STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Heath P. Taylor, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JUAN COTTO,

APPELLANT

APPELLATE CASE NO. 2025-002214

ANDERS BRIEF OF APPELLANT

W. CHANDLER NORVILLE
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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by failing to *sua sponte* instruct the jury on the affirmative defense of entrapment?

STATEMENT OF THE CASE

A Charleston County grand jury indicted Appellant for attempted criminal sexual conduct with a minor in the second degree (hereinafter "Attempted CSC with Minor Second"), and criminal solicitation of a minor. R.198-201. The case was tried from October 27 to 28, 2025, before the Honorable Heath P. Taylor, and a jury. R. 1. Rachael C. Arora and W. Ted Smith represented Appellant; Stephen J. Ryan and Michelle Pappas represented the state. R. 1. The jury convicted Appellant as indicted. R. 188, ll. 8-14. Judge Taylor sentenced Appellant to twenty years, suspended upon the service of fifteen years' incarceration followed by five years of probation for Attempted CSC with Minor Second, and ten years' incarceration for criminal solicitation of a minor, to run concurrently. R. 195, l. 18 – 196, l. 4.

This appeal follows.

STANDARD OF REVIEW

"Because the question of entrapment is generally one for the jury, an appellate court reviews the trial court's decision not to give an entrapment instruction *de novo*." *State v. Brown*, 362 S.C. 258, 264, 607 S.E.2d 93, 96 (Ct. App. 2004).

ARGUMENT

The trial court should have *sua sponte* instructed the jury on the affirmative defense of entrapment.

Relevant Facts

Officer Desiree Schnackenberg created a fake account on several social media websites pretending to be a thirteen-year-old girl named "Maddy." R. 61, ll. 17-25; 62, ll. 11-16. Schnackenberg engaged Appellant online as "Maddy," and the two engaged in conversation. R. 62, ll. 21-24; See State's Exhibit 1 (USB drive- chats and phone calls) (On file with this Court). During the conversation, Appellant, on several different occasions, expressed doubt that he was speaking to the person the social media profile held itself out to represent. See State's Exhibit 1. However, the conversation turned sexual in nature, with Appellant asking "Maddy" about her sexual experience and preferences. See State's Exhibit 1.

"Maddy" tried to have Appellant come and meet her at a predetermined arrest location. R. 63, ll. 10-22. Appellant seemed to agree but asked "Maddy" several times to speak on the phone or video call first. See State's Exhibit 1 ."Maddy" rejected Appellant's invitations to speak on the phone or video chat on several occasions, eventually telling him that his choices were to come over to "her house," or contact would be severed. See State's Exhibit 1. For example, "Maddy" said: "If we hanging tonight, I'll call. If not, then I'm not calling;" "So you coming or what?;" "Show me in person or bye. I'm not calling anymore;" "You getting me mad. Either we doing this or not;" "Or I'm gonna block you 'cause you're saying you're coming but you ain't;" "I am not calling. We either hang out or I'm blocking you." See State's Exhibit 1. Appellant's statement to police was entered into evidence, wherein he denied having ever done anything similar. R. 144, ll. 2-5, 18-25.

Trial counsel asserted in her opening statement that the state had "create[d]" a crime and "tr[ied] to trap [Appellant] into committing a crime." R. 57, ll. 23-25; 58, ll. 6-7. In closing, trial counsel again argued that "all the messages were sent to [Appellant] to ask him to come over, to try to engage." R. 164, ll. 11-12. However, trial counsel did not request a jury charge on entrapment, nor did she object to the trial court's charge.

Discussion

Because there was evidence in the record that Officer Schnackenberg induced Appellant into performing the acts for which he was charged, Appellant was entitled to a jury charge on entrapment. This Court should reverse.[1]

"When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion...or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor." *Sorrells v. United States*, 287 U.S. 435, 445 (1932). Entrapment is an affirmative defense, available where there is "conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for trickery, persuasion, or fraud of the officer." *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004) (*quoting State v. Johnson*, 295 S.C. 215, 216, 367 S.E.2d 700, 701 (1988)). Entrapment consists of two elements: "government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in criminal conduct." *Matthews v. United States*, 485 U.S. 58, 63 (1988).

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[1] Appellant concedes that trial counsel's failure to request the jury charge renders the issue unpreserved for appellate review. However, should this Court decide to abandon its appellate preservation rules, this case presents ideal facts for the defense of entrapment.

The entrapment defense creates a burden-shifting paradigm. First, the defendant bears the initial burden to "produce more than a scintilla of evidence that the government induced him to commit the charged offense." *Brown*, 362 S.C. at 263, 607 S.E.2d at 95 (*quoting United States v. Sligh*, 142 F.3d 761, 762 (4th Cir. 1998)). Once the defendant meets that initial burden, the burden shifts to the state to prove beyond a reasonable doubt that the defendant was predisposed to commit the offense. *Id.* The fact that the defendant does not testify or call any witnesses does not preclude him from receiving a charge on entrapment if there is evidence in the record to support it. *See id.* (*citing Sherman v. United States*, 356 U.S. 369, 373 (1958)). In determining whether an entrapment charge is warranted, the Court accepts the defendant's version of the facts to be true. *Id.* at 264, 607 S.E.2d at 96 (*citing United States v. Trejo*, 136 F.3d 826, 827 (D.C. Cir. 1998)). The question of entrapment is "one for the jury, rather than for the court." *Matthews*, 485 U.S. at 63. The court should give the entrapment instruction unless "there is no evidence in the record that, if believed by the jury, would show that the government's conduct created a substantial risk that the offense would be committed by a person other than one ready and willing to commit it." *Brown*, 362 S.C. at 263, 607 S.E.2d at 95 (*quoting United States v. Osborne*, 935 F.2d 32, 38 (4th Cir. 1991)).

Here, Appellant's messages with "Maddy" showed a significant amount of hesitation to travel to the predetermined arrest location. In fact, Officer Schnackenberg, on several occasions, pushed Appellant into going to "Maddy's" house. Therefore, there is evidence in the record by which the jury could have concluded that Appellant would not have gone to the location, and thus not committed an "overt act, beyond mere preparation, in furtherance of" the offense of CSC with Minor Second, in the absence of Officer Schnakenberg's pushing. *See State v. Reid*, 383 S.C. 285, 293, 679 S.E.2d 194, 198 (Ct. App. 2009) (defining attempt); *see also id.* at 298,

679 S.E.2d at 200 (collecting cases from other jurisdictions holding that the act of *travelling* to a prearranged location with the purpose of having sex with a minor is an overt act).

Further, the facts of this case go beyond "a government official merely afford[ing] opportunities or facilities for the commission of the offense." *State v. Gaines*, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008). Here, unlike in other cases, Officer Schnackenberg did not merely reach out to Appellant. Officer Schnackenberg pressured Appellant on several occasions to make an overt act in furtherance of CSC with a Minor Second. *Contra id.* ("The mere fact that Gaines' initial contact with [undercover] was instigated by a SLED agent contact him and stating 'hey' does not entitled him to an entrapment instruction.").[2]

Further, the error was not harmless. *See Brown*, 362 S.C. at 265, 607 S.E.2d at 97 ("Because entrapment was Brown's only defense, the prejudice from this error was significant and, thus, warrants a new trial."). It is true that Appellant raised an additional defense below, that he had no criminal intent. However, the fact that Appellant raised an additional, even contradictory defense does not bar him from obtaining an instruction on the defense of entrapment. *See generally Matthews*, 485 U.S. at 59-60 (defendant who denies commission of the crime is nonetheless entitled to an entrapment instruction when the evidence so warrants it). Further, while the refusal to give a requested jury charge must be "both erroneous and prejudicial," *Brown*, 362 S.C. at 262, 607 S.E.2d at 95, prejudice is generally more substantial when the refused jury charge is a *defense*. *Cf. State v. Rye*, 375 S.C. 119, 123, 651 S.E.2d 321,

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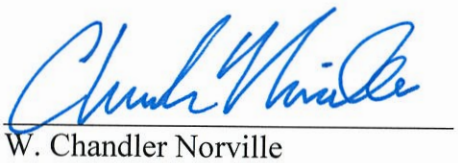
2 Further, *Gaines* analyzed an entrapment instruction on a charge of criminal solicitation. But here, Appellant was also charged with Attempted CSC with a Minor Second, which requires more proof than criminal solicitation. Even if Officer Schnackenberg did not induce Appellant into committing the offense of criminal solicitation—which Appellant maintains was a question properly submitted to the jury—there is evidence in the record that she induced Appellant to go further and commit the overt act necessary to convict him of Attempted CSC with a Minor Second.

323 (2007) ("where a defendant requests a charge on a *defense* that is supported by the evidence presented at trial, the trial court is required to charge the jury on that defense, and the failure to do so is reversible error." (emphasis added)).

Accordingly, the trial court should have charged the jury on the affirmative defense of entrapment. Appellant is entitled to a new trial.

CONCLUSION

For the foregoing reasons, Appellant's convictions and sentences should be reversed, and this case remanded for a new trial.



W. Chandler Norville
Appellate Defender

ATTORNEY FOR APPELLANT

This 3RD day of June, 2026.

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JUAN COTTO,

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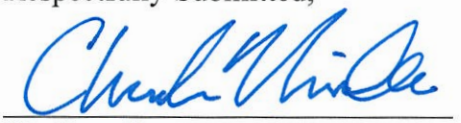
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Juan Cotto states:

1. He is 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 Heath P. Taylor, which was held on Oct. 27-28, 2025, 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 Juan Cotto.

Respectfully Submitted,



W. Chandler Norville
Appellate Defender

ATTORNEY FOR APPELLANT

This 3RD day of June, 2026.

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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."

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This 3RD day of June, 2026.