ORIGINAL

RECEIVED
AUG 1 4 2013
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Darlington County

Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LARRY TYLER,

APPELLANT

APPELLATE CASE NO. 2013-000466

INITIAL BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to grant a directed verdict to the charge of contributing to the delinquency of a minor when the State failed to present any substantial evidence beyond a reasonable doubt that appellant did anything to make the minor delinquent as alleged by the indictment?

STATEMENT OF THE CASE

Appellant was convicted of obscene/criminal solicitation of a minor, sexual exploitation of a minor in the second degree, contributing to the delinquency of a minor, and disseminating harmful material to minors after a jury trial held before the Honorable Paul M. Burch on February 25 – 27, 2013, in Darlington County. Respective sentences of eight (8) years, eight (8) years, eight (8) years, and three (3) years were imposed. Richard Jones, Esquire, was trial counsel. John Holt, Esquire, and Patti Parker, Esquire, were the assistant solicitors.

This appeal follows.

STATEMENT OF FACTS

Doris Brown testified that she was the grandmother of the minor and the minor's younger sister. She would take them over where appellant lived with his mother, Ernestine Witherspoon, to visit. At one visit, appellant gave the minor a cell phone. On their way home in the car, the minor's sister said there was a picture of a naked man on the phone. Ms. Brown took the phone back to where appellant lived. (Tr. p. 43, line 21 – p. 46, line 7).

The minor testified that she was twelve years old. She said they went to visit a lot at where appellant lived. He was always taking pictures of them with his cell phone. She said they played a racing game. If appellant won, he would get a hug from her. If he lost, he would have to pay her a dollar. Appellant always won. She identified the cell phone appellant gave her and said when they got in the car with their grandmother, they noticed pictures on the phone. One was a girl in a bikini. The other one was a picture of appellant with blue underwear. (Tr. p. 52, line 8 – p. 55, line 17). She did not read or see any text messages. (Tr. p. 60, lines 1 – 4).

The minor's younger sister testified next. She said she was ten years old. She, too, said appellant would take pictures of them. He took more of her sister. She also testified about the cell phone appellant gave them. She saw pictures of girls with bathing suits and a picture of appellant with blue drawers. (Tr. p. 60, line 23 – p. 66, line 1).

Tyquan Brown testified that he was twenty-one and a cousin of the minor and her sister. He went to where appellant lived just one time and appellant gave him the cell phone. In addition to the pictures, he noticed some inappropriate drafted text messages that appellant had written about/to the minor. He called the minor's mother and told her what he found. He also gave her the phone. (Tr. p. 67, line 22 – p. 73, line 5).

Georgita Brown, the minor's mother, testified she saw the pictures and saw the drafts. She called the police and met Deputy Hodges at a local Roses. She gave him the cell phone. (Tr. p. 79, line 11 – p. 83, line 9).

Deputy Hodges said they got a search warrant for appellant's residence and his vehicle. There were pictures that were found off of appellant's computer and some of his other phones. (Tr. p. 90, lines 17 – 24).

Sergeant Tunsdall testified that he used an extraction device to extract data off of appellant's cell phone. The data was placed on a thumb drive and then entered into his laptop so he could burn a disk from it for evidence. (Tr. p. 95, line 18 – p. 97, line 3).

Deputy Harrell testified he worked in forensics and collected appellant's computer, a hard drive, and several cell phones. (Tr. p. 99, lines 4 – 25). He went over the unsent drafted text messages concerning the minor that appellant drafted. (Tr. p. 102, line 6 – p. 103, line 13). Next, he discussed photos taken off appellant's desktop computer. Most of the images were of young girls under ten years of age. At least one image was pornographic. (Tr. p. 104, line 20 – p. 107, line 22).

ARGUMENT

The trial court erred in refusing to grant a directed verdict to the charge of contributing to the delinquency of a minor because the State failed to present any substantial evidence beyond a reasonable doubt that appellant did anything to make the minor delinquent as alleged by the indictment.

At the conclusion of the State's case, defense counsel moved for a directed verdict to the charge of contributing to the delinquency of a minor. (Tr. p. 128, lines 14 – 18). The indictment alleged the following:

> That Larry James Tyler, being over eighteen (18) years of age, did in Darlington County, on or about July 1, 2011, to September 24, 2011, knowingly and willfully encourage, aid, or cause or influence one [minor], a minor, to violate a law or municipal ordinance; or to become incorrigible or ungovernable and beyond the control of her parents or guardian; or to become habitually truant, or to without just cause and without consent of her parent or guardian to repeatedly desert her home; or to engage in an occupation which is in violation of law; or to associate with immoral or vicious persons, or to frequent a place of existence of which is in violation of law; or to habitually use obscene or profane language; or to beg or solicit alms in a public place under pretense; or to so deport herself to willfully injure or endanger her morals or health or the morals or health of others, in violation of Section 16-17-490, S.C. Code of Laws, 1976, as amended.

As defense counsel noted, the only testimony by the minor was that she was given a cell phone for about ten minutes and she saw a picture of appellant in blue briefs and a woman in a bathing suit. That did not show that appellant contributed to the delinquency of a minor. (Tr. p. 128, line 19 – p. 129, line 2).

The trial judge said he wanted to think about the motion overnight. (Tr. p. 133, lines 23 – 24). The next day, he said he had some concerns, but he denied the motion. He did say

he reserved the right to review the motion. (Tr. p. 138, lines 2 – 10). Denying the directed verdict motion was error.

Due process as guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979).

Our Court has held:

> [T]he trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. [Emphasis added].

State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), cert. denied, 493 U.S. 895, 110 S.Ct. 246 (1989).

In applying this standard, our Court has held that evidence which is "sufficient to raise a strong suspicion of the guilt of the accused" is not sufficient to constitute "any evidence form which the guilt of the accused may be fairly and logically deduced." State v. Totherow, 263 S.C. 275, 210 S.E.2d 228, 230 (1974). See, also, State v. Turner, 117 S.C. 470, 109 S.E. 119, 120 (1921). The motion for a directed verdict should be granted, therefore, "where evidence merely raises a suspicion of guilt, or is such to permit the jury to merely conjecture or to speculate as to the accused's guilt." State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 677 (1976), citing State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93,

cert. denied, 420 U.S. 945 (1974). "If the evidence is consistent with both innocence and guilt it cannot support a conviction." United States v. Varoz, 740 F.2d 772, 775 (10th Cir. 1984); United States v. Ortiz, 445 F.2d 1100, 1103 (10th Cir 1971). Guilt is only to be found when there is a "rationally supportable state of near certitude." Evans-Smith v. Taylor, 19 F.3d 899, 906 (4th Cir 1994).

Appellant did not cause the minor "to violate a law or municipal ordinance." He did not cause her "to become incorrigible or ungovernable beyond the control of her parents." He did not make her "become habitually truant" or to "repeatedly desert her home; or to engage in an occupation which is in violation of the law." He did not make her "associate with immoral or vicious persons, or to frequent a place the existence of which is in violation of law." He also did not cause her "to habitually use obscene or profane language; or to beg or solicit alms in a public place." Appellant simply did not cause the minor to become delinquent because she was not delinquent.

CONCLUSION

A directed verdict should be granted.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of August, 2013.

RECEIVED
AUG 14 2013
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Darlington County
Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LARRY TYLER,

APPELLANT

APPELLATE CASE NO. 2013-000466

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) Indictment(s)
(2) Trial Transcript dated February 25 – 27, 2013:
Cover page,
Tr. p. 30 – p. 133,
Tr. p. 138.

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

August 14th, 2013

Robt M. Pachak

Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

RECEIVED
AUG 14 2013
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Darlington County
Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LARRY TYLER,

APPELLANT

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, this 14th day of August, 2013.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of August, 2013.

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