey concerned the statutory definition of most serious offenses, rape is not defined as a most serious or serious offense in the recidivist statute. The Court held Lindsey's 1976 rape conviction did not necessarily contain all the elements of the most serious offenses of criminal sexual conduct in the first degree, criminal sexual conduct in the second degree, or criminal sexual conduct with a minor. Id. at 18-19, 583 S.E.2d at 741. The record before the Court contained no evidence concerning Lindsey's 1976 rape conviction. The indictment provided no details of the facts or circumstances concerning the rape. Thus, the Court concluded the 1976 rape may have fallen into the category of third degree criminal sexual conduct involving sexual battery using force or coercion, but without aggravating circumstances. In light of the fact that criminal sexual conduct in the third degree was not listed as a most serious offense in the recidivist statute, the Court reversed Lindsey's life sentence. Id. at 19-20, 583 S.E.2d at 742.

Likewise, the only evidence concerning Appellant's prior conviction for rape was the trial judge's comments:

> in 1971, Greenwood County, the defendant did beat, bruise, and ill treat with the intent to violently injure, feloniously to ravish, carnally know, and other said things against the victim, Moselle Jackson Williams. He was sentenced as a youthful offender at that time based on his age of [seventeen] as a result of an indictment for rape.

Tr. 136, line 25 – Tr. 137, lines 6.[5] Criminal sexual conduct in the first degree requires the use of aggravated force, forcible confinement, kidnapping, robbery, extortion, burglary, or housebreaking, or the rendering of the victim helpless by distribution of an intoxicating substance. S.C. Code Ann. § 16-3-652(1). Criminal sexual conduct in the second degree requires the use of aggravated coercion to accomplish the sexual battery. S.C. Code Ann. § 16-3-653.

The limited information in the record clearly demonstrated no forcible confinement or other crime, or the use of an intoxicating substance. Aggravated coercion is the threat to use force or violence of a high and aggravated nature to overcome the victim or another person or the threat to retaliate in the future by the infliction of physical harm, kidnapping or extortion, under circumstances of aggravation. S.C. Code Ann. § 16-3-651(b). The record is devoid of any evidence of threats made by Appellant. Therefore, the only question is whether "beat, bruise, and ill treat with intent to violently injure" satisfied the element of aggravated force. Aggravated force is "physical force of physical violence of a high and aggravated nature to overcome the victim" or "the threat of the use of a deadly weapon." S.C. Code Ann. § 16-3-651(c). Although the record contained evidence of the use of force – "beat, bruise, and ill treat" – the record contained no evidence that the conduct rose to the level of "physical force of physical violence of a high and aggravated nature." In fact, criminal sexual conduct in the third degree requires the use of force or coercion to accomplish the sexual battery in the absence of aggravating circumstances. S.C. Code Ann. § 16-3-654(1)(a). It is the degree of force used that distinguishes third-degree and first-

[5] The prosecution did not enter the indictments or certified convictions into evidence; therefore, neither is available for review.

degree criminal sexual conduct. The record before the trial judge was insufficient for a determination that Appellant's rape conviction satisfied the statutory requirement of aggravated force; therefore, Appellant's sentence of life without parole must be reversed.

CONCLUSION

Appellant respectfully requests this Court reverse his sentence of life imprisonment and remand the matter for re-sentencing.

Respectfully submitted,

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Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of May, 2013.