STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge
Appellate Case No. 2012-212797

THE STATE,

Respondent,

vs.

CHARLES M. HARRIS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly denied Appellant's directed verdict motion because there was evidence in the record from which the jury could find each element of the criminal solicitation of a minor charge.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In July, 2007, the Oconee County Grand Jury indicted Appellant Charles M. Harris on one count of criminal solicitation of a minor. (Indictment No. 2007-GS-37-1081; Record on Appeal [R.], pp. 189-190). The charge arose from Internet chats between Appellant and an undercover police officer posing as a thirteen year old female, during which Appellant asked the "minor" if she wanted to have sex, and discussed meeting her for that purpose. The case was called for a jury trial on August 13, 2012, before the Honorable Alexander S. Macaulay, Circuit Court Judge.

Deputy Casey Bowling of the Oconee County Sheriff's Office testified he was assigned to work with the Internet Crimes Against Children Task Force in 2007. In that capacity, he entered a Yahoo chat room on March 15, 2007, using an undercover profile of a thirteen year old female with the name "Amy Sophia" or "Amy Grace" (hereinafter "Amy"). After entering the chat room, Amy waited to see if anyone in the chat room contacted her. At 4:24 p.m., "mr lover love me," later identified as Appellant, contacted Amy, and started communicating with her. (Trial Transcript [TT], pp. 97-106, State's Exhibit S-1 [Chats]; R., pp. 2-11; 169).

After some small talk, during which Appellant asked Amy if she had a hard day at school, and what she did for fun, Appellant asked Amy if she had a boyfriend. When Amy said no, Appellant said she needed one and he was "to old."[1] He then asked Amy if she liked old men, and when Amy replied "i don't no, i guess," Appellant said "and you

[1] Quotes from the chats will use the exact wording and spelling reflected in the chat transcripts.

are onley 13." Appellant told Amy there were guys on the Internet just looking for sex, but stated he was "not like that at all." (TT, pp. 107-110, State's Exhibit S-1 [Chats]; R., pp. 12-15; 169).

After a forty-three minute break in the chat, Appellant resumed the conversation with "ok sweety." Amy asked "whats up," to which Appellant replied "not me lol jk." After some discussion about Appellant's car, the chat ended at 5:57 p.m. (TT, pp. 112-114, State's Exhibit S-1 [Chats]; R., pp. 17-19; 169).

At 11:54 a.m. on March 16, 2007, Appellant again reached out to Amy on-line. They initially talked about the weather and being bored. At 12:13 p.m., Appellant stated he was "looking for something to do," and asked Amy where her parents were. After Amy told Appellant her parents just left for work, he said "i just wish you were older." When Amy said she did not care, Appellant stated she should care because he was "a lot older," and it was "not right." He then said it was not right for him "to think about [Amy] like that," and when Amy asked "like how," Appellant stated "well, im just a man you no," and told her "when you get a man then you will know what im talking about." (TT, pp.115-118, State's Exhibit S-3 [Chats]; R., pp. 20-23; 173).

After talking about photographs and verifying Amy was home alone, Appellant asked Amy "what would you do if I was there." He then asked her if she had "ever seen a man nude." When Amy responded that she saw one once, Appellant asked her if she liked seeing him, and what she liked about it. He asked if she wanted "to see another

man." He told her he had a webcam, and showed her his face. (TT, pp. 118-123, State's Exhibit 3 [Chats], State's Exhibit 4 [Photograph]; R. pp. 23-28, 173-180). [2]

Appellant told Amy he did not "want to be [her] frist." When she asked why, he stated "you might like it to much lol." He said "if you were older it would be alright," and he "would love to meet [Amy] but I know its not right." He then said "i don't want to go to jail." (TT, pp. 123-124, State's Exhibit S-3 [Chats], R., pp. 28-29; 173-180).

After again saying "but you onley13," Appellant asked Amy "you want to have sex." Amy replied "if u want will u b careful," and Appellant responded "yes i would be." (TT, pp. 124-125; State's Exhibit S-3 [Chats]; R., pp. 29-30; 173-180).

At 1:02 p.m., Appellant asked Amy "where you want to meet at." They arranged for Appellant to pick Amy up at her house, and at 1:11 p.m., Appellant said he was "coming now." (TT, pp. 125-127, State's Exhibit S-3 [Chats]; R., pp. 30-32; 173).

Appellant did not show up at the residence the undercover gave as Amy's address. At 3:07 p.m., Appellant again reached out to Amy on-line, and told her he got lost. They then arranged for him to come back and pick her up at the Hardee's in front of her house. He asked what time Amy's mother would get home, and after she told him "not until 11," Appellant said he would be there to pick her up by 4:00 p.m. He then said "and we do not have to have sex eighter if you don't want to ok," and "i want push my self on you." At 3:17 p.m., Appellant told Amy "ill see you in a little bit sweety, ok," and ended the

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[2] State's Exhibit #4 (Photograph) has been deliverd to this Court for its consideration.

communication at 3:18 p.m. with "ok sweety bye bye." (TT, pp. 127-130, State's Exhibit 3 [Chats]; R., pp. 32-35;173-180).

Appellant did not show up at the Hardee's, but law enforcement was able to conclusively identify him from the personal information he gave to Amy during the chats, the picture of his face he sent Amy, and Department of Motor Vehicles information. Deputy Bowling obtained an arrest warrant, and arrested Appellant on March 17, 2007. (TT, pp. 130-133; R., pp. 35-38).

Appellant waived his Miranda[3] rights, and admitted he had communicated with Amy. He said Amy was thirteen years old, and stated he "made a mistake" asking her to have sex with him, claiming he only intended to teach Amy a lesson. (TT, pp. 134-137; R., pp. 39-42).

The circuit court denied Appellant's directed verdict motions, finding Appellant specifically asked about having "sex," the meaning of which was reasonably understood to include certain activities. The court further found it was for the jury to determine if the word was used in some other way during the chats. (TT, pp. 174-178, 220; R., pp. 74-78).

The jury convicted Appellant of criminal solicitation of a minor, and the circuit court sentenced him to ten years incarceration, suspended to five years probation, including one year home detention. (TT, pp. 267-268, 279-281; R., pp. 162-163; 166-168). This appeal followed.

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[3] Miranda v. Arizona, 384 U.S. 436 (1966).

ARGUMENT

The circuit court properly denied Appellant's directed verdict motion because there was evidence in the record from which the jury could find each element of the criminal solicitation of a minor charge.

Relying on State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013), State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011), and State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), Appellant contends the circuit court failed to apply the appropriate directed verdict analysis, and erred in denying his directed verdict motions because the State did not present sufficient circumstantial evidence to establish Appellant's intent, or that he reasonably believed he was communicating with someone under the age of eighteen. This case is readily distinguishable from Logan, Odems and Bostick, and there is ample evidence in the record from which the jury could find both the requisite intent, and Appellant's belief he was communicating with a minor.

If there is any direct evidence, or any substantial circumstantial evidence, reasonably tending to prove the guilt of the accused, the case must be submitted to the jury. State v. Cope, Op. No. 27303 (S.C. Sup. Ct. filed August 28, 2013) (2013 WL 4553427); State v. Brandt, 393 S.C. 526, 713 S.E.2d 591, 599 (2011). When reviewing the denial of a directed verdict motion, the appellate court views the evidence and all reasonable inferences in the light most favorable to the State. *Id.*; *see also* State v. Gaines, 380 S.C. 23, 667 S.E.2d 728, 732-33 (2008) (same).

Criminal solicitation of a minor requires that a person over the age of eighteen knowingly communicate with a person reasonably believed to be under the age of eighteen, for the purpose of, or with the intent of, persuading, inducing, enticing, or

coercing the person to engage or participate in a sexual activity or a violent crime. S.C. Code Ann. §16-15-342 (A) (Supp 2012); *see also* Gaines, 667 S.E.2d at 733. For purposes of the statute, "sexual activity" includes, *inter alia*, masturbation, vaginal, anal or oral intercourse, and touching in an act of apparent sexual stimulation or sexual abuse. S.C. Code Ann. §16-15-375 (5) (2003).

A. Intent

In Odems and Bostick, the evidence linking the defendants to the crimes was entirely circumstantial. After noting there was no direct evidence of the defendants' involvement in the crimes, the Supreme Court held the circumstantial evidence presented merely raised a suspicion of guilt, and therefore, was not sufficient to warrant submitting the cases to the jury. Odems, 720 S.E.2d at 53; Bostick, 708 S.E.2d at 778.[4]

In this case, there is direct evidence linking Appellant to the crime. It is undisputed Appellant communicated with Amy using the screen name "mr lover love me." The personal information he gave during the chats, the picture of his face he sent to Amy, and Department of Motor Vehicles records confirmed Appellant's identity. In addition, after his arrest, Appellant admitted he communicated with Amy, and told Deputy Bowling the girl was thirteen years old.

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[4] Logan is completely inapplicable to this case. In Logan, the Supreme Court made it clear Odems and Bostick dealt with the directed verdict analysis when the State relies on circumstantial evidence, while Logan addressed the appropriate jury charge in circumstantial evidence cases, which involves a very different test to be used by the jury when considering circumstantial evidence. Logan, 747 S.E.2nd @ 449.

The content of the communications between Appellant and Amy provide both direct and circumstantial evidence of Appellant's intent. In the March 15 chat, Appellant steered the conversation from innocent topics such as school and what Amy liked to do, to whether she had a boyfriend, and whether she liked old men when she was only thirteen. Appellant then stated there are guys on the Internet just looking for sex, but assured Amy he was not one of them. He referred to Amy as "sweety," quickly followed by the clearly sexual innuendo that he was not "up."

In short, during the very first chat, Appellant engaged in classic grooming behavior by gradually introducing the issue of sex into the conversation, and trying to win Amy's trust by casting himself as her protector. He continued the grooming behavior in the March 16 chat, ultimately asking Amy if she wanted "to have sex," and assuring her he would be careful with her, which provided direct evidence of Appellant's intent.

In addition to the direct evidence of intent, the content of the chats provided substantial circumstantial evidence from which the jury could infer Appellant's intent. *See* State v. Tuckness, 257 S.C. 295, 185 S.E.2d 607, 608 (1971) (question of intent is one of fact and ordinarily for jury determination; intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence); State v. Meggett, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012) (same). Appellant orchestrated the progression in the chats from innocent topics to sex, and after asking Amy if she wanted to have sex, he discussed picking her up from her home for that purpose.

Appellant contends the fact he did not actually "travel" to meet with Amy and have sex shows he did not have the requisite intent to commit criminal solicitation of a minor. He acknowledges the Supreme Court expressly held in Gaines that no such overt act is required under the applicable statute, but calls that holding "disturbing," and argues not requiring an overt act punishes a person for his "thoughts."

As Appellant does in this case, the defendant in Gaines contended he was entitled to a directed verdict on the charge of criminal solicitation of a minor because there was no evidence of an "overt act" on his part to actually engage in sexual acts with the minor. The Supreme Court affirmed denial of his directed verdict motion, holding "[t]he plain language of [the criminal solicitation of a minor] statute imposes no such requirement." 667 S.E.2d at 733.

The language of the criminal solicitation of a minor statute has not changed since it was enacted in April, 2004. The plain language of the statute prohibits "soliciting" (persuading, inducing, enticing or coercing) a minor to engage in sexual activity or a violent crime. S.C. Code §16-15-342(A) (Supp. 2012). Contrary to Appellant's assertions, the statute does not punish people for "thoughts," but applies only when a person conveys those "thoughts" to a minor via some form of communication. Conveyance of the "thoughts" is the "evil deed" addressed by the statute. If Appellant had kept his "thoughts" to himself and not conveyed them to Amy, he would not have violated the statute.

Appellant correctly notes the fact he did not "travel" distinguishes this case from State v. Green, 397 S.C. 268, 724 S.E.2d 664 (2012), and State v. Reid, 393 S.C. 325,

713 S.E.2d 274 (2011). He fails to acknowledge, however, that the defendants in both cases were convicted of criminal solicitation of a minor based on the communications between them and the undercover officers, as well as attempted criminal sexual conduct with a minor based on their "travel" for the purpose of having sex with a person they believed was a minor. Further, while the on-line communications in Green were more graphic than the communications at issue in this case, the communications in Reid were very similar. Green, 724 S.E.2d at 666; State v. Reid, 383 S.C. 285, 679 S.E.2d 194, 196 (Ct. App. 2009).

B. Amy's Age

Appellant also contends the State failed to present evidence to prove he reasonably believed Amy was under the age of eighteen as required by the criminal solicitation of a minor statute. This contention is patently meritless.

Deputy Bowling's on-line profile was a thirteen year old girl. (TT, pp. 99-100; R., pp. 4-5). Appellant expressly referenced Amy's age as thirteen in both the March 15 and March 16 chats, talked about him being older, said it was not right for him to "think about her like that" or want to meet her, and said he did not want to go to jail. (State's Exhibits S-1 and S-3; R., pp. 169-173). After his arrest, Appellant told Deputy Bowling he had been communicating with a thirteen year old girl. (TT, pp. 136-137; R., pp. 41-42). Thus, there was direct evidence conclusively establishing Appellant believed he was communicating with a person under the age of eighteen as required by the criminal solicitation of a minor statute.

There was ample direct and circumstantial evidence from which the jury could find each element of the criminal solicitation of a minor charge, including Appellant's intent and belief he was communicating with a person under the age of eighteen. Accordingly, the circuit court properly denied Appellant's directed verdict motions.

CONCLUSION

Based on the foregoing, Respondent respectfully submits Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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Oxtober 14, 2013

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

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October 14, 2013

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

Robert M. Dudek
Chief Appellate Defender
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I further certify all parties required by Rule to be served have been served.

This 14 day of October, 2013.

Sally B. Ellison

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