STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Stephanie McDonald, Circuit Court Judge
Appellate Case No. 2012-208388

THE STATE,

Respondent,

vs.

KENNETH THOMAS GAHAGAN,

Appellant.

FINAL BRIEF OF RESPONDENT

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Appellant failed to preserve his recross examination argument because he did not attempt to proffer the witness' testimony. Further, the trial court did not abuse its discretion in refusing to allow Appellant to recross the witness because no new matter was brought out during redirect examination. Regardless, even if the trial judge erred, any error was harmless because the question Appellant wanted to ask on recross examination only pertained to the first-degree criminal sexual conduct with a minor charge that Appellant was acquitted of and the witness' credibility was not critical to the case.

II.

Appellant's directed verdict argument regarding the first-degree criminal sexual conduct with a minor charge is moot in light of the fact that the jury acquitted Appellant of the charge. Regardless, the State presented sufficient evidence to submit the charge to the jury.

STATEMENT OF THE CASE

In April of 2011, a Charleston County Grand Jury indicted Appellant for one count of lewd act upon a minor and one count of first-degree criminal sexual conduct with a minor. On February 1, 2012, Appellant proceeded to trial. Assistant Public Defenders Mary Ford and Ted Smith represented Appellant at trial, and Assistant Solicitor Elizabeth Gordon represented the State at trial.

The jury returned a verdict of not guilty on the first-degree criminal sexual conduct with a minor charge and guilty of lewd act upon a minor. The Honorable Stephanie McDonald sentenced Appellant to twelve years of imprisonment for the lewd act upon a minor conviction.

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

At trial, Victim, who was five years old at trial, testified that Appellant "put his private on [her] bottom" when she was in her mother's room. (R. p. 22; R. p. 25.) Victim also testified that she was lying on her stomach when Appellant came into the room, pulled her panties down, and touched her butt with his penis. (R. p. 26.) Appellant moved his body up and down. (R. p. 27.) Further, Victim testified that "[i]t hurt" when Appellant put his penis on her butt. (R. p. 29.)

On cross-examination of Victim's father ("Father"), defense counsel elicited the following testimony:

> Q. You told us how [Victim] revealed to you that she was sexually assaulted.
>
> A. Yes, ma'am.
>
> Q. Is it fair to say that she did not say, Daddy, I was sexually assaulted?
>
> A. Of course not. And, yes, but not in those exact words. She was three years old.
>
> Q. Right. But she did not say sexually assaulted. That was your interpretation of what she said to you, right?
>
> A. No. That's what she said to me but not in those exact words.
>
> **Q. Right. So saying that she was sexually assaulted, that was the interpretation you took from the words that she told you?**
>
> **A. Yes.**

(R. pp. 51-52) (emphasis added).

On redirect examination of Father, the State asked the following question without objection: "[B]ased on what [Victim] told you that night was there any other conclusion

to be drawn than what had happened to her was a sexual assault?" (R. p. 53.) In reply, Father stated: "No, ma'am." (R. p. 53.)

On recross examination of Father, Appellant attempted to ask the following question: "When you went to the police to report this you had indicated to them that you did not know if there had been penetration, correct?" (R. p. 54.) The State objected on the ground that the question was beyond the scope of redirect examination. (R. p. 54.) The trial judge sustained the objection. Appellant made no attempt to proffer Father's testimony. (R. p. 54.)

ARGUMENT

I.

Appellant failed to preserve his recross examination argument because he did not attempt to proffer the witness' testimony. Further, the trial court did not abuse its discretion in refusing to allow Appellant to recross the witness because no new matter was brought out during redirect examination. Regardless, even if the trial judge erred, any error was harmless because the question Appellant wanted to ask on recross examination only pertained to the first-degree criminal sexual conduct with a minor charge that Appellant was acquitted of and the witness' credibility was not critical to the case.

Appellant's recross examination argument on appeal fails for three reasons: First, Appellant failed to preserve the issue because he did not attempt to proffer Father's testimony. Second, the State did not bring up a new matter on redirect examination. Finally, even if the trial judge erred, any error was harmless in light of the fact that the question Appellant wanted to ask only pertained to the first-degree criminal sexual conduct with a minor charge that Appellant was acquitted of and Father's credibility was not critical to the case. Accordingly, this Court should affirm Appellant's sentence and conviction.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs where the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010). Moreover, "[t]he right to, and scope of, recross-examination is within the

sound discretion of the trial court." Liberty Mut. Ins. Co. v. Gould, 266 S.C. 521, 533, 224 S.E.2d 715, 720 (1976).

Analysis

A. Not Preserved

First, Appellant's recross examination argument fails because Appellant never proffered Father's testimony. Thus, the issue is not preserved for review.

"[A] proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been." State v. Santiago, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct. App. 2006). "It is well settled that a reviewing court may not consider error alleged in exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been." State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979).

Notably, our appellate courts have relaxed the rule regarding proffering when a defendant attempts to proffer evidence, but the trial judge refuses to allow the proffer. See State v. Jackson, 384 S.C. 29, 34, n. 3, 681 S.E.2d 17, 20 (Ct. App. 2009) ("The threshold issue is whether Jackson attempted to proffer the evidence, rather than whether his attempt succeeded. The rule regarding proffers has been relaxed where the trial court refuses to allow a proffer and the record clearly demonstrates prejudice, or where the appellate court is able to determine from the record what the testimony was intended to show and that prejudice clearly exists.").

However, in this case, defense counsel made no attempt to proffer the testimony from Father. Thus, this Court should not relax the proffering rule for Appellant.

Accordingly, this Court should find Appellant's recross examination argument not preserved and affirm Appellant's sentence and conviction.

B. No New Matter Brought Out on Redirect Examination

Second, Appellant's recross examination argument fails because the State did not elicit any new matter on redirect examination. Appellant was the one that asked Father if he interpreted Victim's disclosure as if a sexual assault occurred. The State simply re-asked the same question.

Under our rules of evidence, "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility. Rule 611 (b), SCRE. Further, Rule 611 (d), SCRE addresses redirect examination and recall of the witness:

> A witness may be re-examined as to the same matters to which he testified only in the discretion of the court, but without exception he may be re-examined as to any new matter brought out during cross-examination. After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only in the discretion of the court. This rule shall not limit the right of any party to recall a witness in rebuttal.

Rule 611 (d), SCRE.

However, the rule is silent on recross examination. See Id. The Fourth Circuit has stated the following: "Absent the introduction of any new matter on re-direct examination, the rule is that recross-examination is not required. Without something new, a party has the last word with his own witness." United States v. Fleschner, 98 F.3d 155, 157 (4th Cir. 1996).

On cross-examination, defense counsel elicited the following testimony from Father:

> Q. You told us how [Victim] revealed to you that she was sexually assaulted.

A. Yes, ma'am.

Q. Is it fair to say that she did not say, Daddy, I was sexually assaulted?

A. Of course not. And, yes, but not in those exact words. She was three years old.

Q. Right. But she did not say sexually assaulted. That was your interpretation of what she said to you, right?

A. No. That's what she said to me but not in those exact words.

Q. Right. So saying that she was sexually assaulted, that was the interpretation you took from the words that she told you?

A. Yes.

(R. pp. 51-52) (emphasis added).

On redirect examination of Father, the State asked the following question: "[B]ased on what [Victim] told you that night was there any other conclusion to be drawn than what had happened to her was a sexual assault?" (R. p. 53.) In reply, Father stated: "No, ma'am." (R. p. 53.)

Accordingly, the State's question during redirect examination of Father did not bring out any new matter. In addition, even assuming that Father told police that he was not sure if penetration occurred, his testimony was not inconsistent with the alleged statement. Father testified regarding a "sexual assault," not penetration. (R. pp. 52-53.)

C. No Prejudice

Finally, Appellant's recross examination argument fails because Appellant suffered absolutely no prejudice from the exclusion of the testimony.

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597

(1991). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

"It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him." State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 285, 288 (1947). When a review of the entire record establishes an error is harmless beyond a reasonable doubt, an appellate court should not reverse a conviction. State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003).

In this case, any alleged error would have been entirely harmless. The question Appellant sought to ask on recross examination dealt with penetration and, specifically, whether Father believed penetration had occurred. In light of the fact that the jury acquitted Appellant of first-degree criminal sexual conduct with a minor, which was the only charge that required penetration, Appellant suffered absolutely no prejudice from the exclusion of the testimony. The fact that Appellant was acquitted of first-degree criminal conduct with a minor proves that the exclusion of the evidence did not contribute to the verdict.

Further, Father's credibility was not material to the case since Father did not personally witness the sexual abuse occur. Thus, any impeachment value the excluded testimony had, assuming Father actually made that statement to the police, would have been minimal and irrelevant to the critical issues in dispute. Accordingly, even if the trial judge erred in refusing to admit the testimony, any error was harmless.

II.

Appellant's directed verdict argument regarding the first-degree criminal sexual conduct with a minor charge is moot in light of the fact that the jury acquitted Appellant of the charge. Regardless, the State presented sufficient evidence to submit the charge to the jury.

Appellant's directed verdict argument on appeal fails for two reasons: First, the issue is moot in light of the fact that the jury acquitted Appellant of the first-degree criminal sexual conduct with a minor charge. Second, the State presented evidence that Appellant touched Victim's butt with his penis and "it hurt" Victim, which was sufficient evidence to submit the charge to the jury.

Standard of Review

On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). Further, an appellate court must affirm the trial judge's ruling "[i]f there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused[.]" State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004).

When an appellate court is reviewing the denial of a directed verdict motion in a case solely involving circumstantial evidence, our Supreme Court has instructed:

> When the state relies exclusively on circumstantial evidence and a motion for a directed verdict is made, the circuit court is concerned with the existence or nonexistence of evidence, not with its weight. The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, **a trial judge is not**

required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

Id. at 594, 606 S.E.2d at 478 (citations omitted) (emphasis in original).

Thus, an analysis of the trial judge's ruling hinges on whether all of the circumstantial evidence taken together was sufficient for the jury to reasonably infer the defendant's guilt beyond a reasonable doubt. Id. at 595, 606 S.E.2d at 478. Critically, the appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). **"[U]nless there is a total failure of evidence** tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) (emphasis added).

Analysis

A. Mootness of the Issue

First, Appellant's directed verdict argument on appeal fails because the issue is moot in light of the fact the jury acquitted Appellant of first-degree criminal sexual conduct.

"An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). "A case becomes moot when a judgment, if rendered, would have no practical legal effect upon the existing controversy, thus making it impossible for the reviewing court to grant effectual relief." State v. Passmore, 363 S.C. 568, 581, 611 S.E.2d 273, 280 (Ct. App. 2005). "[The appellate court] will not issue

advisory opinions on questions for which no meaningful relief can be granted." In re Kaundra C., 318 S.C. 484, 486, 458 S.E.2d 443, 444 (Ct. App. 1995).

In this case, Appellant's directed verdict argument is moot because the jury acquitted Appellant of first-degree criminal sexual conduct with a minor. By appealing a trial judge's decision not to direct a verdict of acquittal, the relief that an appellant is seeking on appeal is the entry of a verdict of acquittal. Cf. State v. Hepburn, 406 S.C. 416, __, 753 S.E.2d 402, 416 (2013) ("Based on the foregoing, we find the trial court erred in refusing to grant [Hepburn's] mid-trial motion for directed verdict, and now direct a verdict of acquittal.").

Critically, the jury already acquitted Appellant of first-degree criminal sexual with a minor. Thus, this Court cannot grant Appellant any meaningful relief. Cf. Haynes v. Graham, 192 S.C. 382, __, 6 S.E.2d 903, 905 (1940) ("We find no merit in the exceptions which charge error to the presiding Judge for refusing defendants' motion for a directed verdict in the matter of punitive damages. . . [I]n this case, the question has become an academic one, since the jury found only actual damages. This Court has repeatedly held that in such case there is no ground for appeal."). Accordingly, the relief from an erroneous denial of a defendant's motion for a directed verdict is not a new trial on all charges; the relief is a directed verdict of acquittal on the charge that the trial court should have directed a verdict.

Notably, Appellant acknowledges the fact that the jury acquitted him of first-degree criminal sexual conduct with a minor. However, Appellant claims he was prejudiced by having the charge submitted to the jury because the jury "may have been less inclined to convict Appellant of lewd act on a minor if there was not some more serious charge that the jury had to consider as well." (App. Br. p. 14.)

As an initial matter, Appellant's argument is entirely speculative. Further, Appellant's argument overlooks the fact that the trial judge charged the jury the following:

> The indictments in this case allege one count of criminal sexual conduct with a minor in the first degree and one count of lewd act upon a minor. **Each indictment charges a separate and distinct offense. You must decide each indictment separately on the evidence and the law applicable to it, uninfluenced by your decision as to any other indictment.** The defendant may be convicted or acquitted on either or both of the offenses charged. You will be asked to write a separate verdict of guilty or not guilty for each indictment.

(R. p. 98) (emphasis added).

Because the law presumes juries follow jury instructions, Appellant's argument is without merit. See Foye v. State, 335 S.C. 586, 590, n.1, 518 S.E.2d 265, 267 (1999) ("A jury is presumed to follow instructions."); see also State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) ("It is the duty of jurors to take the law from the court in the particular case on trial. It must be presumed that they do so.").

Moreover, the first-degree criminal sexual conduct with a minor charge and lewd act upon a minor charge arose from the same event (i.e. Appellant putting his penis on Victim's butt). Thus, the jury would have heard the same evidence regardless of the trial judge's decision with respect to the directed verdict motion.

Because the jury acquitted Appellant of first-degree criminal sexual conduct, Appellant's directed verdict argument is moot. Accordingly, this Court should affirm Appellant's sentence and conviction.

B. Sufficient Evidence

Second, Appellant's directed verdict argument on appeal fails because the State presented evidence through Victim's testimony that Appellant put his penis on her butt and it hurt, which was sufficient evidence to submit the charge to the jury.

Under section 16-3-655 (A)(1): "A person is guilty of criminal sexual conduct with a minor in the first degree if . . . the actor engages in sexual battery with a victim who is less than eleven years of age . . . ." S.C. Code Ann. § 16-3-655 (A)(1).

Further, our Legislature defined sexual battery as the following: "'Sexual battery' means 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, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651 (h).

In State v. Mathis, our Supreme Court held that the defendant was not entitled to a directed verdict for the first-degree criminal sexual conduct with a minor charge. State v. Mathis, 287, S.C. 589, 593, 340 S.E.2d 538, 541 (1986). The defendant claimed that the State failed to present evidence of intrusion. Id. The six-year-old victim testified that the defendant "touched her with his penis." Id. However, the victim could not remember whether or not the defendant put his penis inside her body. Id. Despite not being able to remember if intrusion occurred, the victim testified that "it hurt" when the defendant touched her with his penis. Id. The Court reasoned that the victim's testimony was evidence of "some 'intrusion, however slight'" as required by the statute. Id.

The facts of this case are nearly identical to the facts of Mathis. In the case at hand, Victim testified that Appellant "put his private on [her] bottom." (R. p. 22; R. p. 25.) Victim also testified that she was lying on her stomach when Appellant came into the

room, pulled her panties down, and touched her butt with his penis. (R. p. 26.) Appellant moved his body up and down. (R. p. 27.) Further, Victim testified that "[i]t hurt" when Appellant put his penis on her butt. (R. p. 29.) Thus, the State presented enough evidence, including evidence of intrusion, to get the charge submitted to the jury.

Accordingly, the trial judge properly denied Appellant's motion for a directed verdict with respect to the first-degree criminal sexual conduct with a minor charge, and this Court should affirm Appellant's conviction and sentence.

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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May 15, 2014

STATE OF SOUTH CAROLINA

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Appellant.

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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May 15, 2014

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Appeal from Charleston County
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THE STATE,

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent, with proof of service, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 15th day of May, 2014.

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