STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEVEN GREGORY FROST,

APPELLANT

APPELLATE CASE NO. 2012-213043

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in requiring the jury to make a finding under section 16-3-655 of the South Carolina Code that appellant inserted an object into the complainant's genitals when no such requirement exists in the statute and no evidence supported such a finding?

STATEMENT OF THE CASE

On June 11, 2012, appellant Steven Gregory Frost ("Frost") was indicted by an Oconee County grand jury for first degree criminal sexual conduct with a minor – victim under 11 years of age. R.___. On September 17 – 19, 2012, Frost was tried before the Honorable J. Cordell Maddox, Jr. and a jury. Tr. 1. Lindsey S. Simmons represented the State. Transcript 1. R. Daniel Day represented Frost. Tr. 1. The jury convicted Frost. Tr. 189, ll. 2 – 7. Judge Maddox sentenced Frost to forty years' imprisonment. Tr. 197, l. 23 – 198, l. 10. Frost timely filed and served a notice of appeal and this appeal follows.

ARGUMENT

The trial court erred in requiring the jury to make a finding under section 16-3-655 of the South Carolina Code that appellant inserted an object into the complainant's genitals when no such requirement exists in the statute and no evidence supported such a finding.

Relevant Facts

Complainant Child testified that in October 2011, Frost inserted his fingers into her vagina. Tr. 76, l. 22 – 77, l. 8. This evidence of digital penetration was the only kind of sexual battery alleged by Child. Tr. 70, l. 20 – 82, l. 24. At no point did Child or any other witness allege that Frost inserted any object into Child's vagina. Child's mother entered the room during the alleged incident and claimed she put a stop to it. Tr. 106, l. 2 – 107, l. 25.

Before closing arguments, the trial judge discussed the jury charge and the verdict form with the parties. Transcript 136, l. 20 – 139, l. 11. The trial judge gave the parties the opportunity to review the verdict form. Transcript 137, ll. 16 – 24. The verdict form, in relevant part, looked as follows:

> We, the jury, by unanimous consent, find the Defendant Steven Greg Frost:
>
> 1. _____ **Guilty** of First Degree Criminal Sexual Conduct with a Minor.
>
> The sexual battery involved (choose one):
>
> _____ Sexual Intercourse
>
> _____ Anal Intercourse
>
> _____ Intrusion by an Object
>
> _____ **NOT Guilty** of First Degree Criminal Sexual Conduct with a Minor.

R. ___ (Verdict Form). Neither the State nor Frost objected to this verdict form. Tr. 137, l. 16 – 138, l. 5.

The trial judge charged the definition of "sexual battery" from section 16-3-651(h) of the South Carolina Code: "A sexual battery in South Carolina is sexual intercourse, cunnilingus, fellatio, anal intercourse, sexual intercourse, **or** any intrusion however slight of any part of a person's body **or** of any object into the genitalia or anal openings of another person's body." Tr. 173, ll. 11 – 18; see also S.C. Code Ann. § 16-3-651(h) (emphasis added). The jury returned with the following question: "Does digital penetration qualify as (1) sexual intercourse or (2) intrusion by an object?" R. ___ (Court's Ex. 2); Tr. 185, l. 3 – 188, l. 4. The following colloquy then occurred over how to answer the jury's question:

> THE COURT: The question is: Does digital penetration qualify as, one, sexual intercourse or, two, intrusion by an object? What's y'all's answer to that?
>
> MS. SIMMONS: It's my position its sexual intercourse. I think he can be either, but –
>
> THE COURT: I don't know how sexual intercourse – have you got a definition of sexual intercourse? I think it's an intrusion by an object, quite frankly. I think sexual intercourse is defined.
>
> MS. SIMMONS: Judge, to be honest with you, I had a dilemma about which one it was. I think it could be concluded either, so…
>
> THE COURT: Yeah. I mean, I just – and I don't know whether they're stuck on that – I don't know what, but I sort of expected that question because I don't think it's sexual intercourse by definition.
>
> (Whereupon, counsel confer off the record.)
>
> MS. SIMMONS: I know the definition of sexual battery is codified, but…
>
> MR. DAY: It just talks about more and more about it, which doesn't have anything to do with this.
>
> THE COURT: Well, sexual battery means sexual intercourse. The other definitions are any intrusion however slight. I don't think it sexual

intercourse. I mean, I think just by definition is probably got to be intrusion by an object.

MS. SIMMONS: Thank you, Judge. I could not find sexual intercourse as defined.

MR. DAY: It's not in the statute I don't think.

THE COURT: No, it's not. Sexual battery. But I think just by very definition, and I certainly don't hold myself out as any type of textbook, but I'm more comfortable with going with intrusion by an object.

MS. SIMMONS: We have no objection, Judge.

THE COURT: Any objection to that from either side?

MR. DAY: Well, the problem I have is object. An object has to be something that is separate from an individual, and it would be an inanimate object because it says object. It doesn't say –

THE COURT: It doesn't say inanimate object.

MR. DAY: I know, but object in itself.

THE COURT: Well, I mean, if – the way the statute as written, it's one of those three, **and if I had to pick between those two in that question, then I think it would be an intrusion by an object. I mean, let's face it. When that statute was written, whoever did it didn't follow through with it.**

MR. DAY: I know this particular statute is too, too young for that to have come up. **I almost want to argue that it's neither one.**

THE COURT: Well, you can.

MR. DAY: I certainly don't believe that it's sexual intercourse, but whether it be an object. Because they could've said that after sexual intercourse or intrusion into the body by part of the –

THE COURT: Well –

MR. DAY: By the accused.

THE COURT: If sexual battery is sexual intercourse, the various other definitions, or any intrusion however slight if any part of the person's body or any object into the genital area. **So I think you got to go with intrusion by object.** It's not sexual intercourse.

MR. DAY: Then note my objection, Your Honor.

Tr. 185, l. 3 – 187, l. 16 (emphasis added). When, the jury returned to the courtroom, the trial judge told them, "For the sake of the choices that you have before you, my interpretation is that it would be intrusion by an object." Tr. 187, l. 25 – 188, l. 2. After the jury's verdict, Frost made a motion for new trial based on the judge's response to this question. Transcript 190, ll. 5 – 13. This motion was denied. Tr. 190, ll. 14 – 16.

Discussion

The trial court's error was in assuming that the jury was required to check a box other than "Guilty" or "Not Guilty" on the verdict form. The only evidence in the case was that Frost allegedly digitally penetrated Child. R. ___ (Court's Ex. 2). The trial judge told the jury this evidence fit into the "intrusion by object" box on the verdict form. This interpretation violated the relevant statute. The verdict form should have had a box for "None of the Above."

What caused the trial court's confusion is the sentencing scheme contained in the CSC with a minor statute. S.C. Code Ann. § 16-3-655. Under certain situations codified in this section, a defendant may be eligible for the death penalty. S.C. Code Ann. § 16-3-655(D)(1). A defendant with a prior conviction for CSC with a minor may be executed if two requirements are met. S.C. Code Ann. § 16-3-655(D)(1). First, the defendant must have a prior conviction for CSC with a minor. S.C. Code Ann. § 16-3-655(D)(1). Second,

that prior conviction must have involved "sexual or anal intercourse by a person or intrusion by an object." S.C. Code Ann. § 16-3-655(D)(1). If neither "sexual or anal intercourse" or "intrusion by an object" are found by a jury, then the defendant must receive a life sentence. S.C. Code Ann. § 16-3-655(D)(1).

If the Legislature had meant that a defendant could be eligible for the death penalty for cunnilingus, fellatio, or penetration by a defendant's body part, then the finding of sexual or anal intercourse or insertion by an object would be unnecessary in section 16-3-655(D)(1). The Legislature, knowing that the definition of sexual battery under CSC included things other than intercourse or object insertion, deliberately left these out when determining which offenders would be eligible for the death penalty. Because the Legislature distinguished between intrusion of an object and intrusion of a body part, the trial judge was not free to undo that distinction. Conflating "object" with "body part" contravenes the Legislature's plainly expressed intent.

The clear intent of the Legislature is that when a defendant is convicted of CSC with a minor based on conduct that is not sexual intercourse, anal intercourse, or insertion of objects, that defendant will not be eligible for the death penalty if convicted a second time. See Laird v. Nationwide Ins. Co., 243 S.C. 388, 395, 134 S.E.2d 206, 209 (1964) (stating that legislative intent is the primary focus when construing statutes). "The legislature must have intended to mean what it has plainly expressed...Where the words of a statute are plainly expressive of an intent, not rendered dubious by context, the interpretation must conform to and carry out that intent." Beaty v. Richardson, 56 S.C. 173, 180, 34 S.E. 73, 76 (1899).

Because the trial judge failed to understand that the jury was not required to make a finding of sexual intercourse, anal intercourse, or intrusion by an object, he erred in responding to the jury's adroit question. The effect of the judge's response was a charge on the facts and the removal of a vital factual determination from the jury's province. Frost has suffered prejudice from this error. Because of the court's error, if he is convicted again of CSC with a minor, he would be eligible for the death penalty. Frost is entitled to a jury finding on any fact that could enhance his sentence. Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi, the United States Supreme Court held that a judge could not enhance a defendant's sentence based on his finding that the defendant committed a hate crime. Id. The Court held that the defendant was entitled to a jury determination on this factor because it enhanced his sentence. Id.

In a PCR action, the South Carolina Supreme Court used Apprendi to reverse a conviction in a drug trafficking case. Dervin v. State, 386 S.C. 164, 167-68, 687 S.E.2d 712, 713-14 (2009). In Dervin, the defendant was indicted for trafficking cocaine in an amount between 200-400 grams. Id. at 166-67, 687 S.E.2d at 712-13. The trial judge instructed the jury that the defendant could be found guilty of trafficking if she had more than ten grams. Id. The jury never made a finding of the exact amount of drugs possessed by the defendant. Id. The State argued that Apprendi did not require reversal because the defendant was sentenced within the statutory maximum. Id. The Court disregarded that argument and reversed because the trial court failed to require the jury to find the specific amount of drugs possessed by the defendant. Id. at 168-69, 687 S.E.2d at 714.

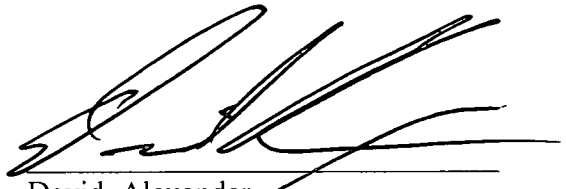
The same logic from Apprendi and Dervin require reversal in this case. Just as the defendant in Dervin was entitled to a jury determination of the amount of drugs because it affected her sentence, Frost was entitled to a jury determination of whether he committed the specific sexual batteries making him eligible for the death penalty under section 16-3-655(D)(1). The judge's incorrect response removed an important sentencing factor from the jury. Because Frost is entitled to a jury finding on this issue, the case must be reversed and remanded for a new trial. The State may argue that the remedy would be to strike the finding by the jury. This remedy is not allowable. Apprendi and Dervin are clear that juries—not judges—must make these findings.

Furthermore, it is impossible to speculate on the effect this incorrect answer had on the jury's deliberations. The judge's charge on the facts may have influenced their deliberations and caused a guilty verdict. "In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences." State v. Hill, 394 S.C. 312, 320, 714 S.E.2d 879, 883-84 (Ct. App. 2011). If the improper influence affects the jury's partiality, then the defendant likely has suffered prejudice. Id. Since this error can only be corrected by a jury and the error corrupted the integrity of the jury's deliberations, a new trial is required.

CONCLUSION

For the foregoing reasons, appellant's conviction must be reversed and this case remanded for a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of July, 2013.

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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 indictment(s);
(2) Trial transcript pages 1-5; 70-82; 100-118; 136-200;
(3) Court's Exhibits 1 and 2;
(4) Verdict Form

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

July 11th, 2013

David Alexander
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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 the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also served upon Mr. Steven Gregory Frost, #133769 McCormick Correctional Institution 386 Redemption Way McCormick, SC 29899, this 11th day of July, 2013.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of July, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.