STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County
The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No: 2012-213043

THE STATE,

Respondent,

v.

STEVEN GREGORY FROST,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Appellant's argument is not preserved, but even if preserved, the trial court properly required the jury to make a finding under section 16-3-655 that Appellant committed CSC by intrusion by an object. Furthermore, any error in the trial court's advising the jury that digital penetration fit into "intrusion by an object" is harmless because Appellant suffered no prejudice.

STATEMENT OF THE CASE

An Oconee County Grand Jury indicted Appellant for first-degree criminal sexual conduct with a minor (CSC-First), victim under eleven years of age. (R.pp. 114-115) On September 17-19, 2012, Appellant proceeded to trial before a jury. R. Daniel Day, Esquire, represented Appellant and Assistant Solicitor Lindsey S. Simmons represented the State. The jury found Appellant guilty, and the Honorable J. Cordell Maddox, Jr., sentenced him to forty years' imprisonment. (R.pp. 100, 109.)

On September 21, 2012, Appellant filed a Notice of Appeal and on October 8, 2012, he filed an Amended Notice of Appeal.

STATEMENT OF FACTS

The victim (Victim) was adopted as a young child by Appellant's mother, Christine Longwith. (R. p.23, lines 16-25.) Longwith had three adult children, including Appellant, and two younger children she adopted later in life, including Victim. (R. p.23, lines 14-25.) In October of 2011, when Victim was eight years old, Appellant spent time at the house where Longwith and Victim lived. (R. p.9, lines 20-22; R. p.10, lines 1-13; R. p.24, lines 17-25; R. p.25, lines 1-13.) While there, Appellant called Victim into her bedroom where he was watching a movie, asking her to change the movie for him. (R. p.10, lines 14-25; R. p.27, line 19-25.) Appellant then touched Victim inside her underpants and put his fingers inside her and moved them around. (R. p.12, line 23-R. p.13, line 11.) Appellant was eventually charged with CSC-First. (R. p.45, lines 18-20.)

At trial, Victim testified that Appellant had put his hand inside her underpants and inserted his fingers into her "wrong spot," which was the term she used to describe her private area. (R. p.12, line 12-R. p.13, line 11.) While it was happening, Longwith walked in. (R. p.13, line 24-R. p.14, line 3.) Longwith asked Appellant what he was doing and pulled Victim out of the room. (R. p.14, lines 4-13.) Victim testified that at that point, she told her mother what had occurred. (R. p.14, lines 8-16.)

Longwith testified Appellant moved back to her area in October 2011 and came around her house often, where he would sleep in Victim's room while Victim slept in the living room. (R. p.24, line 17-R. p.25, line 10.) She testified that in mid-October, Appellant brought a girlfriend by the house and the two of them slept on the sofa while Victim slept in her own bedroom. (R. p.25, line 11-R. p.27, line 22.) The following day, Appellant got in Victim's bed after Victim had gotten up. (R. p.27, lines 4-6.) Around lunch time, Longwith heard Appellant call Victim into the room to change his movie, and

Longwith went into the bedroom after Victim had been gone for a while. (R. p.27, lines 21-25.) Longwith saw Appellant's right hand under Victim's clothes in the back and saw his left hand holding Victim's hand. (Tr. 106, lines 2-9.) After pulling Victim out of the room, Longwith explained that Victim told her Appellant had his hand in her "potty hole." (R. p.28, lines 14-22.) She testified that she did not immediately report the incident to law enforcement. (R. p.30, lines 1-9.)

Sergeant Gentry Hawk, of the Oconee County Sheriff's Department, testified she received a report about the incident the following February. (R. p.41, line 4-R. p.42, line 19.) Sgt. Hawk sent Victim to the Child Advocacy Center for an interview and then referred her for a medical exam. (R. p.43, line 17-R. p.44, line 4.) Dr. Sallie Carter examined Victim and testified the exam was consistent with a penetrating injury, appearing to have been something actually inside the vagina. (R. p.19, lines 20-22; R. p.20, lines 20-22.) She further testified the injury she observed could have been caused by penetration of more than one finger. (R. p.21, lines 4-7.) Sgt. Hawk testified that she obtained a statement from Longwith and, together with the medical evidence that corroborated Victim's story, was able to charge Appellant with CSC-First. (R. p.44, line 25-R. p.45, line 25.)

After the State rested, the following exchange took place:

> [The State]: And, Judge, it's my understanding as far as the charge the jury on the verdict form needs to make a factual finding as well; is that correct?
>
> The Court: Yeah. . . . If y'all have . . . a sample that you want me to look at, how about doing it for me. So if y'all will do a verdict form that would help.

(R. p.46, lines 10-19.) The next morning, the discussion continued:

The Court: The other thing I need to talk to you about before we start, you have a check list on your verdict form. Is there a new requirement for the checklist on your verdict form?

[The State]: Judge, the way I understand . . . 16-3-655 subsection A (1) is – under C (1) it says: If a person is convicted of A (1), which is criminal sexual conduct with a minor first degree, it says that the Judge, let's see, the case of a person . . . convicted at trial under section A (1) must designate as part of the verdict whether the conduct that constituted sexual battery involved sexual or anal . . . intercourse or intrusion by an object.

The Court: Okay.

[The State]: I never made one that looks like that, but I think we have to include it.

The Court: I hadn't either. But that - - it may have been amended. If it hadn't been amended, it's something that hasn't been done. I understand why it needs to be done.

Have you had a chance to look at the verdict form?

[Appellant]: Yes.

The Court: Do you agree that's - - -

[Appellant]: That appears that's the way I would have written it, Your Honor, based on the statute.

(R. p.47, line 21-R. p.48, line 24.) (emphasis added.)

After the jury began deliberations, it sent the following question to the trial court: "Does digital penetration qualify as, one, sexual intercourse or, two, intrusion by an object?" (R. p.96, lines 3-5.) After discussing it with counsel, the trial judge noted he was "more comfortable going with intrusion by an object." (R. p.96, line 5-R. p.97, line 10.) When asked if he had any objection, Appellant had the following exchange with the trial court:

[Appellant]: Well, the problem I have is object. An object tends to be something that is separate from an individual, and would be an inanimate object because it says object. It doesn't say - - -

The Court: It doesn't say inanimate object.

[Appellant]: I know, but object in itself.

The Court: Well, I mean, if - - the way the statute is 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 intrusion by an object. I mean, let's face it. When that statute was written, whoever did it didn't follow through with it.

[Appellant]: 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.

[Appellant]: I certainly don't believe that it's sexual intercourse, but whether it be an object. Because they could have said after sexual intercourse or intrusion into the body by part of the - - -

The Court: Well - - -

[Appellant]: By the accused.

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

[Appellant]: Then note my objection, Your Honor.

(R. p.97, line 13-R. p.98, line 16.)

The trial court told the jury that its interpretation would be intrusion by an object. (R. p.99, lines 1-2.) The jury returned a verdict of guilty and marked "intrusion by an object" on the verdict form. (R. p.100, lines 2-7.) Appellant renewed his directed verdict motion and moved for a new trial based on the "response to the question

particularly as to object that under the statute may not fall into it, but because of the fact that it was a part of his body . . . ." (R. p.101, lines 5-13.) The trial court denied both motions and sentenced Appellant to forty years' imprisonment. (R. p.101, lines 14-16; R. p.109, lines 1-5.)

ARGUMENT

Appellant's argument is not preserved, but even if preserved, the trial court properly required the jury to make a finding under section 16-3-655 that Appellant committed CSC by intrusion by an object. Furthermore, any error in the trial court's advising the jury that digital penetration fit into "intrusion by an object" is harmless because Appellant suffered no prejudice.

Appellant argues the trial court erred in requiring the jury to make a finding under section 16-3-655 that Appellant inserted an object into the victim's genitals when no such requirement exists in the statute and no evidence supported such a finding. Specifically, he argues the error was in the trial court's assumption that the jury was required to check a box other than "Guilty" or "Not Guilty" on the verdict form. However, because Appellant did not object to the verdict form at trial, did not move for a mistrial following the jury's question regarding which category to check for digital penetration, and did not specifically argue that a verdict form reading simply "Guilty" or "Not Guilty" should have been submitted to the jury, this issue is not preserved for appellate review.

Even if preserved, section 16-3-655 (D)(1) requires that "[i]n the case of a person convicted at trial for a violation of [first-degree CSC with a minor] the judge or jury, whichever is applicable, must designate as part of the verdict whether the conduct that constituted the sexual battery involved sexual or anal intercourse by a person or intrusion by an object." Thus, the trial court was in compliance with the statute when it submitted a verdict form to the jury with spaces to check one of these three acts and, as a consequence, properly responded to questions about that form. Furthermore, the State presented sufficient evidence to support the finding that the conduct involved intrusion by an object. Finally, Appellant suffered no prejudice because he was sentenced within the

range of sentencing for CSC-First regardless of which category digital penetration fit into on the verdict form.

Preservation

Initially, the State submits Appellant's arguments are not preserved for appellate review because they were neither raised to nor ruled upon by the trial court. State v. Brown, 402 S.C. 119, 125 n.2, 740 S.E.2d 493, 496 n.2 (2013) (describing the four basic requirements to preserving issues at trial for appellate review, including the requirement that the issue must have been raised to and ruled upon by the trial court); State v. Policao, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) ("The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal.").

At trial, Appellant did not argue that the jury was not required to make a finding under section 16-3-655 by checking one of the acts on the verdict form. Indeed, Appellant reviewed the verdict form prior to its submission to the jury and did not object to the wording, specifically stating, "That appears that's the way I would have written it, Your Honor, based on the statute." (R. p.48, lines 23- 24.) The only objection at trial in regard to the verdict form came after the jury asked whether digital penetration was sexual intercourse or intrusion by an object. After the jury's question, Appellant stated that the problem he had was with the word "object." (R. p.97, lines 13-16.) He then said to the trial court, "I almost want to argue that it's neither one." (R. p.98, lines 1-2.) The trial court replied, "Well, you can." (R. p.98, line 3.) At that point, the following exchange took place:

> [Appellant]: I certainly don't believe that it's sexual intercourse, but whether it be an object. Because they

> could have said after sexual intercourse or intrusion into the body by part of the - - -
>
> The Court: Well - - -
>
> [Appellant]: By the accused.
>
> The Court: If sexual battery is sexual intercourse, the various other definitions, or any intrusion however slight of any part of the person's body or any object into the genital area. So I think you got to go with intrusion by an object. It's not sexual intercourse.
>
> [Appellant]: Then note my objection, Your Honor.

(R. p.98, lines 4-16.)

It is clear from the above exchange that Appellant was only objecting to the word object. He never brought to the trial court's attention, before or after the verdict form went to the jury, that he did not believe the jury was required to make a finding under § 16-3-655. As the trial court pointed out to him, he was entitled to argue that digital penetration fit into neither category. He could have moved for a mistrial based on the problem with the verdict form, asked the trial court to throw out the categories and thereby leave the jury with only "Guilty" and "Not Guilty" as choices, or asked the trial court to tell the jury it could find digital penetration was "None of the above." However, he did not. His objection remained limited to his problem with the word "object." Appellant did not ask for any specific relief to correct what he considered the trial court's error. It is the duty of the appellant to present his objection with enough specificity for the trial court to be able to rule on it. "For an objection to be preserved for appellate review, the objection must be made . . . with sufficient specificity to inform the circuit court judge of the point being urged by the objector." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) (emphasis added) (citing Wilder Corp. v. Wilke, 330 S.C. 71,

76, 497 S.E.2d 731, 733 (1998)). Likewise, he did not argue the evidence did not support such a finding, as he does now. Thus, these arguments are not preserved for review by this Court.

Merits

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston Cnty. Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998). Furthermore, "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the express intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

Here, the Legislature was clear. It defined sexual battery as "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." S.C. Code Ann. § 16-3-651 (2003) (emphasis added). It essentially divided sexual battery into five different acts: (1) sexual intercourse, (2) cunnilingus, (3) fellatio, (4) anal intercourse, and (5) any intrusion into the genital or anal openings. The fifth act is further defined to include both body parts and objects as ways to commit the intrusion. However, no distinction is made between the two ways as the statute is written. If the Legislature wanted to separate intrusion of body parts from intrusion of objects, the statute could have been written ". . . intrusion, however slight, of any part of a person's body, or intrusion of any object, into the genital or anal openings of another person's body." The way the statute is written emphasizes the intrusion into the genital or anal

openings of another person's body as the act, while "of any part of a person's body or of any object" simply illustrates what instruments could be used to commit the intrusion. Our appellate courts have focused on the intrusion portion of the act, not the instrument by which the intrusion was committed. In South Carolina Dep't of Soc. Servs. v. Forrester, 282 S.C. 512, 517-18, 320 S.E.2d 39, 43 (Ct. App. 1984), this Court stated, "We have already held the preponderance of evidence shows that Forrester did insert a finger into the older niece's vagina. This is an intrusion into the genital opening so as to constitute a sexual battery, however slight the insertion may have been." (emphasis added).

Of these five acts, when the Legislature amended the statute to add subsection (D)(1), only three of them were designated as constituting a sexual battery severe enough to warrant receiving the death penalty. "In the case of a person convicted at trial for a violation of subsection (A)(1), the judge or jury, whichever is applicable, must designate as part of the verdict whether the conduct that constituted the sexual battery involved sexual or anal intercourse by a person or intrusion by an object." S.C. Code Ann. § 16-3-655 (D)(1) (Supp. 2012). According to the notes included in the July 1, 2006 amendment that added this section, the intent of the General Assembly was "to provide for the death penalty for a subsequent offense of first degree criminal sexual conduct with a minor who is less than eleven years of age . . . ." Nothing in the Legislature's stated intent differentiates between the five acts and which ones warrant the death penalty. However, it is clear the Legislature intentionally excluded cunnilingus and fellatio from the list. Because the intrusion act is written as one act, it is unreasonable to assume the statute was meant to only include "object" intrusion but not "body part" intrusion as one of the acts listed in subsection (D)(1).

"When a statute does not define a term, the Court typically gives the phrase its ordinary meaning." FCC v. AT&T Inc., 131 S. Ct. 1177, 1182 (2011) (citation and internal quotations omitted). Merriam-Webster's Online Dictionary defines object as "something material that may be perceived by the senses." (last visited August 15, 2013) http://www.merriam-webster.com/dictionary/object; see also Merriam-Webster's Online Dictionary, "material" (last visited August 15, 2013) http://www.merriam-webster.com/dictionary/material (defining material as (1) relating to, derived from, or consisting of matter, and (2) bodily) and Merriam-Webster's Online Dictionary, "bodily" (last visited August 15, 2013) http://www.merriam-webster.com/dictionary/bodily (defining bodily as of or relating to the body). Thus, the word "object" would include body parts. Because a body part can fit into the definition of the word "object," it makes sense that the Legislature condensed the two acts involving intrusion into "intrusion by an object" instead of writing out "by an object or body part."

Connecticut's statutory definition of "sexual intercourse" is similar to South Carolina's definition of "sexual battery." Under Connecticut's General Statutes § 53a-65(2), "Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body." Connecticut appellate courts have determined, "A finger is considered an 'object' that can be manipulated into a genital opening." State v. Antonio A., 878 A.2d 358, 362 n.3 (Conn. App. Ct. 2005) (quoting State v. Albert, 719 A.2d 1183 (Conn. App. Ct. 1998), aff'd, 759 A.2d 1037 (Conn. 2000)).

Even if the trial court erred in advising the jury to make a finding that digital penetration qualified as intrusion of an object, there is no prejudice to Appellant at this time. "If [Appellant] ha[d] previously been convicted of, pled guilty or nolo contendere

to, or adjudicated delinquent for [CSC-First] or a federal or out-of-state offense that would constitute [CSC-First], he [would have been required to] be punished by death or by imprisonment for life, as provided in this section." S.C. Code Ann. § 16-3-655 (D)(1) (Supp. 2012). However, defense counsel reviewed Appellant's extensive criminal history on the record and he did not have any prior CSC-First convictions, adjudications, or pleas that would have required him to receive the death penalty or life in prison. Indeed, he received a sentence of forty years. As far as Appellant's argument that he would now be eligible for the death penalty if he is convicted of or pleads guilty to CSC-First at any time in the future, this would be a speculative argument not ripe for appeal. Thus, contrary to Appellant's argument, he has suffered no prejudice from the jury's finding the act of digital penetration constituted intrusion of an object. Even if the jury had simply found Appellant guilty without specifying the act, he could have received the same sentence of forty years. See S.C. Code Ann. § 16-3-655 (D)(1) (Supp. 2012) ("A person convicted of a violation of subsection (A)(1) is guilty of a felony and, upon conviction, must be imprisoned for a mandatory minimum of twenty-five years, no part of which may be suspended nor probation granted, or must be imprisoned for life.")

Appellant cites Apprendi v. New Jersey, 530 U.S. 466 (2000), to support his argument that Appellant was entitled to a jury finding on any fact that could enhance his sentence. The Apprendi court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. He also cites Dervin v. State, 386 S.C. 164, 687 S.E.2d 712 (2009), in which the Supreme Court found counsel was ineffective in failing to object to the imposition of a twenty-five-year sentence. In Dervin, the Court found the jury was merely charged that it could convict Dervin if it found she possessed more than

ten grams of cocaine. Id. at 168, 687 S.E.2d 713. However, the jury would have had to find she possessed more than 400 grams of cocaine to warrant the twenty-five-year sentence she received. Id. at 169, 687 S.E.2d 714. Because the jury only made a finding in the amount of more than ten grams, the maximum she should have received was ten years. Id. at 168, 687 S.E.2d 714.

Appellant's reliance on these cases is misplaced. According to this line of cases, "the relevant statutory maximum 'is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant.'" Id. at 168, 687 S.E.2d 714 (quoting Blakely v. Washington, 542 U.S. 296 (2004) (reiterating the holding in Apprendi)). Here, Appellant received a sentence of forty years, well within the range of any conviction for CSC-First. "A person convicted of a violation of subsection (A)(1) is guilty of a felony and, upon conviction, must be imprisoned for a mandatory minimum of twenty-five years, no part of which may be suspended nor probation granted, or must be imprisoned for life." S.C. Code Ann. § 16-3-655 (D)(1) (Supp. 2012). Additionally, Appellant never articulated this argument at trial and, thus, it is not preserved for appellate review. See State v. Policao, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) ("The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal.").

Appellant's argument that the trial court's "incorrect answer" to the jury's question may have caused a guilty verdict is also without merit. The jury indicated through its question that it had already determined Appellant committed digital penetration. It simply asked the trial court which category that particular act fit into. Addressing Appellant's argument that no evidence supported the jury's finding that

Appellant committed CSC-First by intrusion by an object, sufficient evidence was presented through direct testimony of both Victim and Longwith that Appellant put his fingers inside Victim's genital opening. Thus, the jury found the evidence was sufficient to show there was digital penetration, and the jury's only question was which category the act fit into. Also, as noted above, digital penetration clearly qualifies as a sexual battery for purposes of CSC-First and the forty-year sentence imposed, so Appellant suffered no prejudice.

In sum, Appellant did not sufficiently specify his objection to the jury's making a finding under section 16-3-655 that Appellant committed CSC-First by intrusion by an object. Additionally, he did not raise the issue to the trial court that no evidence supported such a finding. However, even if this Court finds these issues are preserved and determines the trial court erred in advising the jury that digital penetration was intrusion by an object, the jury had already determined Appellant committed digital penetration and, thus, Appellant's sentence of forty years was appropriate under the statute for CSC-First. Accordingly, this Court should affirm the trial court.

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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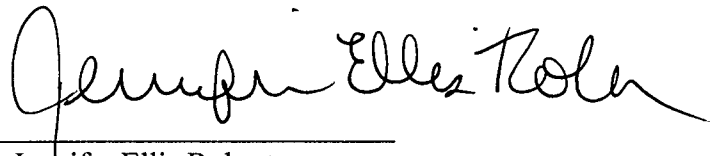
BY: 
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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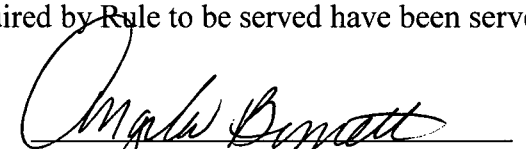
I further certify that all parties required by Rule to be served have been served.
This 1st day of October, 2013.



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