STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PEDRO CERVANTES RODRIGUEZ,

APPELLANT

APPELLATE CASE NO. 2022-001511

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to quash the indictment where the indictment only alleged appellant committed a "sexual battery," and it failed to specify what kind of sexual battery appellant allegedly committed, since the indictment did not sufficiently put appellant on notice of what he was called upon to answer or defend against?

STANDARD OF REVIEW

If a defendant raises a timely challenge to the sufficiency of an indictment, the reviewing court is charged with:

> determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.

State v. Gentry, 363 S.C. 93, 102–03, 610 S.E.2d 494, 500 (2005).

"In determining whether an indictment meets the sufficiency standard, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances." State v. Tumbleston, 376 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct.App.2007). In doing so, "one is to look at the 'surrounding circumstances' that existed pre-trial, in order to determine whether a given defendant has been 'prejudiced,' i.e., taken by surprise and hence unable to combat the charges against him." State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991).

The trial court's factual conclusions as to the sufficiency of an indictment will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support. Id. Accordingly, an appellate court is bound by the trial court's factual findings when the findings are supported by the evidence and not controlled by error of law. Id.

ARGUMENT

The court erred by refusing to quash the indictment where the indictment only alleged appellant committed a "sexual battery," and it failed to specify what kind of sexual battery appellant allegedly committed, since the indictment did not sufficiently put appellant on notice of what he was called upon to answer or defend against.

Relevant facts

Prior to trial, defense counsel McKellar moved to quash the indictment for criminal sexual conduct in the first degree. Counsel argued the indictment only alleged that appellant committed a "sexual battery upon the victim who is less than eleven years of age at the time of the incident." Counsel argued the indictment did not specify what type of sexual battery appellant allegedly committed, whether it was sexual intercourse or some other type of sexual battery. Counsel noted that a "sexual battery" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse or any intrusion, however slight, of any part of another person's body or of any object into the genital or anal opening of another person's body except when such intrusion is accomplished for a recognized treatment or diagnostic purpose." Defense counsel stated in every other similar case the defense had seen, including State v. Tumbleston, 376 S.C. 90, 654 S.E.2d 849 (2008), the indictment stated the specific "sexual battery" the defendant allegedly committed. R. 9, l. 18 - 11, l. 7.

The solicitor maintained that the defense reliance on State v. Tumbleston, 376 S.C. 90, 654 S.E.2d 849 (2008) was misplaced. The solicitor said the indictment in this case mirrored the language of the CSC with a minor first statute in alleging a sexual battery was committed on a child less than eleven-years-old. The solicitor reasoned that the judge was going to define

"sexual battery" for the jury, and she also assumed defense counsel had told appellant what a sexual battery was and given him different examples of a sexual battery. R. 11, l. 10 - 12, l. 3. The judge denied the motion to quash the indictment for criminal sexual conduct in the first degree. R. 12, ll.14-15.

Discussion

Article 1, § 11 of the South Carolina Constitution provides that "no person may be held to answer for any crime the jurisdiction which is not within the magistrates court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed. . ." South Carolina Code §17-19-10 provides that "no person shall be held to answer in any court for an alleged crime or offense unless upon indictment by a grand jury." An indictment is needed to give notice to the defendant of the charges against him. State v. Gentry, 363 S.C. 93, 102 n. 6, 610 S.E.2d 494, 499 n. 6 (2005).

Here, defense counsel properly raised the sufficiency of the indictment motion before the jury was sworn, pursuant to South Carolina Code §17-19-90, and State v. Means, 367 S.C. 374, 383, 626 S.E.2d 348, 353-54 (2006). Therefore, the trial court was called upon to determine whether the indictment sufficiently notified appellant of what he was called upon to answer or defend against. See State v. Gentry, 363 S.C. at 102-03, 610 S.E.2d at 500 *citing* State v. Wilkes, 353 S.C. 462, 465, 578 S.E.2d 717, 719 (2003).

In this case, both the defense and the solicitor cited State v. Tumbleston, 376 S.C. 90, 654 S.E.2d 849 (2008) in support of their arguments. In Tumbleston, the indictments specified the nature of the sexual battery Tumbleston allegedly committed. One alleged cunnilingus, one alleged sexual intercourse, and another alleged digital penetration. See State v. Tumbleston, 376 S.C. 90, 100-101, 654 S.E.2d 849, 854-855.

Here, as seen, the indictment only alleged that appellant only committed "the crime of criminal sexual battery with a minor in the first degree, in that the defendant did commit a sexual battery upon Blysse C., a minor who was under eleven years of age at the time of the incident." R. 213. Appellant understands that the sufficiency of an indictment is examined objectively, from the viewpoint of a reasonable person, and not from the subjective viewpoint of a particular defendant. State v. Means, 367 S.C. 374, 383, 626 S.E.2d 348, 353-54 (2006).

When examining this indictment with a practical eye to all the surrounding circumstances, it did not put appellant on notice of what he was called to defend against in this case. The solicitor's assertion that the judge would properly the jury on the definition of a sexual and the state's assumption "[t]hat Mr. McKellar has told his client what sexual battery is" misses the point. The judge later instructing the jury on the definition of sexual battery was not of any help to the defense as it prepared a defense. Further, Counsel McKeller was the person asking for proper notice of the crime appellant allegedly committed against the minor.

During the trial the minor alleged appellant touched her vagina with "his hands and his mouth." R. 131, ll. 2-10. The indictment should have alleged appellant performed cunnilingus upon a minor less than eleven-years-old. That would have provided appellant with notice of the offense he was accused of committing. Further, there is nothing in this record that shows appellant was provided with any other notice of this charge prior to trial. The judge erred by refusing to quash the indictment for a lack of the sufficiency of the charge of criminal sexual conduct with a minor in the first degree. See, State v. Gentry, 363 S.C. at 102-03, 610 S.E.2d at 500 *citing* State v. Wilkes, 353 S.C. 462, 465, 578 S.E.2d 717, 719 (2003).[1]

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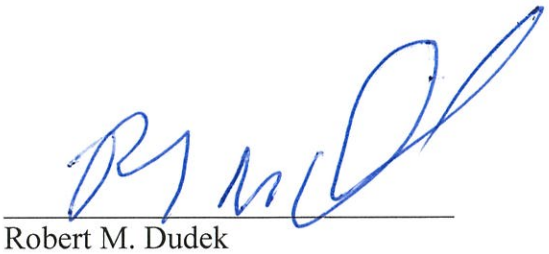
[1] The only other legal issues in this case were the judge's ruling that the forensic interview complied with South Carolina Code Section 17-23-175, and the denial of the defense motion for a directed verdict. R. 73, l. 5 - 76, l. 21; R. 153; Tr. 159.

CONCLUSION

By reason of the foregoing argument, this court should vacate appellant's conviction for criminal sexual conduct in the first degree due to the defective indictment.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of July, 2023.

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SC Court of Appeals

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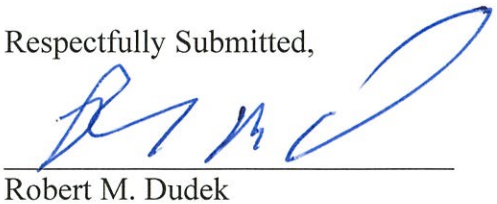
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Pedro Cervantes Rodriguez states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Diane Schafer Goodstein, which was held on October 17-18, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, he asks the Court to relieve him as counsel for Pedro Cervantes Rodriguez.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

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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) Entire Trial Transcript dated October 17-18, 2022

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

Robert M. Dudek
Chief Appellate Defender

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PO Box 11589
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(803) 734-1330

ATTORNEY FOR APPELLANT

This 19th day of July, 2023.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Robert M. Dudek
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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Pedro Cervantes Rodriguez, #389266, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 19th day of July, 2023.

Robert M. Dudek
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