

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE

RESPONDENT,

V.

LARRY JAMES TYLER

APPELLANT.

C/A NO. 2013-000466

MOTION FOR LEAVE TO FILE
PRO SE
SUPPLEMENTAL BRIEF

COMES NOW THE APPELLANT, PRO SE, AND MOVES
THIS HONORABLE COURT FOR LEAVE TO FILE A PRO-
SE SUPPLEMENTAL BRIEF, SUPPLEMENTAL
COUNSEL'S BRIEF ON APPEAL.

APPELLANT MAKES THIS MOTION ON HIS
ASSERTION THAT THE BRIEF OF COUNSEL WAS SO
LIMITED IN ARGUMENT THAT SUBSTANTIAL JUSTICE
HAS NOT BEEN APPROPRIATED FOR APPELLANT.

DATE: 9-8-2014

RESPECTFULLY SUBMITTED,

Larry J. Tyler

354459

EVANS C. I.

610 HWY 9 W.

BENNETTSVILLE, S. C.

29512

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SEP 09 2014

SC Court of Appeals

SOUTH CAROLINA APPEAL COURT
COUNTY OF DARLINGTON

C/A NO. 2013-000466

STATE OF SOUTH CAROLINA

RESPONDENT

PRO SE SUPPLEMENTAL
BRIEF AND ARGUMENT
(REPLY BRIEF)

VS

LARRY JAMES TYLER

APPELLANT

APPELLANT RESPECTFULLY REQUEST THE APPELLATE COURT GIVE DUE CONSIDERATION TO APPELLANT'S EXCEPTIONS TO THE ERRORS AND OMISSIONS STATED HEREIN.

1. PRESERVED FOR APPELLATE REVIEW

A. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT, AS TO ALL COUNTS?

IT SHOULD BE NOTED IN THIS APPEAL THAT APPELLANT'S TRIAL COUNSEL MADE "A MOTION FOR A DIRECTED VERDICT AS TO ALL COUNTS" (TR 128; LINES 6-7) AND ARGUED THE LACK OF "ANY COMPETENT EVIDENCE" TO SUPPORT THE FINDING OF GUILT ON SEXUAL EXPLOITATION CHARGE (TR 128; LINES 7-13); THE STATE'S FAILURE IN THIS BURDEN TO [PROVE] (SIC) THAT THE [APPELLANT] IS GUILTY OF CONTRIBUTING TO THE DELINQUENCY OF A MINOR" (TR 129; LINES 1-2); THAT THERE WAS "NO PROOF AT ALL" THAT ANY COMMUNICATION WAS RECEIVED OF THE MINOR AT ISSUE IN THE CASE, AND THEREFORE NOTHING TO SUPPORT A VERDICT FOR THE CRIMINAL SOLICITATION CHARGE (TR 129; LINES 3-20); AND THAT WITH RESPECT TO THE DISSEMINATING HARMFUL MATERIALS CHARGE, THERE WAS EVIDENCE WHATSOEVER TO THAT CHARGE." (TR 129; LINE 21 TO 130; LINE 14) TRIAL COUNSEL AGAIN REQUESTED THAT THE JUDGE "DIRECT A VERDICT IN FAVOR

OF THE [APPELLANT] ON ALL FOR CHARGES." (TR. 130; LINES 15-16)

IT IS CLEAR FROM THE RECORDS THAT THE SUFFICIENCY OF THE EVIDENCE UNDERLYING EACH CHARGED COUNT WAS CHALLENGED BY APPELLANT'S TRIAL COUNSEL. THEREFORE, APPELLANT'S CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE, AS TO ALL COUNTS, WAS PROPERLY PRESERVED FOR REVIEW.

CONTRIBUTING TO THE DELINQUENCY OF A MINOR.

APPELLANT WOULD FIRST POINT OUT THAT RESPONDENT SEVERELY CONFUSES THE ISSUE REGARDING APPELLANT'S APPEAL FROM THE TRIAL COURT'S DENIAL OF IT'S MOTION FOR DIRECTED VERDICT AS TO THE CONTRIBUTING CHARGE.

APPELLANT'S ARGUMENT BELOW WAS NOT LIMITED TO THE STATE'S FAILURE TO PROVE SUBSECTION (2) OF THE CONTRIBUTING STATUTE (§ 16-17 490) AS WOULD BE THE INSINUATION FROM RESPONDENT'S BRIEF, AT PP 8-9

FOR CLARIFICATION, APPELLANT'S ARGUMENT ON APPEAL IS NO DIFFERENT THAN THAT PROPERLY PRESENTED TO THE TRIAL COURT:

AS TO CONTRIBUTING TO THE DELINQUENCY OF A MINOR, YOUR HONOR, THE ONLY TESTIMONY THAT WAS IN -- THAT WAS PRESENTED TODAY FROM EITHER MS. JADA McCULLOUGH OR MR. JASMINE McCULLOUGH WAS THAT FOR ABOUT TEN MINUTES THEY HAD POSSESSION OF THE RED CELL PHONE WHICH CONTAINED, I BELIEVE BOTH OF THEM SAID, A PICTURE OF THE DEFENDANT IN BIKINI UNDERWEAR AND A LADY IN A BATHING SUITE.

AND FOR THAT REASON WE FAIL -- WE FEEL THAT THE STATE HAS FAILED IN ITS BURDEN TO PROVE THAT THE DEFENDANT IS GUILTY OF CONTRIBUTING TO THE DELINQUENCY OF A MINOR.

AGAIN, FOR CLARIFICATION, APPELLANT ARGUES THAT THE ONLY CREDIBLE RELEVANT EVIDENCE PRESENTED TO THE JURY WAS THE TESTIMONY THAT THE PURPORTED VICTIM AND HER SISTER MOMENTARILY POSSESSED A CELL PHONE CONTAINING A PHOTO OF

A WOMAN IN A BATHING SUIT.

IT IS PARAMOUNT THAT IT BE NOTED THAT, FOR ALL ITS REFERENCES TO THE RECORD, RESPONDENT'S BRIEF DOES NOT REFERENCE ANY POINT IN THE TRIAL WHERE EVIDENCE WAS INTRODUCED TO SUPPORT AN INFERENCE THAT AT THE TIME JADA MCCULLOUGH POSSESSED THE PHONE, THE OFFENDING TEXT MESSAGE WAS STORED THEREIN. * FOOTNOTE 1

THROUGHOUT THE TRIAL, THERE WERE REPEATED REFERENCES TO APPELLANT'S "IN BIKINI UNDERWEAR - A PHOTO IN THE PHONE, AND VIEWED BY JADA MCCULLOUGH. (TR. 55; LINE 13, TR. 65; LINE 22, 23; TR. 70; LINE 18; TR. 80; LINE 20-21). THE PHONE CONTAINING THE PHOTO WAS IMMEDIATELY RETURNED TO APPELLANT. (TR. 49; LINE 16-23)

AT SOME LATER POINT IN TIME, (A MONTH, POSSIBLY TWO), THE CELL PHONE WAS RECEIVED BY TYQUAN BROWN, WHO VIEWED AND REPORTED OFFENDED TEXT DRAFT MESSAGE. (TR. 72; LINE 16-17)

THE STATE'S ENTIRE CASE HINGED ON THE THEORY THAT APPELLANT DRAFTED AND STORED THE OFFENDING TEXT WITH THE INTENT TO DELIVER THE MESSAGE TO THE UNDERAGE JADA BY GIVING HER THE PHONE. THE STATE CALLED WITNESSES, ADMITTED EXHIBITS, OFFERED ITS CASE TO THE JURY, AND CLOSED ITS CASE SENDING ITS THEORY TO THE JURY FOR DELIBERATION.

THE JURY, CLUELESS AS TO WHAT ACTUALLY CONSTITUTES ANY OF THE CRIMINAL OFFENSES WITH WHICH APPELLANT WAS CHARGED 1

IT IS IMPORTANT TO NOTE THAT WITNESS ERIC HODGE, THE STATE'S WITNESS, WAS HEARD BY THE JURY - ON VIDEO, (EX. NO. 12) IN OPEN COURT - STATING (1) THAT THE PHONE AT ISSUE WAS GIVEN TO JADA MCCULLOUGH IN JUNE OR JULY, 2011, AND (2) THAT THE TEXT MESSAGE WAS CREATED AS A DRAFT IN AUGUST, 2011, WHICH ESTABLISHED WITH CERTAINTY THAT APPELLANT DID NOT DELIVER OR ATTEMPT TO DELIVER ANY "LOVE LETTER" TO MRS. MCCULLOUGH. (TR. 90; LINES 14-15)

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THE JURY LATCHED ON TO THE STATE'S THEORY WITHOUT EVER HEARING A SCANTILLA OF EVIDENCE THAT THE OFFENDING TEXT MESSAGE WAS EVER STORED IN THE PHONE WHEN APPELLANT GAVE THE PHONE TO JADA POSSIBLY MONTHS BEFORE ITS RECEPTION BY TYQUAN BROWN AND, SUBSEQUENTLY,

THE EVIDENCE INTRODUCED AT TRIAL CONSISTED OF THE FACT THAT APPELLANT GAVE THE MCCULLOUGH SISTERS A CELL PHONE WITH A NON NUDE PHOTO OF HIMSELF AND A NON NUDE PHOTO OF A WOMAN, JADA SAW THESE NON-NUDE PHOTOS. APPELLANT DOES NOT AND HAS NOT AT ANY POINT DISPUTED THE FOREGOING FACTS.

IN ADDITION TO THE EVIDENCE OF THE PHOTOS, THE STATE OFFERED ITS THEORY THAT APPELLANT SPECIFICALLY INTENDED FOR THOSE PHOTOS TO BE INFLUENTIAL IN WHAT RESPONDENT WOULD CALL A "GROOMING" OF JADA MCCULLOUGH. (BRIEF OF RESPONDENT, P. 13 (TOO))

THE STATE INTRODUCED CREDIBLE EVIDENCE THAT APPELLANT GAVE TYQUAN BROWN THE SAME CELL PHONE AT A LATER DATE, AND THAT THE PHONE THEN CONTAINED THE QUESTIONABLE DRAFT. APPELLANT DOES NOT DISPUTE THIS AS WELL.

APPELLANT'S CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE, AGAIN, COMES FIRST FROM THERE BEING NO EVIDENCE THAT THE DRAFTED TEXT MESSAGE WAS IN THE PHONE WHEN THE PHONE WAS PASSED FROM APPELLANT TO THE MCCULLOUGH SISTERS. ABSENT SUCH EVIDENCE, THE JURY'S VERDICT IMPERMISSIBLY REST ON THE STATE'S THEORY (I.E. THE STATE'S SUPPOSITION) THAT THE MESSAGE WAS PASSED TO THE MINORS BY APPELLANT.

INFERENCE MAY ONLY BE DRAWN FROM FACTS IN EVIDENCE; INFERENCE MAY NOT BE DRAWN UPON OFFERED THEORIES.

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INTERESTINGLY, RESPONDENT'S BRIEF LAUNCHES INTO A VERY IMPRESSIVE ARGUMENT FOR THE SUFFICIENCY OF THE EVIDENCE IN ANOTHER JURISDICTION "GROOMING" CASE. HOWEVER, DISPIE THE EFFORT PUT INTO SAID ARGUMENT, THE STATE HAS NEVER INDICTED, TRIED, OR CONVICTED APPELLANT OF ANY OUT-OF-STATE OR OTHER JURISDICTION GROOMING OFFENSE. NOR DOES APPELLANT APPEAL FROM ANOTHER JURISDICTION GROOMING CONVICTION.

APPELLANT TOOK APPEAL FROM THE STATE'S FAILURE TO PRODUCE SUFFICIENT EVIDENCE TO SUSTAIN HIS SOUTH CAROLINA CONVICTION FOR CONTRIBUTING TO THE DELINQUENCY OF A MINOR. AND UNDER SOUTH CAROLINA LAW, THE DECISION OF STATE V. BRISTER, 435 NW 2d 679 (NEB. 1989) (INTERPRETING NEBRASKA STATUTES) IS NOT CONTROLLING IN APPELLANT'S CASE.

SIMILARLY, STATE V. RODRIGUEZ, 279 S.C. 106, (1983) (CITED BY RESPONDENT) DECIDED UNDER AN ENTIRELY DIFFERENT SET OF FACTS, IS CLEARLY DISTINGUISHABLE FROM APPELLANT'S CASE. IN RODRIGUEZ, THERE WAS AN ONSET SEXUAL ACT COMMITTED AGAINST THE MINORS OF SUCH A CHARACTER AS TO SATISFY THE STATUTES REQUIREMENT THAT THE ACT CAUSED THE MINORS TO BE SO DEPORTED AS TO HARM OR ENDANGER THEIR MORALS.

IN TURNING TO THE RULES OF STATUTORY CONSTRUCTION AND THE RULE OF LEVITY, COURTS CANNOT GIVE THE TEXT OF A CRIMINAL STATUTE A MEANING THAT DIFFERS FROM IT'S ORDINARY, ACCEPTED MEANING, AND THAT DISFAVORS THE DEFENDANT. BURRAGE V. UNITED STATES, 571 U.S.

(2014). WHERE THE LANGUAGE OF A STATUTE IS CLEAR AND UNAMBIGUOUS, AND CONVEYS A DEFINITE MEANING, "THERE IS NO OCCASION FOR EMPLOYING RULES OF STATUTORY INTERPRETATION, AND THE COURT HAS NO RIGHT TO LOOK FOR OR IMPOSE ANOTHER MEANING." GORDON V. PHILLIPS UTILITIES, INC., 362 S.C. 403, 406 (2005).

THE GENERAL RULE OF THE COURTS "IS TO APPLY THE STATUTE AS IT IS WRITTEN- EVEN IF... SOME OTHER APPROACH MIGHT ACCORD WITH GOOD POLICY." BURRAGE, 571 U.S. AT

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THE STATUTE DEFINING CONTRIBUTING TO THE DELINQUENCY OF A MINOR PROVIDES, IN PERTINENT PART:

IT SHALL BE UNLAWFUL FOR ANY PERSON OVER EIGHTEEN YEARS OF AGE TO KNOWINGLY AND WILLFULLY ENCOURAGE AND OR CAUSE OR TO DO ANY ACT WHICH SHALL CAUSE OR INFLUENCE A MINOR TO SO DEPORT HIMSELF OR HERSELF AS TO WILLFULLY INJURE OR ENDANGER HIS OR HER MORALS OR HEALTH OR THE MORALS OR HEALTH OF OTHERS.

S.C. CODE. ANN. § 16-17-490. (EMPHASIS ADDED.)

IT IS CLEAR FROM THE TEXT OF THE STATUTE THAT AN ACT MUST OCCUR AGAINST THE MINOR "WHICH SHALL CAUSE OR INFLUENCE" THE MINOR TO BECOME DEMORALIZED.

UNLIKE RODRIGUEZ, WHERE DEMORALIZATION ACTUALLY OCCURRED (THUS SATISFYING THE STATUTE'S REQUIREMENTS), APPELLANT'S CASE DIDN'T INVOLVE ANY ACT OR ACTS SHOWN TO "CAUSE" OR "INFLUENCE" JADA McCULLOUGH TO DEPORT HERSELF SO AS TO HARM OR ENDANGER HER MORALS OR HEALTH. THE LANGUAGE OF THE STATUTE REQUIRES DEPORTATION TO ACTIVELY BE CAUSED OR INFLUENCED. THE LANGUAGE GIVES A CLEAR DEFINITE MEANING, AND LEAVES NO ROOM FOR A COURT TO LOOK FOR OR IMPOSE ANOTHER MEANING FAVORABLE TO RESPONDENT, GORDON, SUPRA, C WHICH MAY ACCORD WITH GOOD POLICY." BURRAGE, SUPRA

FOR ALL THE FOREGOING REASONS, THE STATE FAILED TO PROVE APPELLANT GUILTY OF VIOLATING § 16-17-490 BEYOND

CRIMINAL SOLICITATION OF A MINOR

AGAIN, THERE WAS NEVER ANY EVIDENCE INTRODUCED TO THE JURY FROM WHICH THEY COULD INFER THAT THE PHONE PASSED FROM APPELLANT TO THE MCCULLOUGH SISTERS AT ANY TIME PRIOR TO THE SISTERS RECEIPT OF THE PHONE. FOR THIS REASON, NO EVIDENCE SUPPORTS THE TRIAL COURTS DENIAL OF APPELLANT'S MOTION FOR A DIRECTED VERDICT AS TO THIS COUNT.

DISSIMINATING HARMFUL MATERIALS

BECAUSE THE TEXT MESSAGES WERE NOT PROVEN TO BE IN THE PHONE UPON TRANSFER TO THE MCCULLOUGH SISTERS, THE ONLY EVIDENCE THE JURY HEARD RELEVANT TO THIS CHARGE WAS THAT THE PHONE CONTAINED PHOTOS OF APPELLANT AND A WOMAN, BOTH IN BATHING SUITS AND UNDERWEAR.

WHILE THE RESPONDANT WOULD ARGUE THAT
(BRIEF OF RESPONDANT P. 15)

"YOUNG CHILDREN ARE NOT NORMALLY EXPOSED TO ADULTS, MALES IN THE UNDERWEAR."

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IT IS NOT A VIOLATION OF THE CRIMINAL LAWS OF THIS STATE TO EXPOSE MINORS TO SUCH PHOTOS. IF THAT WERE SO, WALMART AND HAYNIES COULD BE CRIMINALLY PROSECUTED FOR DISPLAYING SUCH PHOTOS IN THE STORES STATEWIDE.

SEXUAL EXPLOITATION OF A MINOR

IT APPEARS THE STATE'S SOLE PIECE OF EVIDENCE OFFERED IN CONNECTION WITH THIS CHARGE WAS A PHOTO OF A FEMALE POSED AS IF ENGAGED IN "ANAL SEX." THE PHOTO WAS SIEZED FROM APPELLANT'S YAHOO EMAIL ACCOUNT WHICH, IS NOT LOCATED ON HIS COMPUTER HARD DRIVE, AND FOR ALL INTENTS AND PURPOSES, IS ACCESSIBLE BY ANYONE SIMPLY BY SENDING APPELLANT AN EMAIL.

IT IS COMMON KNOWLEDGE THAT AN EMAILED PHOTO CAN BE RECEIVED WITHOUT EVER BEING ACKNOWLEDGED BY THE RECIPIENT. FOR THIS REASON ALONE, IT WOULD HAVE BEEN NECESSARY FOR THE STATE TO ESTABLISH SOME SORT OF BASIS FOR ITS THEORY, THAT APPELLANT COMMITTED A CRIMINAL ACT BY THE VERY FACT THAT THE PURPORTEDLY ILLEGAL PHOTO WAS IN APPELLANT'S EMAIL. THAT IS, THERE WOULD HAVE TO BE SOME

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FORM OF PROOF THAT THE PHOTO WAS SAVED, STORED, DUPLICATED OR COPIED BY APPELLANT RATHER THAN SOME PROOF THAT IT WAS "IN" HIS EMAIL. THERE WAS NONE.

*2 THE STATE FAILED TO OFFER ANY PROOF THAT THIS ONE PHOTO WAS RECEIVED FROM ANYWHERE OTHER THAN APPELLANT'S "INBOX," UNREAD AND UNOPENED. THE STATE FAILED TO ESTABLISH EVEN APPELLANT'S KNOWLEDGE OF ITS EXISTENCE, MUCH LESS HIS DUPLICATING OR REPLICATING OR CREATION OF THE PHOTO.

*2 THE STATE WITNESS AND "EXPERT," DEPUTY RUSS HARRELL, TESTIFIED PRETTY CLEARLY TO THE FACT THAT HE WAS NOT CERTAIN WHERE THE EMAIL ACTUALLY ORIGINATED FROM - ONLY THAT IT MAY HAVE BEEN SENT FROM "VERISON" (TR. 123; LINE 15) OR FROM SOME OTHER LOCATION." (TR. 123; LINE 18-19) AS TO IT'S LOCATION IN APPELLANT'S EMAIL, THE ONLY THING DEPUTY HARRELL COULD SAY WITH CERTAINTY WAS THAT THE EMAIL PHOTO WAS NOT IN S.P.A.M. (TR. 124; LINE 5) DEPUTY HARRELL'S TESTIMONY - AND THE STATE'S EVIDENCE ON THE WHOLE - FAILED TO ESTABLISH THAT APPELLANT EVEN KNEW THE PHOTO WAS IN HIS EMAIL.

FOR ALL OF THESE REASONS, THE STATE'S CASE AGAINST APPELLANT WAS BASED ON NOTHING MORE THAN ITS HOLLOW THEORY THAT APPELLANT USED HIS EMAIL TO SEND THE QUESTIONABLE PHOTO TO HIMSELF AND USED THE EMAIL FOR SOME SORT OF "POOR MAN'S STORAGE UNIT" (STATE'S OPENING; TR. 24; LINE 6-7) *#3

*3 APPELLANT'S CONVICTION AS TO THIS COUNT MUST BE SUPPORTED BY MORE THAN A HOLLOW THEORY EXPRESSED IN AN OPENING STATEMENT.

IT MUST BE GROUNDED IN SOME FACTUAL EVIDENCE. BECAUSE IT IS NOT, THE CONVICTION FOR SEX EXPLOITATION SHOULD BE VACATED.

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DATE: 9-8-2014

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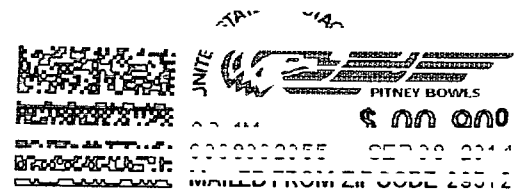
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