

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Sumter County
Hon. R. Ferrell Cothran, Jr., Circuit Court Judge

ORIGINAL

RECEIVED

JAN - 6 2012

S.C. Supreme Court

The State,

Petitioner,

v.

Ricky Darren Sanders,

Respondent.

Opinion No. 2010-UP-362 (S.C. Ct. App. filed July 12, 2010)

BRIEF OF PETITIONER

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STATEMENT OF ISSUES ON CERTIORARI

- I. The Court of Appeals erred in finding the trial court abused its discretion in excluding a remote conviction.

- II. The Court of Appeals failed to address the issue of whether the trial court properly charged the jury on the law of the case. Because this Court should reverse the decision of the Court of Appeals regarding the excluded prior conviction, the trial court's jury charge should be addressed and affirmed.

STATEMENT OF THE CASE

Respondent was indicted on charges of criminal sexual conduct in the first degree and kidnapping. Respondent case was called for trial April 14, 2008. Prior to trial, the State sought to exclude the victim's remote conviction for filing a false police report. The victim's conviction occurred in 1997. (R.2).

The trial court found the conviction was more than ten years old at the time of trial and, therefore, was a remote conviction. The court indicated it would not allow the conviction to be used for impeachment purposes. The trial court found it would allow convictions within the ten year time limit, but did not believe the remote convictions should be admitted. (R.4-5; 7; 10-12). The trial court allowed the victim to be impeached by convictions which fell within the ten year time limit of Rule 609(b), such as the victim's shoplifting charge. (R.10-12). Respondent filed a timely appeal.

The South Carolina Court of Appeals reversed the trial court's decision excluding the remote conviction. State v. Sanders, Op. No. 2010-UP-362 (S.C. Ct. App. filed July 12, 2010). The State served and filed a Petition for Rehearing on July 19, 2010, and the Court of Appeals denied the Petition on August 27, 2010.

ARGUMENT

I. The Court of Appeals erred in finding the trial court abused its discretion in excluding a remote conviction.

The Court of Appeals erred in finding the trial court abused its discretion in excluding the victim's remote 1997 conviction for filing a false police report. First, the issue was not properly preserved. Further, the conviction was properly excluded under Rule 609(b), SCRE, and Respondent never argued it fell within the exception to that Rule. Finally, the trial court never wavered from its finding that the conviction was too remote for admission.

Preservation

First, the issue as raised by Respondent to the Court of Appeals was not properly preserved for review on appeal. Respondent argued at trial that the ten-year rule for consideration of a remote conviction should begin in 2005 when Respondent was arrested, and not in 2008 when the trial occurred. (R.3-5; 8-9). He never maintained the trial court should allow the remote convictions into the record based on the "interest of justice" exception to Rule 609(b) as he argued on appeal.

Once the court acknowledged the ten-year time limit and found the convictions were remote in time, Respondent never contended the convictions were admissible under Rule 609(b)'s exception to the ten-year rule. Because Sanders merely argued the ten-year time limit should start at a time other than trial, any argument that the conviction should be admitted in the "interest of justice" under the Rule 609(b) exception was not properly before the Court of Appeals and should not have formed the basis for the reversal. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (defendant may not argue one

ground below and another on appeal); State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (party cannot argue one ground below and then argue different ground on appeal).

Rule 609(b), SCRE

The admission or exclusion of evidence falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. State v. Morris, 376 S.C. 189, 205, 656 S.E.2d 359, 368 (2008). As well, the scope of cross-examination is within the discretion of the trial court, and the court's decision will not be reversed on appeal absent a showing of prejudice. State v. Colf, 337 S.C. 622, 625, 525 S.E.2d 246, 247-48 (2000).

Pursuant to Rule 609(b), SCRE:

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Rule 609(b), SCRE (emphasis added).

Rule 609(b) creates a presumption that remote convictions are inadmissible. See State v. Bryant, 369 S.C. 511, 516, 633 S.E.2d 152, 155 (2006). Further, in State v. Johnson, this Court explained the conviction or release from confinement must be within ten years of the date of trial and not the date of arrest or of the offense. State v. Johnson, 363 S.C. 53, 57, 609 S.E.2d 520, 522 (2005). The trial court properly ruled the conviction was remote in time beyond the ten year limit imposed by Rule 609(b).

As a result of the trial court's correct ruling the conviction was remote, and not admissible under Rule 609(b) absent an exception, the burden was on Respondent to demonstrate "in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Rule 609(b). Respondent never provided any evidence to satisfy this burden. Respondent did not even make an argument that the conviction should be admitted under the exception to Rule 609(b).

Respondent failed to meet his burden of demonstrating the conviction should be admissible for impeachment. See State v. Colf, 337 S.C. 622, 626-627, 525 S.E.2d 246, 248 (2000) (party seeking to admit remote conviction must overcome presumption the conviction is inadmissible). Respondent did not comply with the exception to Rule 609(b) because he did not provide the trial court with specific facts and circumstances of the conviction to enable the trial court to make a determination regarding whether the probative value of the offense substantially outweighs its prejudicial nature or whether its admission would be in the interest of justice.

The record contains no evidence regarding the underlying facts and circumstances of the conviction so the trial court, even if he had been asked to consider the exception to Rule 609(b), had no facts on which to base his decision. See Colf, 337 S.C. at 627, 525 S.E.2d at 248 (factors to consider include 1. the impeachment value of the prior crime; 2. the point in time of the conviction and the witness's subsequent history; 3. the similarity between the past crime and the charged crime; 4. the importance of the testimony; 5. The centrality of the credibility issue). Respondent never offered any facts regarding the conviction during argument and made no proffer of the facts after he was denied admission of the conviction.

Accordingly, based on the record before the Court, Respondent cannot demonstrate how he was prejudiced by the exclusion of the conviction because he has not shown he was entitled to have the conviction admitted under the exception to Rule 609(b)'s presumption that a remote conviction is inadmissible.

Moral Turpitude

The South Carolina Court of Appeals rests its decision on the fact the trial court veered off on a tangent related to whether the conviction is from a crime of moral turpitude or whether it carries a conviction beyond one year. The Court of Appeals found because the court stated the conviction would not have been admissible based on its sentence being less than one year, it abused its discretion by employing the wrong standard. The trial court, however, consistently held the conviction was beyond the ten year time limit, and as a result, was too remote to be admitted. The trial court found it would allow convictions within the ten year time limit, but did not believe the remote convictions should be admitted. (R.4-5; 7; 10-12).

The trial court then allowed additional argument by Respondent's counsel regarding the admissibility of the conviction. The trial court never reversed its prior rulings that the ten year time limit under Rule 609(b) controlled. Instead, the trial court considered Rule 609(a), finding whether the crime was a crime of moral turpitude was not the appropriate standard and because the conviction carried a sentence of less than one year, it was not admissible. The trial court's confusion of the standards in Rule 609(a) and 609(b) does not demonstrate the trial court failed to properly exercise its discretion in refusing to admit the conviction.

The issue briefed on appeal was not presented to the trial court and is not properly preserved for review on appeal. Even if properly preserved, the conviction was beyond the ten-year time limit and under Rule 609(b) is presumed to be inadmissible. Respondent never argued or demonstrated any specific facts or circumstances of the conviction to satisfy the exception to Rule 609(b)'s ten-year limitation. Finally, while the trial court did veer on a tangent related to the old moral turpitude standard, the court remained consistent in its holding that the conviction was too remote for admission into evidence. Accordingly, this Court should find the Court of Appeals erred in holding the trial court abused his discretion in excluding the prior conviction.

II. The Court of Appeals failed to address the issue of whether the trial court properly charged the jury on the law of the case. Because this Court should reverse the decision of the Court of Appeals regarding the excluded prior conviction, the trial court's jury charge should be addressed and affirmed.

Respondent maintains the trial court erred in failing to charge the jury that the State had to prove Respondent had sexual intercourse with the victim without her consent. The issue, however, is not properly preserved for review on appeal because Respondent did not raise it after the court initially charged the jury. Further, the court charged the jury with the appropriate law in South Carolina so there is no error in the charge as given. Finally, the burden of proof was never shifted to Respondent to prove there was consent versus the State being required to prove the elements of criminal sexual conduct.

First, this issue is not properly preserved for review on appeal. Respondent did not request a charge on consent or object to the failure by the trial court to give the jury a charge on consent when first given the opportunity. After the court originally charged the jury, both sides were given the opportunity to raise any issues before the jury retired, but both the State and Respondent indicated they did not. (T.591-592; R. 73-74). As a result of Respondent's failure to contemporaneously object to the trial court's jury charge, the issue is not preserved for review. See State v. Knighton, 334 S.C. 125, 136-137, 512 S.E.2d 117, 123 (Ct. App. 1999) (failure to object to charge as given or to request additional charge when given opportunity to do so constitutes waiver of right to complain on appeal); Rule 20(b), SCRCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires,

but out of the hearing of the jury Failure to object in accordance with this rule shall constitute a waiver of objection”).

Further, the charge given was clearly sufficient to instruct the jury on the applicable law related to the charge of criminal sexual conduct. Generally, a trial court is required to charge only the current and correct law of South Carolina. State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006). A jury charge is correct if it contains the correct definition of the law when read as a whole. Rayfield, 369 S.C. at 119, 631 S.E.2d at 251. “The substance of the law is what must be charged to the jury, not any particular verbiage.” State v. Adkins, 353 S.C. 312, 318-19, 577 S.E.2d 460, 464 (Ct. App. 2003). On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. State v. Lee-Grigg, 374 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007).

In State v. Cox, 274 S.C. 624, 266 S.E.2d 784 (1980), this Court addressed a similar argument posited by Respondent. In Cox, the Court found the definition of “aggravated coercion” provided in section 16-3-651 was “meant to provide that the sexual battery occurred under circumstances where the victim’s consent was lacking.” Id. at 628, 266 S.E.2d at 786. The Court found where the judge charged the statutory language and “[g]iven the adequacy of the statutory language, appellant’s request to charge was unnecessary” and found no error in the court’s refusal to charge lack of consent. Id.

In the instant case, the trial court fully explained the elements of criminal sexual conduct in the first degree. The trial court charged the jury with the applicable language from sections 16-3-651 and -652 of the South Carolina Code. (T.587-588; 596-597; R. 69-70; 78-79). The trial court properly explained Respondent can be found guilty only if the jury concluded the State proved beyond a reasonable doubt that Respondent “used aggravated

force to accomplish the sexual battery” or “the victim submitted to a sexual battery while the victim was also a victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar act.” (T.588; 597; R. 70; 79). Further, the court twice defined “aggravated force” pursuant to the definition provided in section 16-3-651(c) of the South Carolina Code. (T.588; 597; R. 70; 79). Specifically, the court stated: “Aggravated force means to use a physical force or physical violence of a high and aggravated nature to overcome the victim. This includes the threat of use of a deadly weapon.” (T.597; R. 79).

The definition of “aggravated force” is sufficient to apprise the jury regarding lack of consent. The definition, just like the definition of “aggravated coercion” in Cox, is “meant to provide that the sexual battery occurred under circumstances where the victim's consent was lacking.” Cox, 274 S.C. at 628, 266 S.E.2d at 786. Accordingly, this Court should find the statutory language charged was sufficient and the trial court did not err in refusing to charge the jury regarding lack of consent.

Finally, nothing in the charge or during the case shifted the burden onto Respondent to prove consent or to prove his innocence. During his closing argument, Respondent’s counsel insinuated numerous times that the sex between Respondent and the victim was consensual. (T.534-545; R. 32-43). The State responded by indicating there was no evidence presented indicating consent. (T.557-560; 577; R. 55-58; 59).

The trial court charged the jury that the State had the burden to prove each and every element beyond a reasonable doubt. (T.580-582; R. 62-64). The trial court specifically stated: “A person charged with committing a criminal offense in South Carolina is never required to prove himself or herself innocent.” (T.580; R. 62). The trial court also instructed

the jury that they were responsible for making findings of fact and weighing the evidence presented. (T.578-579; R. 60-61).

Accordingly, this Court should find the issue regarding the jury charge is not properly preserved for review on appeal because Respondent did not object or offer a charge after the trial court first charged the jury. On the merits, the jury charges given by the trial court were sufficient and properly explained the substance of the law to be charged. A charge specifically related to lack of consent was not necessary given the clear definition of “aggravated force” in the statute and the trial court’s full instruction to the jury regarding sections 16-3-651 and -652. Because this Court should find the Court of Appeals erred in reversing the trial court’s exclusion of the victim’s remote conviction, this Court should consider this issue which was not determined by the Court of Appeals, and affirm the trial court’s jury charges as given.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be reversed and Respondent's conviction and sentence reinstated.

Respectfully submitted,

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January 6, 2012

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PROOF OF SERVICE

I, ELLEN DuBOIS, certify that I have served the within Brief of Petitioner on Respondent by depositing three copies of the same in the United States mail, postage prepaid, addressed to:

Elizabeth A. Franklin-Best, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 6th day of January, 2012.



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