STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Howard P. King, Circuit Court Judge
Appellate Case No. 2013-213741

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THE STATE, ...RESPONDENT

v.

JAMES WALKER, ...APPELLANT

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF ISSUE ON APPEAL

The trial court did not err in denying Appellant's motion for a directed verdict, where the victims' testimonies coupled with Appellant's own voluntary statements provided sufficient substantial evidence of Appellant's intent.

STATEMENT OF THE CASE

Appellant was true bill indicted during the March 2012 term of the Lexington County Grand Jury for two counts of Lewd Act Upon a Child (2012-GS-32-0297, -0398). The indictment sheets indicate Appellant committed these acts on or about January 1, 2006 through September 6, 2011. Beth Fullwood, Esquire, represented Appellant. On November 6, 2012, Appellant proceeded to a trial by jury. On November 8, 2012, the jury convicted Appellant of both charges. The Honorable Howard P. King sentenced Appellant to twelve years concurrent imprisonment for each charge, provided that upon the service of eight years the balance be suspended and Appellant be placed on probation. Judge King's sentence also provided that Appellant's name be placed on the sexual registry for life. Appellant thereafter filed an appeal. This final brief follows.

STATEMENT OF THE FACTS

Appellant is the father of the victims, Camille and Cassie Walker. R. p. 10, ll. 5-7. Camille Walker testified her date of birth was May 23, 1996. R. p. 130, l. 8. Camille testified Appellant "would come in [her] room at night and sometimes I'd wake up and he'd be there and sometimes he would wake me up...[a]nd he would inappropriately touch me." R. 130, ll. 20-24. Camille testified "I would wake up to feel someone rubbing my stomach or my dad talking in ear and then he would rub under my clothes in my upper area or my under area and he would whisper things like, Love me, or Cuddle with me, or Kiss me." R. p. 21, ll. 3-7. Camille clarified that "upper area" meant her breasts. R. p. 21, l. 10. Camille further testified Appellant's hand "went under my underwear, but he didn't touch anything else. He just went to the line." R. p. 21, ll. 16-17. Camille clarified by line she meant the pubic area. R. p.21, ll. 18-19.

Camille testified Appellant would "make us kiss him goodnight and it would make me uncomfortable and he would say, love me, and stuff like that." R. p. 19, ll. 20-22. Camille also stated, "[w]e would be watching TV or something and [Appellant] would make us lay down and he would do it to us when no one was around and he was watching TV. And he did it to my sister as well." R. p. 22, ll. 1-4. Camille clarified that "[h]e'd just put his hand down our pants." R. p. 24, l. 21.

Camille testified she was eleven or twelve years old when Appellant's inappropriate touching began. R. p. 19, ll. 1-2. Camille further testified Appellant's inappropriate touching began when she was in the sixth grade and continued throughout middle school. R. p. 18, ll. 20-24. Camille testified Appellant's inappropriate touching stopped "around then because I got older and I started wearing tighter clothes and I

would go to bed early and I wouldn't say goodnight and I'd lock my door." R. p. 18, ll. 20-24. Camille testified she wore tighter clothes because she "felt like he couldn't go under [her] clothing if [she] wore tighter clothes." R. p. 20, ll. 18-20.

Cassie Walker, the second victim, testified her date of birth was May 17, 1994. R. p. 68, l. 17. Cassie testified Appellant "would kiss me inappropriately and I—it was uncomfortable. Sometimes he would grab my butt or smack my butt." R. pg. 60, ll. 16-17. Cassie testified Appellant would enter her room when she was sleeping and he would "plunk himself down" on her bed and would say "you didn't say goodnight to me or you didn't say you love me and goodnight and then that's when he would start touching me." R. p. 59, ll. 17-23. Cassie testified that one night Appellant:

> came into my room and he was eating a chocolate bar...and he did not have a shirt on and he said, you ought to try this chocolate bar and I said, no thank you, I don't want to try the chocolate bar, and he put it in his mouth and it was melted and he made me open my mouth and he told that he wanted me to try it and he came at me like he was going to make out with me with the chocolate bar in this mouth to taste it.

R. pg. 56, ll. 1-10. Cassie also testified that while in the living room, Appellant would make her sit on his lap and that would make her uncomfortable. R. p. 4. Cassie further testified that in September 2011 was when she had the conversation with her mom about Appellant's inappropriate touching because Camille had told their mom earlier that day. R. p. 61-62.

Appellant testified he "would get up in the middle of the night and kind of check on everybody to make sure the TVs were off, Xboxes were shut off. Every now and then you'd hear one of them fuss." R. pg. 120, ll. 15-18. Appellant testified Camille had acid reflux and would complain that her stomach hurt so he would rub her stomach to calm

her down. R. p. 120, ll. 22-25; R. p. 121, ll. 3-5. Appellant also testified Cassie occasionally would sleepwalk and he would have to put her back to bed. R. p. 121, ll. 7-15.

Detective Stephen Collins testified that he received the complaint involving this case on September 7, 2011. R. p. 82, ll. 4-7. Detective Collins testified that at the time of the report Camille Walker was fifteen years old and Cassie Walker was seventeen years old. R. p. 1, ll. 15-18. Detective Collins also testified that at their first meeting, Appellant informed him "that during this point in his life that we were talking about he was taking some kind of sleeping pills that made him act weird." R. p. 92, ll. 13-15.

Detective Collins testified that at their second meeting, Appellant arrived for a polygraph exam and he was advised of his Miranda rights. R. p. 2, ll. 22-23. Appellant did not go through with the polygraph, but desired to speak to Detective Collins, whereafter, Detective Collins placed Appellant under arrest and advised him of his Miranda rights again at the Lexington County Sheriff's Department. R. p. 94, ll. 8-24. Detective Collins testified he specifically asked Appellant if he wanted a lawyer and Appellant answered no. R. p. 96, ll. 15-17. Detective Collins described Appellant as being "very emotional while talking ...crying visibly upset and he also...informed me that over the course of the weekend he had actually considered suicide." R. p. 97, ll. 6-9. Detective Collins further testified Appellant stated "he was sorry for what he'd done, that he had failed his family and he loved his family." R. p. 99, ll. 1-2. Detective Collins also testified Appellant stated that he knew his daughters would not lie and that he remembered touching them. R. p. 97, l. 25; R. p. 98, l. 1-3.

ARGUMENT

The trial court did not err in denying Appellant's motion for a directed verdict, where the victims' testimonies coupled with Appellant's own voluntary statements provided sufficient substantial evidence of Appellant's intent.

Appellant contends the trial court should have granted his motion for a directed verdict because the State failed to provide substantial circumstantial evidence that his intent was to arose or gratify his own sexual desires or those of his daughters. However, Appellant's argument lacks merit because both victims' testimonies, along with Appellant's own statements to Detective Collins provided substantial evidence from which Appellant's intent could be inferred for the case to be submitted to the jury. Thus, Appellant's conviction and sentence should be affirmed.

In South Carolina, "[i]n reviewing a denial of a motion for a directed verdict, the appellate court must view the evidence in the light most favorable to the State." State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). When ruling on a directed verdict motion, the lower court should determine the existence or nonexistence of evidence and not its weight. Mitchell, 341 S.C. at 409, 535 S.E.2d at 127. A directed verdict is proper "when the evidence merely raises a suspicion that the accused is guilty." State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). "Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Id. However, a "trial judge is required to submit the case to the jury if there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'" Mitchell, 341 S.C. at 409, 535 S.E.2d at 127 (citing State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989)).

In this case, the State presented evidence from both victims, Camille and Cassie Walker, that Appellant had inappropriately touched them. Both victims testified Appellant would say things such as "love me" to them before touching them. Appellant

argues this testimony is direct evidence of Appellant's lewd or lascivious conduct, but is not direct evidence of Appellant's intent to gratify either his sexual desires or those of his victims. However, Appellant's argument fails as this testimony is circumstantial evidence from which a jury could "fairly and logically deduce" Appellant's criminal intent. See id.

Generally, there are two types of evidence presented in a case, direct evidence and circumstantial evidence. "Direct evidence directly proves the existence of a fact and does not require deduction." State v. Logan, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013). On the other hand, "[c]ircumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact." Id. The victims' testimonies in this case provided sufficient circumstantial evidence for the trial court to submit the case to the jury. The Appellant's words such as "love me" or "kiss me" to the victims reasonably tended to prove Appellant's intent to gratify his own sexual desires. Further, both victims testified the inappropriate touching was not a one-time occurrence, but continued to occur over a lengthy period also adding circumstantial evidence from which a jury could fairly and logically deduce Appellant's intent to arouse, appeal to or gratify the lusts or passions or sexual desires of himself or of the victims.

The above testimony provided sufficient circumstantial evidence to overcome Appellant's motion for a directed verdict as in State v. Whisonant, 355 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999). In Whisonant, the court found the victim's testimony provided sufficient evidence to withstand the defendant's motion for a directed verdict on the element of intent. Id. at 153, 515 S.E.2d at 771. The victim in Whisonant testified the defendant, the father of her friend, touched her breast area, both on top and underneath her clothing, unbuttoned her shorts, told her to "open up," and threatened to kill her if she told anyone. Id. at 152, 515 S.E.2d at 770. The victim testified the defendant committed

these acts while she was sleeping on the couch in his house and everyone else was asleep. Id. As in Whisonant, the circumstantial evidence provided through the victims' testimonies in this case provide sufficient substantial evidence from which Appellant's intent could be inferred. In Whisonant, no other evidence was needed to submit the case to the jury besides the victim's testimony. Similarly, in this case the victims' above testimonies alone provided enough evidence to withstand Appellant's directed verdict motion. Thus, the trial court properly denied Appellant's motion for a directed verdict as the victims' testimonies sufficiently met the evidentiary threshold for the case to be submitted to the jury.

Along with the victims' testimonies, Appellant's own admissions to Detective Collins added evidence from which Appellant's criminal intent could be inferred. Detective Collins testified Appellant seemed very emotional when he told him that he was "sorry" for what he had done and that "he had failed his family." Appellant also admitted to touching his daughters and told Detective Collins that he knew his daughters would not lie. Appellant attacks the admissibility of these statements because Appellant was not given a Miranda rights form to sign and no cameras or tape recorders were utilized during this interview with Detective Collins although they were available. Appellant also argues these statements were involuntarily given because some confusion exists in the trial transcript as to whether Appellant desired to talk with Detective Collins on that day.

In South Carolina, "[a] trial court's determination of voluntariness of a statement will not be reversed absent an abuse of discretion amounting to clear error of law." State v. McLeod, 303 S.C. 420, 423, 401 S.E.2d 175, 177 (1991), overruled on other grounds by State v. Evans, 307 S.C. 477, 415 S.E.2d 816 (1992). The State has the burden to

show whether a confession is admissible at trial. State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986). In determining the voluntariness of a statement, the trial court should examine the totality of circumstances. State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). Factors a trial court should consider in the "totality of circumstances analysis include: background, experience, conduct of the accused, age, length of custody, police misrepresentations, isolation of a minor from his or her parent, threats of violence, and promises of leniency." State v. Dye, 384 S.C. 42, 47, 681 S.E.2d 23, 26 (Ct. App. 2009).

In this case, the trial judge did not abuse his discretion in allowing Appellant's statements into evidence. Appellant was advised of his Miranda rights before his polygraph exam and then once again after he was placed under arrest by Detective Collins at the Lexington County Sheriff's Department. Detective Collins testified Appellant wanted to talk to him prior to the arrest and that Appellant had called him prior to the interview in order to speak with him. R. p. 96, ll. 22-25; R. p. 97, ll. 1-2. Detective Collins also testified he did not promise Appellant anything in exchange for his statements and he specifically asked if Appellant wanted an attorney and Appellant refused the offer for an attorney. R. p. 96, ll. 10-17.

When considering the totality of circumstances, Appellant's statements were properly admitted into evidence by the trial court. The statements do not appear to be the product of an interrogation by Detective Collins. ("Interrogation is either express questioning or its functional equivalent. It includes words or actions on the part of the policy (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." State v. Kennedy, 325 S.C. 295, 304, 479 S.E.2d 838, 842 (Ct. App. 1996)). The transcript reflects that Appellant initiated contact with Detective Collins prior to his polygraph exam and even

after he refused to take the polygraph, Appellant was free to leave but decided to speak with Detective Collins and follow him in his own car to the Lexington County Sheriff's Department. Further, Detective Collins read Appellant his Miranda rights a second time that day and Appellant explicitly refused an attorney at that point. Detective Collins' actions followed customary police procedure and Detective Collins did not utilize misrepresentations, coercion, or threats in this encounter with Appellant.

The facts that Appellant did not sign a Miranda wavier of rights form and that his interview with Detective Collins was not tape recorded does not by themselves make Appellant's statements involuntary. These are factors the trial court considers in determining whether Appellant was advised of his rights and made these statements voluntarily. When taking the totality of circumstances into account, the trial court correctly allowed Appellant's statements into evidence. The trial court conducted a Jackson v. Denno hearing on these statements before the trial began and concluded that Appellant was informed of his rights properly. The trial judge found a Miranda waiver form was not required to be signed in order for Appellant's statements to be voluntarily given. See State v. Simmons, 384 S.C. 145, 163, 682 S.E.2d 19, 28 (Ct. App. 2009) (finding "[a]lthough the police did not require Simmons to sign a waiver of rights form, this did not necessarily negate the voluntary nature of Simmon's statements."). The record reflects the trial court properly admitted Appellant's statements into evidence under the totality of circumstances test.

Accordingly, the trial court did not err in denying Appellant's motion for a direct verdict on the element of intent as ample evidence in the record existed from which the jury could fairly and logically deduce Appellant's guilty intent.

CONCLUSION

For all the foregoing reasons, the State submits that Appellant's conviction and sentence be affirmed.

Respectfully submitted,

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May 22, 2014

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CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated May 23, 2014, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served. This 23rd, day of May, 2014.

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