RECEIVED

AUG 13 2014

S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Appeal From Oconee County
The Honorable Alexander S. Macauley, Circuit Court Judge
Appellate Case No. 2014-001236

THE STATE,

Respondent,

v.

CHARLES M. HARRIS,

Petitioner.

Opinion No. 2014-UP-160 (S.C. Ct. App. filed April 2, 2014)

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals properly affirm the circuit court's denial of Petitioner's directed verdict motion based on the direct and circumstantial evidence presented at trial?

STATEMENT OF THE CASE

In July, 2007, the Oconee County Grand Jury indicted Petitioner Charles M. Harris on one count of criminal solicitation of a minor. (Record on Appeal [R.], pp. 189-190). The charge arose from Internet chats between Petitioner and an undercover police officer posing as a thirteen year old female, during which Petitioner 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 Petitioner, contacted Amy, and started communicating with her. (R., pp. 2-11; 169).

After some small talk, during which Petitioner asked Amy if she had a hard day at school, and what she did for fun, Petitioner asked Amy if she had a boyfriend. When Amy said no, Petitioner 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," Petitioner said "and you are onley 13." Petitioner told Amy there were guys on the Internet just looking for sex, but stated he was "not like that at all." (R., pp. 12-15; 169-170).

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

After a forty-three minute break in the chat, Petitioner resumed the conversation with "ok sweety." Amy asked "whats up," to which Petitioner replied "not me lol jk." After some discussion about Petitioner's car, the chat ended at 5:57 p.m. (R., pp. 17-19; 171-172).

At 11:54 a.m. on March 16, 2007, Petitioner again reached out to Amy on-line. They initially talked about the weather and being bored. At 12:13 p.m., Petitioner stated he was "looking for something to do," and asked Amy where her parents were. After Amy told Petitioner her parents just left for work, he said "i just wish you were older." When Amy said she did not care, Petitioner 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," Petitioner stated "well, im just a man you no," and told her "when you get a man then you will know what im talking about." (R., pp. 20-23; 173-174).

After talking about photographs and verifying Amy was home alone, Petitioner 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, Petitioner 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. (R. pp. 23-28, 174-176).[2]

Petitioner 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." (R., pp. 28-29; 176).

[2] State's Exhibit #4 (Photograph) was delivered to the Court of Appeals for consideration.

After again saying "but you onley13," Petitioner asked Amy "you want to have sex." Amy replied "if u want will u b careful," and Petitioner responded "yes i would be." (R., pp. 29-30; 177-177).

At 1:02 p.m., Petitioner asked Amy "where you want to meet at." They arranged for Petitioner to pick Amy up at her house, and at 1:11 p.m., Petitioner said he was "coming now." (R., pp. 30-32; 177-178).

Petitioner did not show up at the residence the undercover gave as Amy's address. At 3:07 p.m., Petitioner 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," Petitioner 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., Petitioner told Amy "ill see you in a little bit sweety, ok," and ended the communication at 3:18 p.m. with "ok sweety bye bye." (R., pp. 32-35; 179-180).

Petitioner 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 Petitioner on March 17, 2007. (R., pp. 35-38).

Petitioner 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. (R., pp. 39-42).

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

The circuit court denied Petitioner's directed verdict motions, finding Petitioner 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. (R., pp. 74-78).

The jury convicted Petitioner 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. (R., pp. 162-163; 166-168). This appeal followed.

By unpublished opinion filed April 2, 2014, the South Carolina Court of Appeals affirmed the Petitioner's conviction, citing the applicable standard of appellate review of directed verdict rulings, and statutory and case law regarding the criminal solicitation of a minor statute. (Appendix, pp. 1-2). By Order filed May 8, 2014, the Court denied Petitioner's Petition for Rehearing. (Appendix, p. 7). Petitioner filed a Petition for Writ of Certiorari on August 7, 3014, seeking review of the Court of Appeals opinion.

ARGUMENT

The Court of Appeals properly affirmed the circuit court's denial of Petitioner's directed verdict motion because there was both direct and substantial circumstantial evidence Petitioner communicated with a person he reasonably believed to be a minor with the intent to persuade, induce, entice or coerce the minor to engage in a sexual activity as statutorily defined.

Petitioner contends the Court of Appeals erred in affirming the denial of his directed verdict motion, and imposed a strict liability standard for criminal solicitation of a minor. As a threshold matter, contrary to his assertion he raised the same arguments before the Court of Appeals, Petitioner raised the "strict liability" issue for the first time in his Petition for Rehearing, and therefore, the issue is not preserved for review by this Court. Further, there was both direct and substantial circumstantial evidence from which the jury could find Petitioner had the requisite intent to violate the criminal solicitation of a minor statute, and under the applicable law regarding directed verdict motions, the Court of Appeals properly affirmed the denial of Petitioner's directed verdict motion.

A. Preservation

Only issues raised in the Court of Appeals and in the petition for rehearing can be included in a petition for writ of certiorari as issues for Supreme Court review. Rule 242(d)(2), SCACR; *see also* State v. Primus, 349 S.C. 576, 564 S.E.2d 103, 107 (2002) (issue not raised in the brief to the Court of Appeals, but instead raised for the first time in the petition for rehearing, is not properly preserved for the Supreme Court's consideration in a petition for writ of certiorari), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Prior to his Petition for Rehearing, Petitioner never asserted the criminal solicitation of a minor statute, as interpreted by this Court in State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008), imposes a strict liability

crime with no consideration of "abandonment" of criminal intent, and thereby violates public policy. Therefore, the issue is not properly before this Court.

Even if preserved, however, Petitioner's contention is meritless. The legislature can make an act or omission a crime regardless of the actor's mental state (intent, knowledge, recklessness, or criminal negligence). State v. Jeffries, 316 S.C. 13, 446 S.E.2d 427, 429-430 (1994); State v. Ferguson, 302 S.C. 269, 395 S.E.2d 182, 183 (1990). Whether an offense is a strict liability offense is a question of legislative intent. Ferguson, 395 S.E.2d at 183.

The legislative intent regarding the mental state required for a criminal solicitation of a minor charge is clearly stated in the statute. Under the statute, the State must prove the person "knowingly contacts or communicates" a person reasonably believed to be a minor, "for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity." S.C. Code Ann. §16-15-342 (Supp. 2013). Thus, on its face, the statute clearly requires a **knowing** communication or contact **for the purpose of or with the intent to**, convince the minor to engage in sexual activity, and it is not a strict liability crime.

Petitioner argues the Court of Appeals opinion "discourages abandonment of momentary criminal intent," which "violates the public policy of encouraging abandonment of any criminal intent." (Petition, pp. 9-10). The fallacy of Petitioner's argument lies in the fact a person cannot "abandon" criminal intent **after** he has already committed the specified crime. While Petitioner may have abandoned his intent to commit criminal sexual conduct with a minor by picking Amy up and having sex with her, he had **already communicated** with Amy **for the purpose of, or with the intent to,**

convince her to engage in sexual activity. In short, he solicited sex from a minor, which violated §16-15-342, and that crime required no overt act toward actually engaging in sex with the minor, which would have constituted a completely different crime in addition to the solicitation crime.

B. Directed Verdict

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, 405 S.C. 317, 748 S.E.2d 194, 211 (2013); 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. Cope, 748 S.E.2d at 211; *see also* Gaines, 667 S.E.2d at 732-33 (same).

As discussed above, 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 2013); *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).

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), Petitioner contends directed verdict was warranted because the State did not

present sufficient circumstantial evidence to establish his intent to solicit sex from a person he reasonably believed was 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 all the required elements for the criminal solicitation of a minor charge.

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 Petitioner to the crime. It is undisputed Petitioner 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 Petitioner's identity. In addition, after his arrest, Petitioner admitted he communicated with Amy, and told Deputy Bowling the girl was thirteen years old.

The content of the communications between Petitioner and Amy provided additional direct evidence of Petitioner's intent. In the March 15 chat, Petitioner 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 older men when she was only

---

[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.

thirteen. Petitioner 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, Petitioner 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. Petitioner's own words were direct evidence of the purpose and intent of the chats with Amy.

In addition, the content of the chats provided substantial circumstantial evidence from which the jury could infer Petitioner'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). Petitioner 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.

Petitioner 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 Petitioner 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. Contrary to Petitioner'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 Petitioner had kept his "thoughts" to himself and not conveyed them to Amy, he would not have violated the statute.[5]

Petitioner 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

[5]Petitioner's contention a violation occurs even if the defendant mentions having sex, but then states he was "just kidding," ignores the fact the "just kidding" remark would be one fact the jury would consider in determining the defendant's intent to solicit sex. Significantly, Petitioner made no such remarks during his chats with Amy. On the contrary, he continued to make comments related to sex in each chat, including the last one prior to his arrest.

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).

The evidence also created a jury issue regarding whether Petitioner reasonably believed Amy was under the age of eighteen as required by the criminal solicitation of a minor statute. Deputy Bowling's on-line profile was a thirteen year old girl. (R., pp. 4-5). Petitioner 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. (R., pp. 169-176). After his arrest, Petitioner told Deputy Bowling he had been communicating with a thirteen year old girl. (R., pp. 41-42). Thus, there was direct evidence conclusively establishing Petitioner believed he was communicating with a person under the age of eighteen as required by the criminal solicitation of a minor statute.

Based on the clear language of the statute and the evidence presented, the circuit court properly denied Petitioner's directed verdict motion. The issues of Petitioner's intent and reasonable belief he was communicating with a minor were determinations of fact to be decided by the jury. The Court of Appeals properly applied the appropriate standard of appellate review, and further review is not warranted.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

BY: Deborah R.J. Shupe

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

August 13, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Appeal From Oconee County
The Honorable Alexander S. Macauley, Circuit Court Judge
Appellate Case No. 2014-001236

THE STATE,

Respondent,

v.

CHARLES M. HARRIS,

Petitioner.

Opinion No. 2014-UP-160 (S.C. Ct. App. filed April 2, 2014)

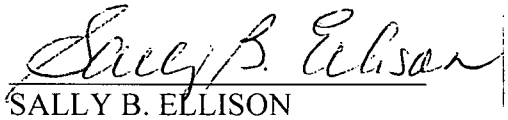
PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies in the United States mail, postage prepaid, addressed to:

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 13th day of August, 2014.



SALLY B. ELLISON
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727