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THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County

Honorable J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 2015-UP-217 (S.C. Ct. App. filed May 8, 2015)

Appellate Case No. 2015-001576

The State of South Carolina,

Respondent-Petitioner,

v.

Venancio Diaz Perez,

Petitioner-Respondent.

REPLY BRIEF OF RESPONDENT-PETITIONER

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STATEMENT OF ISSUE

I.

Inasmuch as the Record on Appeal clearly establishes the sentence in this case was not based upon Petitioner-Respondent's exercise of his right to trial by jury, but upon the trial court's proper consideration of the crimes of which Petitioner-Respondent was convicted and the evidence presented, did the Court of Appeals err in setting aside Petitioner-Respondent's sentences and remanding for resentencing, especially since such relief exceeded that requested by Petitioner-Respondent?

STATEMENT OF THE CASE

Petitioner-Respondent stands upon the Statement of the Case included in its Brief of Petitioner (Respondent-Petitioner).

ARGUMENT

Inasmuch as the Record on Appeal clearly establishes the sentence in this case was not based upon Petitioner-Respondent's exercise of his right to trial by jury, but upon the trial court's proper consideration of the crimes of which Petitioner-Respondent was convicted and the evidence presented, the Court of Appeals erred in setting aside Petitioner-Respondent's sentences and remanding the case for resentencing. Moreover, even if the Court of Appeals was correct in finding the trial court's sentencing of Petitioner-Respondent was improper in some way, it erred in the relief it granted because the scope of the relief granted by the Court of Appeals exceeded that requested by Petitioner-Respondent and that which was properly before it pursuant to the well-established rules of issue preservation and appellate review. (Issue I)

Without repeating the arguments advanced in its Brief of Petitioner (Respondent-Petitioner) and Brief of Respondent (Respondent-Petitioner) filed in this matter, the State would respond to Petitioner-Respondent's arguments as follows.

The conclusion of the Court of Appeals that the sentences imposed by the trial court were based upon Petitioner-Respondent's exercise of his right to a trial is not supported by the appellate record.

The State stands by its position, as argued in its initial brief, that the record is absolutely devoid of any evidence that the trial court based any part of its sentence on Petitioner-Respondent exercising his right to go to trial.¹

The conclusion of the Court of Appeals that the sentence imposed by the trial court on the conviction for the lesser-included offense of ABHAN conviction was based upon the

¹ Counsel for the State would like to note for the Court that it is not clear from the Record when the plea discussions occurred. The undersigned counsel and appellate counsel for Petitioner-Respondent have read the appellate record to indicate they occurred prior to trial. However, the undersigned counsel for the State has been informed by trial counsel for the State that she thinks that the discussion may have occurred while the jury was deliberating.

trial court's consideration of evidence that the victim was digitally penetrated by Respondent, even though the jury found him guilty of the lesser-included on the CSC with a minor first degree indictment, and that such was improper, is not supported by the record on appeal.

The Court of Appeals concluded the trial court's sentence on the ABHAN conviction was based, in part, upon the trial court's improper consideration of the victim's testimony that she had been digitally penetrated by Petitioner-Respondent despite the fact that the jury had convicted Petitioner-Respondent of the lesser-included offense on the CSC with a minor first degree indictment.

During the exchange made after sentencing when the trial court was addressing Petitioner-Respondent's challenge to his sentencing on the basis of vindictiveness, the following statement was made.

This Court is of the opinion that the little girl was abused. This Court is also of the opinion that there was penetration, digital penetration based upon her sworn testimony. The jury has found her not guilty.

The Court's of the opinion he's guilty of all the charges from the testimony I've heard. So it's not any abuse in giving him the consecutive. You understand?

(Emphasis added.) (JA p. 556, lines 5-12).

In his brief, Petitioner-Respondent contends that it was improper for the trial court to consider the victim's testimony of penetration. The State disagrees.

Petitioner-Respondent was tried for two charges – criminal sexual conduct with a minor, first degree, under S.C. Code Section 16-3-655, and lewd act upon a minor, under S.C. Code Section 16-15-140 (hereinafter lewd act). (JA. pp. 13-17). The indictments, although covering the same time period, were for legally different crimes. *See State v. Norton*, 266 S.C. 95, 332 S.E.2d 531 (1985) (double jeopardy prohibition not bar

reindictment for lewd act after directed verdict granted in trial for first-degree criminal sexual conduct with the minor because each offense requires proof of element not required by other, and thus the offenses were distinct for purposes of double jeopardy).

The Court of Appeals overlooked the fact that the evidence of penetration is evidence that supported both indictments. The common law offense of ABHAN is an assault and battery accompanied by circumstances of aggravation. As this Court has recognized, circumstances of aggravation include the taking of indecent liberties with a female without her consent. *See, e.g., State v. Sprouse*, 325 S.C. 275, 285, n. 2, 478 S.E.2d 871, 877, n. 2 (Ct. App. 1996). Although research has not disclosed a case directly on point, it is clear that non-consensual digital penetration would clearly be the taking of indecent liberties with a female without her consent. *See State v. Williams*, 257 S.C. 257, 185 S.E.2d 529 (1971) (defendant took indecent liberties with female by holding victim's neck and declaring "I want you). In addition, digital penetration also clearly constitutes a lewd or lascivious act upon the body of a victim, as required for a conviction of lewd act. Therefore, even though it chose not to convict him of CSC, because the jury could have used the evidence of penetration to convict Petitioner-Respondent of either ABHAN and/or lewd act, the trial court's consideration of such evidence was not improper.²

Petitioner-Respondent also argues that the evidence of penetration was acquitted conduct – because the jury found him not-guilty of CSC – and that the trial court could

² Moreover, as noted in its initial brief, South Carolina does not require the use of special verdict forms in criminal cases (requiring a jury to make special written findings upon each element of the charged crime), and none was used in this case. Without such, it is impossible to know whether the jury concluded the State had not proven an act of penetration occurred or whether they concluded an act of penetration did occur, but used that evidence to conclude Petitioner-Respondent committed ABHAN rather than the greater offense.

only have considered it, under *U.S. v. Watts*, 519 U.S. 148 (1997), if the conduct was proved by a preponderance of the evidence. A reading of *Watts* indicates that the Court issued its holding in the context of sentencing a federal criminal defendant under the federal sentencing guidelines that allow for consideration of acquitted conduct. *U.S. v. Watts*, 519 U.S. at 156. However, even if the evidence was of acquitted conduct, that standard was met here. The trial court's own words clearly indicate that it believed the victim's testimony and would have found the defendant guilty of CSC. Therefore, while the trial court did not state that it found "by a preponderance of the evidence" that digital penetration had occurred, its wording establishes this standard was met. *See California v. Prysock*, 453 U.S. 355, 359 (1981) (rigidity of *Miranda* not extend to precise formulation of warnings given defendant and no talismanic incantation is required to satisfy its strictures).

The sentences were proper and the Court of Appeals erred in not so concluding.

The State has not changed the question for which this Court granted certiorari.

Petitioner-Respondent complains that the State has slightly changed the phrasing of the question in its brief, from that presented to this Court in its Petition for Writ of Certiorari. He fails to mention that the phrasing of the question has only been changed to include one of the subsidiary questions fairly comprised therein. See Rule 242, SCACR. Moreover, the question reflects the same arguments that were raised in the Petition for Rehearing before the Court of Appeals and the Petition for Writ of Certiorari. No new questions have been added, and there is no error in the phrasing of the question in the State's initial brief.

CONCLUSION

For the reasons stated herein and in its initial brief, Brief of Petitioner (Respondent-Petitioner), the State asks this Court to (1) reverse that portion of the opinion of the Court of Appeals that set aside Petitioner-Respondent's sentences and remanded this case for resentencing and reinstate Petitioner-Respondent's sentences; or (2) either (a), if this Court determines there was no vindictiveness by the trial court in sentencing Respondent, but cannot otherwise determine from the record if the sentence was proper, remand this case for the limited purpose of having the trial court set forth the basis for its sentencing, and review and act upon that basis once provided; (b), if the sentence on the ABHAN conviction is determined to be the result of vindictiveness, modify the opinion of the Court of Appeals to only set remand that conviction for resentencing as to whether it is to run consecutively or concurrently to the sentence imposed upon the lewd act conviction; and (3) grant any other and further relief as this Court deems appropriate.

Respectfully submitted,

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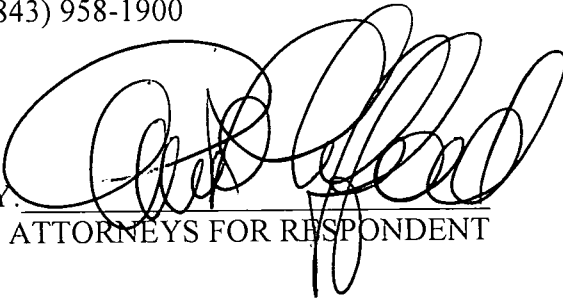
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September 23, 2016

Columbia, South Carolina

STATE OF SOUTH CAROLINA
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CERTIORARI TO THE COURT OF APPEALS
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PROOF OF SERVICE


I, Anne Mueller, certify that I have served the Reply Brief of Respondent-Petitioner on Petitioner-Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to his counsel of record:

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

This 23rd day of September, 2016.


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