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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2011-GS-10-02511
Appellate Case No. 2012-208388

State of South Carolina., ... Respondent,

v.

Kenneth Thomas Gahagan ..... Appellant.

FINAL BRIEF OF APPELLANT

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Statement of the Case

On April 4, 2011, a Charleston County grand jury indicted Appellant Kenneth Gahagan (hereinafter "Appellant") for one count of first degree criminal sexual conduct with a minor, in violation of South Carolina Code Section 16-3-655 (Indictment No. 2011-GS-10-2510), and one count of committing a lewd act on a minor, in violation of South Carolina Code Section 16-15-140 (Indictment No. 2011-GS-10-2511). (Indictments). On February 1, 2012, Judge Markley Dennis selected a jury for Appellant's trial. On February 1-3, Appellant's case was tried to a jury with Judge Stephanie McDonald presiding. Assistant Solicitor Elizabeth Gordon prosecuted the case for the State. Assistant Public Defenders Mary Ford and Ted Smith represented Appellant.

Prior to trial, the Court held a brief competency hearing to evaluate the competency of the alleged victim (hereinafter "Child"), who was five years old at the time of trial. (R. pp. 006-011). After the opening statements of the State and Appellant, the State called seven witnesses – the Child; the Child's father, Pierre Nelson; the Child's mother, April Brown; the Child's mother's roommate, Brandi White; a detective with the Special Victims Unit of the Charleston County Sheriff's Office, Rita Avila; a therapist from Dee Norton Lowcountry Children's Center, LeAnn Gardner; the Child's father's girlfriend, Brook Cumbee; and a pediatric nurse practitioner, Tracy Halasz. The Child testified that the alleged incident occurred in her mother's bedroom when her mother was at work and while the Child and her older brother, Junior, were asleep in her mother's bed. (R. p. 025, line 16 – p. 026, line 1; p. 029, lines 14-17). The Child testified that Appellant "put his private on my bottom" (R. p. 025, line 17), and when asked "what part

of [Appellant's] body touched your bottom," the Child answered "[h]is pee pee." (R. p. 026, lines 18-20).

The testimony of the Child and the Child's parents indicated that the people in the house when the alleged incident occurred were the Child's brother (Junior Nelson), Appellant, the Child's mother's roommate (Brandi White), and Ms. White's daughter. (R. p. 029, lines 16-17; p. 043, lines 7-9; p. 056, lines 8-10; p. 057, lines 10-12; p. 059, lines 12-14). Of these individuals, only the Child and Ms. White testified at trial, and Ms. White had no knowledge of the alleged incident. In fact, Ms. White has never spoken to the Child about the alleged incident and has never heard the Child scream out for help, on the unspecified night of the alleged incident or on any other night. (*See id.*; *see also id.* at R. p. 066, lines 8-16). Thus, the only testimony regarding the details of the alleged incident was from the Child. All other witnesses testified only about events that occurred at least several days after the alleged incident, after the Child made a comment to her father about the alleged incident. Notably, and as discussed further below, the Court refused to permit Appellant's trial counsel to re-cross Mr. Nelson regarding his assertion – made for the first time during his re-direct examination – that no other conclusion could be reached other than that a sexual assault occurred based on the account given by the Child to Mr. Nelson. (R. p. 053, line 19 – p. 055, line 1).

After the close of the State's case-in-chief, Appellant moved for directed verdict. (R. p. 091, lines 15-21). The Court denied Appellant's motion as to both indictments, stating that "the State has produced some evidence, some, that will get it past the directed verdict stage." (R. p. 092, lines 8-14). The Court did not identify the specific evidence

that it was relying upon to deny the directed verdict motion as to both indictments. (*See id.*).

During his case-in-chief, Appellant called one witness – Dr. Amanda Salas, a psychiatrist with specialized training in child adolescence psychiatry. After Dr. Salas testified, Appellant rested. Appellant then renewed his motion for a directed verdict, and the Court denied the motion, stating: "And for the same reasons expressed earlier I will deny that." (R. p. 093, lines 24-25). After closing arguments, the jury returned a verdict of not guilty on the charge of first degree criminal sexual conduct with a minor, and a verdict of guilty on the charge of lewd act upon a minor. (R. p. 106, line 23 – p. 107, line 4). After the jury returned the verdict, the Court held a brief sentencing hearing and sentenced Appellant to a term of twelve years at the Department of Corrections. (R. p. 108, lines 22-24). On February 10, 2012, Appellant timely filed a notice of appeal. (Notice of Appeal and Certificate of Service). This brief follows.

Argument

I. The trial court abused its discretion in refusing to allow Appellant's trial counsel to re-cross Pierre Nelson regarding a new matter brought out during re-direct examination.

A. Relevant Facts

At trial, the second witness called by the State was the Child's father, Pierre Nelson. During his direct examination, he first gave background regarding the members of his family and their living arrangements. (R. p. 041, line 9 – p. 043, line 20). Mr. Nelson then testified as to the details of the night that the Child first made a comment to him regarding the alleged incident. (R. p. 043, line 21 – p. 047, line 16). Mr. Nelson did

not testify as to what the Child said to him specifically regarding the alleged incident, but he answered "Yes, ma'am" when asked by the State's counsel:

> Now, you cannot tell me exactly what [the Child] said. You are limited to where and when something occurred. Did [the Child] tell you that she had been sexually assaulted?

(R. p. 044, lines 7-10). After discussing the events that occurred the night the Child first made the comment to him, Mr. Nelson testified that he subsequently took the Child to a medical exam and a forensic interview. (R. p. 047, lines 17-23). At no point during his direct examination was Mr. Nelson asked to provide an opinion regarding what he believed, based on his daughter's comments to him, actually happened on the night of the alleged incident. (*See generally* R. p. 041, line 9 – p. 048, line 5).

On cross-examination, Appellant's counsel asked Mr. Nelson about his feelings toward April Brown, about his concerns prior to the alleged incident that the Child would be the victim of some kind of sexual incident, and about the night that the Child made a comment to him about the alleged incident. (R. p. 048, line 10 – p. 053, line 10).

After Appellant's counsel cross-examined Mr. Nelson, the Court permitted the State's counsel to conduct a re-direct of Mr. Nelson. (R. p. 053, lines 14-24). First, the State's counsel asked Mr. Nelson what the Child told him happened. (R. p. 053, line 15). Appellant's counsel objected to this question as inadmissible hearsay, and the Court sustained Appellant's objection. (R. p. 053, lines 16-17). Then, the State's counsel asked the following question: "Pierre, was -- based on what [the Child] told you that night was there any other conclusion to be drawn than what had happened to her was a sexual assault?" (R. p. 053, lines 20-22). Mr. Nelson answered, "No, ma'am." (R. p. 053, line

23). The State's counsel then stated that she had no further questions for Mr. Nelson. (R. p. 053, line 24).

After this re-direct, Appellant's counsel requested permission from the Court to conduct a brief re-cross, and the Court agreed. (R. p. 053, line 25 – p. 054, line 1). Appellant's counsel then asked Mr. Nelson: "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. 054, lines 4-6). The State's counsel objected to this question on the basis that it was "beyond the scope" of her re-direct. (R. p. 054, lines 7-8). The Court held that the question was, in fact, beyond the scope of re-direct, and sustained the State's objection, citing South Carolina Rule of Evidence 611. (R. p. 054, line 9). After the Court sustained the objection, Appellant's counsel started to argue as to why the objection should not have been sustained, and the Court invited both counsel to approach to hold a discussion on the record but outside the hearing of the jury. (R. p. 054, lines 10-15). Appellant's counsel pointed out that, on re-direct, the State's counsel had asked Mr. Nelson if there was any doubt in his mind that there was a sexual assault, and that such a question "is going to sexual assault penetration." (R. p. 054, lines 16-20). The Court said: "Okay. It's close but I think that's beyond the scope under Rule 611." (R. p. 054, lines 21-22). The State then called its next witness. (R. p. 055, lines 1-2).

B. Discussion

"The confrontation clause of the Sixth Amendment of the Constitution of the United States is applicable to the States, and the primary interest secured by the confrontation clause is the right of cross-examination." *State v. Cooper*, 386 S.C. 210, 219, 687 S.E.2d 62, 67 (Ct. App. 2009). Where an appellant argues that his rights under

the confrontation clause were violated, the appropriate question for the Court of Appeals is "whether there has been any interference with the defendant's opportunity for effective cross-examination at trial." *Id.* (quoting *Starnes v. State,* 307 S.C. 247, 250, 414 S.E.2d 582, 584 (1991)).

South Carolina Rule of Evidence 611(d) provides in relevant part:

> **(d) Re-examination and Recall.** 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.

S.C. RULE OF EVID. 611(d). While this Rule recognizes that the Court must allow counsel to re-examine a witness regarding a new matter brought out during cross-examination, a natural corollary to this rule is the rule that counsel has the right to re-cross a witness regarding any new matter brought out during re-direct. This corollary rule appears to be recognized in every jurisdiction to have addressed the proper scope of re-cross examination. *See, e.g.*, *Kelly v. State*, 842 So. 2d 223, 226 (Fla. Dist. Ct. App. 2003) ("The decision to allow recross examination is generally subject to the discretion of the trial court. . . . However, when new matters are introduced during redirect examination, denying recross effectively denies the opposing party the right to any cross examination on the new matter and, thus, violates the confrontation clause."); *Hilton v. United States*, 435 A.2d 383, 389 (D.C. 1981) ("When new matters are brought out on redirect examination, however, the confrontation clause does mandate that the opposing party be allowed to recross-examine the witness concerning the new issues."); *State v. Vigil*, 1977-NMCA-119, 91 N.M. 156, 157, 571 P.2d 423, 424 (Ct. App. N.M. (1977) ("A party has a right to recross-examination only where new matter is brought out on redirect examination."); *State v. Faulkner*, 381 N.E.2d 934, 936 (Ohio 1978) ("Only where the

prosecution inquires into new areas during redirect examination must the trial court allow defense the opportunity to recross-examine."); *Com. v. O'Brien*, 645 N.E.2d 1170, 1174 (Mass. 1995) ("The confrontation clause of the Sixth Amendment to the United States Constitution and art. 12 of the Declaration of Rights of the Massachusetts Constitution guarantee a defendant the right to cross-examine each witness against him. This right to cross-examination is an essential component to the right to a fair trial. . . . However, as opposed to cross-examination, a defendant has no right to recross-examination unless the examination addresses a new matter brought out for the first time on redirect examination."). While the South Carolina courts do not appear to have addressed this particular issue, there can be no dispute that this rule – that counsel for a criminal defendant has the right to re-cross a witness as to new matters brought out on re-direct – applies in South Carolina (and every other state) pursuant to the confrontation clause of the Sixth Amendment. *Cf. Liberty Mut. Ins. Co. v. Gould*, 266 S.C. 521, 533, 224 S.E.2d 715, 720 (1976) (recognizing that, while the scope of re-cross examination is within the discretion of the trial court, the exercise of such discretion is subject to review by the Court of Appeals under an abuse of discretion standard).

Here, the trial court abused its discretion in refusing to permit Appellant's trial counsel to re-cross Mr. Nelson regarding a new matter brought out on re-direct. On re-direct, the State's counsel asked Mr. Nelson for the first time whether Mr. Nelson concluded that a sexual assault had, in fact, occurred on the night of the alleged incident. (R. p. 053, lines 20-23).[1] As the Court instructed the jury, Appellant was only guilty of

[1] While the State's counsel framed the question by asking whether any other conclusion could have been drawn from what the Child said to him other than that the Child was sexually assaulted, this question is tantamount to a question as to whether Mr. Nelson

criminal sexual conduct if the State proved that Appellant caused some "intrusion" (i.e. penetration) of the genital or anal openings of the Child. *See* R. p. 110 at 116. The State's counsel's question sought an opinion on the ultimate issue – whether Appellant sexually assaulted the Child – even though Mr. Nelson had only acted as a fact witness prior to re-direct. Mr. Nelson suddenly was being asked not what the Child told him, but what he concluded actually happened. Thus, Mr. Nelson testified for the first time on re-direct that he concluded that a sexual assault had, in fact occurred, thereby clearly implying to the jury that he had concluded some amount of penetration had occurred during the alleged incident. The State had not solicited such opinion testimony during the direct examination of Mr. Nelson; rather, this matter was raised for the first time during the State's re-direct examination.

Because this new matter was raised for the first time during the State's re-direct of Mr. Nelson, Appellant's counsel was entitled to re-cross Mr. Nelson on this subject pursuant to the confrontation clause of the Sixth Amendment and pursuant to the natural extension of South Carolina Rule of Evidence 611(d). Thus, Appellant's counsel should have been permitted to ask Mr. Nelson questions about his prior statement to the police indicating that he, in fact, had not concluded whether any penetration occurred during the alleged incident, meaning he must not have concluded that Appellant committed criminal sexual conduct. When the Court sustained the State's objection, Appellant's counsel correctly argued to the Court that the State's counsel's question on re-direct placed the issue of Mr. Nelson's opinion on penetration at issue for the first time and that she was therefore entitled to re-cross Mr. Nelson on that subject. (*See* R. p. 054, lines 16-20). The

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concluded that the Child was, in fact, sexually assaulted by Appellant.

Court abused its discretion in refusing to permit Appellant's trial counsel to re-cross Mr. Nelson on this issue. Thus, Appellant respectfully requests that this Court reverse and remand for a new trial.

II. The trial court erred in denying Appellant's motion for directed verdict as to the charge of first degree criminal sexual conduct with a minor because the State failed to produce any evidence of sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion of any part of Appellant's body or any object into the genital or anal openings of the alleged victim's body.

A. Relevant Facts

The only witness to the alleged incident who testified at trial was the Child. While the Child's older brother, Junior, was allegedly in the bed with the Child when the incident occurred, he did not wake up during the alleged incidnent (R. p. 025, lines 18-23, p. 027, line 25 – p. 028, line 3) and did not testify at trial. Also, while the Child's mother's roomate, Brandi White, was allegedly in the house at the time of the alleged incident (R. p. 057, lines 10-12; p. 043, lines 7-9; p. 056, lines 8-10; p. 059, lines 12-14), she testfiied that she did not hear anything and has never spoken to the Child about the incident. (R. p. 066, lines 8-16). Thus, the only direct evidence regarding the incident was the Child's testimony.

In describing what happened during the alleged incident, the Child testified that Appellant "put his private **on** my bottom" (R. p. 025, line 17) (emphasis supplied). Also, when asked if "any part of [Appellant's] body touched any part of [the Child's] body," the Child answered, "My bottom." (R. p. 026, lines 15-16). Then, when asked "what part of [Appellant's] body touched your bottom," the Child answered "[h]is pee pee." (R. p. 026, lines 18-20). The State's counsel then asked the Child: "How did it feel when [Appellant] put his pee pee on your butt?" (R. p. 029, lines 11-12). The Child answered,

"It hurt." (R. p. 029, line 13). Importantly, the Child did not testify that Appellant's "pee pee" or any other part of Appellant's body went **in** her butt or in any other part of her body. (*See generally* R. p. 022, line 19 – p. 040, line 8).

At the end of its case-in-chief, the State called Ms. Halasz, a pediatric nurse practitioner who examined the Child on April 23, 2010. (R. p. 079, lines 12-19; p. 081, lines 3-7).[2] Ms. Halasz testified that the results of her exam of the Child were "normal" (i.e. showed no signs of any sexual activity). (R. p. 084, lines 6-8; p. 090, lines 4-10). While Ms. Halasz testified that her exam did not rule out that sexual abuse could have occurred because the Child's body could have healed prior to the exam, Ms. Halasz agreed that the exam was not inconsistent with a finding of no sexual abuse having happened. (R. p. 090, lines 4-10). Thus, Ms. Halasz's testimony did not provide any evidence of a penetration. Also, no other witness's testimony or document introduced proved or tended to prove that some intrusion or penetration of the Child's anus or genitalia occurred. In sum, the record is entirely devoid of evidence – direct or circumstantial – supporting a finding that any of the following occurred: sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion of any part of Appellant's body or any object into the genital or anal openings of the alleged victim's body.

At the close of the State's case-in-chief, Appellant's counsel made a motion for a directed verdict, emphasizing the lack of evidence of any anal penetration. (R. p. 091, lines 15-21). In response, the State's counsel erroneously stated that "the child not only indicated that it went **in** her butt but she also demonstrated with the doll, that the

[2] The indictments allege that the incident occurred "between March 1, 2010 and April 15, 2010." (Indictments).

defendant moved back and forth." (R. p. 091, line 24 – p. 092, line 2) (emphasis supplied). Of course, the record plainly shows that the Child did *not* testify that anything went **in** her butt, but rather testified that Appellant's "pee pee" went **on** her butt. *See supra.* The State's counsel also argued that the Child's testimony that "it hurt" somehow supported a finding of penetration. (R. p. 092, lines 2-5). The Court then denied Appellant's motion, stating:

> Well, as you all both know, and you all both have done a great job, I have to be concerned at this point with the existence or nonexistence of any evidence not with its weight, and the State has produced some evidence, some, that will get it past the directed verdict stage. So I'm going to respectfully deny your motion on both indictments at this time.

(R. p. 092, lines 8-14). The Court did not specify what evidence it was relying on in denying the motion for directed verdict. (*See id.*).

B. Discussion

"The State has the burden of proof as to all the essential elements of the crime." *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 596 (2010). Further, "[t]he accused is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged." *Id.* "In criminal cases, appellate courts review errors of law only and are bound by the trial court's factual findings unless they are clearly erroneous." *State v. Reid*, 383 S.C. 285, 291, 679 S.E.2d 194, 197 (Ct. App. 2009).

Here, Appellant was charged with two crimes: first degree criminal sexual conduct with a minor and lewd act on a minor. (R. p. 127; R. p. 129; R. p. 110 at 116). To be found guilty of first degree criminal sexual conduct with a minor, "the State must prove beyond a reasonable doubt that the defendant engaged in a sexual battery with the victim." (R. p. 110 at 116). Further, a "sexual battery" is defined 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, except when the intrusion is accomplished for medically recognized treatment or diagnostic purposes." (*Id.*).

At trial, the State introduced no evidence of a sexual battery. In fact, the only direct evidence regarding the alleged incident is the Child's testimony that Appellant put his "pee pee" **on** her bottom. Putting an object "on" something is distinct from putting an object "in" something. The State's counsel could have asked the Child if, when she said that Appellant put his "pee pee" **on** her bottom she really meant to say that Appellant put his "pee pee" **in** her bottom. And presumably the State's counsel would have asked for such clarification if she believed the Child was making a misstatement by using the word "on" rather than "in", but the State's counsel did not ask such a question. The State can point to no evidence – direct or circumstantial – showing that any conduct included in the definition of "sexual battery" occurred.[3]

To the extent the State makes the same arguments to this Court that it made to the trial court as to why Appellant's directed verdict motion should have been denied, Appellant respectfully submits that this Court should reject such arguments. At trial, the State's counsel misstated that the Child "indicated that it went in her butt." (R. p. 091, line 25). This assertion is contradicted by the record. Also, the State's counsel cited the Child's testimony that Appellant moved back and forth. (R. p. 092, lines 1-2). But moving back and forth does not indicate that Appellant made any intrusion into the

[3] To the extent the State attempts to argue that the Child made a prior statement – before trial – that tends to prove some intrusion occurred, such argument should be rejected because any such evidence would only be admissible for purposes other than to prove the truth of the matter asserted. *See* S.C. Rule Evidence 802.

Child's genitalia or anus. Again, the Child testified clearly that Appellant put his "pee pee" on – not in – her butt. And the fact that the Child testified that "it hurt" does not tend to prove that any intrusion occurred, particularly in light of the Child's testimony indicating that no intrusion occurred.

In sum, the record is devoid of any evidence – direct or circumstantial – supporting a finding that any of the acts constituting a sexual battery occurred here. Tellingly, the trial court did not identify any such evidence in denying Appellant's directed verdict motion. Because the State failed to introduce any evidence on a material element of the offense of first degree criminal sexual conduct with a minor, Appellant respectfully requests that this Court hold that the trial court erred by denying Appellant's motion for directed verdict as to that charge and remand this action to be retried only as to the lewd act on a minor charge.[4]

Conclusion

For the reasons stated, Appellant respectfully requests that this Court reverse Appellant's conviction and order a new trial only as to the State's charge of lewd act on a minor.

Respectfully submitted,

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[4] Although the jury did not convict Appellant of first degree criminal sexual conduct with a minor, Appellant was prejudiced by having the charge submitted for decision by the jury, who 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.

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant and Final Reply Brief of Appellant comply 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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PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Final Reply Brief of Appellant in the above referenced case have been served upon Salley Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of May, 2014.

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SUBSCRIBED AND SWORN TO before me
this 27th day of May, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021