STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Abbeville County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHANE ALEXANDER WASHINGTON,

APPELLANT

APPELLATE CASE NO. 2016-000907

INITIAL BRIEF OF APPELLANT

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2.

Did the trial judge err by refusing to direct a verdict when the state failed to present any evidence that Appellant engaged in sexual battery, which is a material element of first degree criminal sexual conduct with a minor, on or about July 1, 2010, the date alleged in the indictment?

STATEMENT OF THE CASE

An Abbeville County Grand Jury indicted Appellant on September 30, 2011 for first degree criminal sexual conduct (CSC) with a minor. R. *. His case was called to trial on April 6, 2015 before the Honorable R. Lawton McIntosh, and a jury. Tr. 1. Appellant was tried in his absence after he did not appear for trial. Assistant Solicitors Lance Sheek and Yates Brown represented the state, and Janna Nelson represented Appellant. Tr. 1.

On April 8, 2015, the jury found Appellant guilty. Tr. 13, l. 15 – 14, l. 3. The sealed sentenced was opened on April 20, 2016 by the Honorable Donald B. Hocker. Tr. 1. Appellant was sentenced to thirty years' imprisonment. Tr. 4, l. 25 – 5, l. 2.

This appeal follows.

STATEMENT OF THE FACTS

Minor, who was twelve years old at the time of trial, claimed that Appellant, who was her stepfather, sexually abused her when she was seven years old. Tr. 221, l. 13 – 223, l. 2. Minor first disclosed to her biological father on September 3, 2010. She said the abuse had been "going on every once in while" for a couple of months and that the last occurrence was the day before, which was September 2, 2010. Tr. 217, l. 9 – 218, l. 4. Minor's father immediately called the police and reported the allegations. Tr. 223, ll. 19-22. During an investigation, Minor attended a forensic interview at Beyond Abuse and was physically examined by a pediatrician for signs of sexual abuse. Tr. 180, ll. 1-10; Tr. 162, l. 22 – 163, l. 2. There were no physical findings and Minor's exam was considered "normal." Tr. 164, ll. 12-14; Tr. 165, l. 7 – 166, l. 10.

During this time period, Minor was living with her mother, her five siblings, and Appellant in a four bedroom mobile home. Her mother, Appellant, and her two youngest siblings slept in the master bedroom. Minor shared a bedroom with her two sisters, and her brother had his own room. The fourth bedroom was used by Appellant, who is a tattoo artist, for his business. The family called this bedroom "the tattoo room." Tr. 95, l. 21 – 104, l. 20.

Minor claimed during her forensic interview that the first time Appellant touched her was in the "tattoo room." She alleged that on this occasion Appellant touched her "private" and "butt" with his hand on the "outside." Tr. 209, ll. 12-25; Tr. 225, l. 3 – 226, l. 6; Tr. 227, ll. 16-23; Tr. 230, ll. 3-21; See Court's Exhibit No. 1 (DVD of Forensic Interview). In the weeks or months that followed, Minor claimed Appellant touched her again. She described one time where Appellant allegedly forced her to engage in oral sex in her brother's bedroom and another time where Appellant allegedly anally penetrated her in her mother's bathroom. Tr. 229, ll. 5-21; See Court's Exhibit No. 1 (DVD of Forensic Interview). Minor claimed the latter was the

last time Appellant had touched her, meaning the abuse would have taken place on September 2, 2010, the day before she disclosed to her father. Tr. 208, l. 15 – 209, l. 11; See Court's Exhibit No. 1 (DVD of Forensic Interview).

Minor's description of these alleged encounters occurred during her forensic interview on October 14, 2010. Tr. 180, ll. 1-10; See Court's Exhibit No. 1 (DVD of Forensic Interview). Contrastingly, her testimony before the jury, which occurred nearly five years later, was very vague.

Minor told the jury that Appellant touched her "private" and "rear end" under her clothing with his hand and his "private." Tr. 220, l. 2 – 221, l. 2. She claimed the *first time* Appellant touched her was "around summertime in July" and that on this occasion Appellant touched "both of [her] spots" *on the "outside."* Tr. 221, ll. 13-22 (emphasis added). She alleged that on subsequent occasions Appellant "put his private inside [her] rear end" and that this occurred "around July in the summertime" in the "tattoo room" and her mother's bathroom. Tr. 221, l. 23 – 223, l. 2.

For whatever reason, the state chose to indict Appellant only for the first occasion of alleged sexual misconduct. The indictment alleged, "That Shane Alexander Washington [Appellant], did in Abbeville County, state aforesaid, **on or about the 1st of July, 2010** being older than the victim, willfully and unlawfully commit criminal sexual conduct with a minor in the first degree, to wit: that the said defendant did engage in sexual battery upon a person under the age of eleven (11) years, to wit: one Minor, date of birth: [Redacted], 2002, in violation of Section 16-3-655(A)(1) of the South Carolina Code of Laws, 1976, as amended. R. * (emphasis added).

The jury ultimately found Appellant guilty. Tr. 13, l. 15 – 14, l. 3. As required by statute, the judge had the jury indicate as part of its verdict which of the acts that constitute a sexual battery it found Appellant had committed. See S.C. Code Ann. § 16-3-655(D)(1). The jury found Appellant committed "fellatio" and "any intrusion however slight into any part of her genital or anal openings or any object being inserted into her genital or anal openings." Tr. 13, ll. 19-24.

ARGUMENT

1.

The trial judge erred by admitting evidence of subsequent acts of unindicted sexual misconduct by Appellant when such evidence was not part of the *res gestae*, was not admissible under Rule 404(b), SCRE, and was unfairly prejudicial to Appellant since the subsequent acts were not similar to the conduct for which Appellant was indicted, involved escalating allegations of abuse, and could only have confused and misled the jury.

How the Issue was Presented Below

Before Minor's testimony, the state presented the recording of her forensic interview through Charlotte Ehney, the director of Beyond Abuse, who interviewed Minor on October 14, 2010. Tr. 179, l. 17 – 180, l. 10. As the forensic interview was being played for the jury, defense counsel informed the judge that she had a matter of law and the judge excused the jury from the courtroom. Tr. 185, ll. 11-18.

Counsel argued that the remainder of the video should be excluded because Minor goes on to describe subsequent uncharged allegations of sexual abuse. Counsel explained that when Minor first reported the allegations on September 3, 2010, she claimed the abuse had been happening for a couple of months and that the last time it happened was the day before, which was September 2, 2010. Accordingly, the warrant alleged a timeframe of July 1, 2010 until September 2, 2010. Defense counsel continued:

> However, the indictment, **the Grand Jury elected to indict Mr. Washington [Appellant] for activity strictly on July 1st. On or about July 1st of 2010.** So I have to presume that that would be when things started happening because it's the first date listed in the warrant. I didn't have any idea what Minor was going to say happened on July 1st. **But she, in the rest of the course of this interview, talks about two other incidents . . . she has now talked about everything related to the first incident. She's asked by the interviewer tell me - - tell me**

> **what happened the first time. And we've been through that. And I would submit to you, Judge, that that's what he [Appellant] is indicted for because July 1st is supposedly when this started if you take the incident report and warrant to be - - to have their dates correct. He's indicted for July 1st. She has described the first event. The rest of the interview goes on to ask, were there any other times that it happened.** Tell me about the last time that it happened. And throughout the rest of the time Minor describes the last time that something happened which she said was what sounds like anal penetration in her mother's bathroom . . . If that's the last time something happened that must have been - - if you take what she reported is true, that would have been the day before the report was made, September 2nd, which is not what he's indicted for. She describes some other incident of fellatio in her brother's bedroom.
>
> So, Your Honor, that's my position is that **everything else on this video is irrelevant and overly prejudicial under Rules 401 and 403 and do[es] not relate to the offense that Mr. Washington is charged with in this case.**

Tr. 185, l. 20 – 87, l. 20 (emphasis added).

In response, the assistant solicitor argued that "statutorily time is not of the essence" and suggested that "on or about the 1st day of July, 2010" encompassed all of "the summertime months." Tr. 187, ll. 22-25. Defense counsel disagreed and asserted that "on or about means on July 1st or very close to it." She emphasized that "when [the state] want[s] to indict for a timeframe [it] can." Tr. 189, ll. 6-24. However, for whatever reason, the state chose to indict Appellant only for alleged conduct that occurred on or about July 1, 2010. See R. *.

The solicitor also argued that the alleged subsequent acts should be admissible under the *res gestae* theory, which allows the state "to present the evidence that completes the entire story, instead of presenting a very disjointed story." Tr. 188, ll. 7-20. He later contended that the alleged subsequent acts are a part of the *res gestae* because the acts put the abuse "into context." He asserted, "[W]hat I have found from doing these cases . . . is that if you present the picture to a jury that you've got these kids living there. It happens on one day and it's never happened any other time, it leaves the jury wondering what *precipitated* that one event where it's showing the pattern of conduct puts it in the context that they can understand. It certainly makes it more

logical. And it certainly would go to prove that this child is not misinterpreting something that happened. It wasn't a bathing or helping change clothes and a touch that the child misinterpreted. But this was a pattern of conduct." Tr. 192, ll. 7-19 (emphasis added).

As to *res gestae*, defense counsel asserted that her understanding of the theory is – "I have to explain to you that somebody stole this car because this is the same car he used an hour later in this armed robbery or this bank robbery. That's not what we've got here. We've got three incidents that are . . . very different." Tr. 192, l. 21 – 193, l. 4. Counsel also cited to State v. Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009). She explained that in Clasby the Supreme Court affirmed the admission of evidence of "similar acts" of "continued elicit intercourse" that happened "prior to the indicted offense" as "kind of a grooming theory." Before being cut off by the judge, counsel distinguished this case from Clasby by asserting that the uncharged acts admitted in Clasby were *prior* to the indicted act and were used to show what led up to the indicted crime where here the uncharged acts were *subsequent* to the conduct for which Appellant was indicted. Tr. 195, l. 17 – 196, l. 5.

The judge ultimately found that the alleged subsequent acts were "unindicted crimes." Tr. 194, ll. 4-6. However, citing State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004), and State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999), the judge found the subsequent acts were admissible as part of the *res gestae*. Tr. 196, ll. 6-10. He concluded that the unindicted conduct goes "to show motive and intent, not [a] mistake - - it would also go to show a full presentation of the evidence of the context and environment in which this setting took place." Tr. 194, ll. 7-17.

At the end of the judge's ruling, defense counsel raised Rule 404(b), SCRE. Counsel argued that the unindicted subsequent acts were propensity evidence under Rule 404(b), SCRE,

State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), and not part of the *res gestae*. She emphasized that "on the tape she [Minor] has already explained the complete act for which Mr. Washington [Appellant] is indicted and it is unfairly prejudicial to allow any other act that he is not on notice for, Your Honor." Tr. 196, l. 23 – 197, l. 11. Despite this additional argument, the judge did not alter his ruling and made it clear he had made his determination. Tr. 197, ll. 3-13.

Subject to Appellant's objection, the judge gave the following limiting instruction to the jury before the remainder of the forensic interview was published:

> Ladies and gentlemen, there may be reflected on the video evidence of other acts allegedly committed by the Defendant on the witness. The indictment in this matter only charges the Defendant with conduct that occurred on or around July 1st, 2010. To the extent that any evidence is presented other than the alleged acts on or around July 1st, 2010 you shall not consider the Defendant's innocence or guilt in committing these acts because he had not been indicted for these acts. This evidence, if any, may be considered by you for the sole purpose of considering the Defendant's motive, intent, absence of mistake, and/or to present a setting of the case and its environment. Ladies and gentlemen, it's up to you to evaluate the weight of the evidence and give it such weight that you think it deserves.

Tr. 198, l. 23 – 199, l. 11.

Discussion

The trial judge properly recognized the alleged sexual misconduct described by Minor during her forensic interview and later during her testimony before the jury that occurred after the first episode of abuse was not evidence of the charge for which Appellant was indicted and constituted "unindicted crimes" since Appellant was only indicted for conduct that occurred "on or about the 1st of July, 2010." Tr. 194, ll. 4-6; See R. *.

However, the judge erred by admitting this evidence of unindicted sexual misconduct since this evidence was not part of the *res gestae* and was not admissible under Rule 404(b),

SCRE. Moreover, the evidence was unfairly prejudicial to Appellant since the subsequent acts were not similar to the conduct for which Appellant was indicted, involved escalating allegations of abuse, and could only have confused and misled the jury.

"South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) (citing Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)). "As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE." State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013 (citing Clasby, 385 S.C. at 154, 682 S.E.2d at 895). "If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within an exception in Rule 404(b." Id. "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." Cope, 405 S.C. at 337, 748 S.E.2d at 204 (citing State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008) (internal quotation marks omitted). "Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." Cope, 405 S.C. at 337-338, 748 S.E.2d at 204-205 (citing Clasby, 385 S.C. at 155, 682 S.E.2d at 896).

The *res gestae* theory, on the other hand, "recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred." King, 334 S.C. at 512, 514 S.E.2d at 582 (citing State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), *overruled on*

other grounds by State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014)). Our Supreme Court explained the theory of *res gestae* in State v. Adams:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...' [and is thus] part of the res gestae of the crime charged." And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

Adams, 322 S.C. at 122, 470 S.E.2d at 370-371 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)) (alterations in original). "Under this theory, it is important that the temporal proximity of the prior bad act be closely related to the charged crime." King, 334 S.C. at 513, 514 S.E.2d at 583 (citing State v. Hough, 325 S.C. 88, 480 S.E.2d 77 (1997)).

Citing State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004), and State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999), the judge found the subsequent acts of alleged sexual abuse were admissible as part of the *res gestae*. Tr. 196, ll. 6-10. This was error.

In Sweat, this Court affirmed the admission of evidence of a prior bad act of domestic abuse as part of the *res gestae*. Sweat was charged with first degree burglary, assault and battery with intent to kill, and three counts of assault of a high and aggravated nature after he invaded a home occupied by his estranged wife, her boyfriend, and several others on December 11, 2001. King, 362 S.C. at 121-122, 606 S.E.2d at 510-511. The state introduced testimony from Sweat's estranged wife of an incident of domestic violence that took place two months earlier in October 2001. Sweat's wife reported the prior incident and Sweat spent forty-five days in jail. While he

was in jail, Sweat's wife ended their relationship and became romantically involved with another man.

This Court held the prior episode of domestic abuse was admissible under Rule 404(b), SCRE, as evidence of motive and intent. Id. at 124, 606 S.E.2d at 512. The Court found from the October incident that the jury could have inferred both (1) motive—that Sweat was driven by anger over his estranged wife causing him to go to jail and terminating their relationship; and (2) intent—that Sweat maliciously sought to inflict harm upon his estranged wife and her boyfriend. Id. at 126, 606 S.E.2d at 513. This Court held the evidence was relevant because it tended to make the state's version of the case more probable and was logically related to why Sweat went to the house that night and to his intentions once there. Id. at 127, 606 S.E.2d at 514.

Additionally, this Court held the evidence was admissible as part of the *res gestae* and was properly admitted to "complete the story of the crime on trial." Id. at 133, 606 S.E.2d at 517. The Court concluded that the October incident, and the events that followed, including Sweat's estranged wife moving out and ending their relationship, provided the jury with "an appropriate context in which to place the December 11 attack." Id.

Sweat is easily distinguishable from this case. Here, the alleged unindicted acts occurred *subsequent* to the conduct for which Appellant was indicted as opposed to before and were not relevant in any way to show motive or intent or any other exception contained in Rule 404(b). Moreover, the subsequent acts did not explain or give context to the prior indicted misconduct like the prior act of domestic violence did in Sweat. The subsequent acts only went to propensity—to show Appellant was capable of committing the indicted act of sexual abuse because he later committed additional acts of misconduct against Minor.

In King, our Supreme Court held it was reversible error to admit evidence of prior thefts allegedly committed by King as evidence of motive or as part of the *res gestae*. King was accused of murdering his father-in-law, Billy Turbeville. Turbeville received two checks each month totally $2200. After paying his monthly bills totaling $400, Turbeville kept the remaining cash inside his wallet in the front pocket of his pants. No wallet or cash was found on Mr. Turbeville when his body was discovered. King, 334 S.C. at 508, 514 S.E.2d at 580. The trial court allowed King's ex-wife to testify that King regularly pawned household items, stole cash from her purse, forged checks on her bank account, stole cash from her bank account by using her ATM card, and stopped paying his share of the bills in the months the preceded the murder. Id. at 511, 514 S.E.2d at 582.

After considering both Rule 404(b), SCRE, and the *res gestae* theory, the Court held the remote thefts were not admissible under any theory, and that the evidence merely showed King's bad character and his propensity to commit crimes. Id. at 513, 514 S.E.2d at 583. The Court further held the admission of the evidence was not harmless because the prior thefts suggested King had a drug problem, which was highly prejudicial, and all the evidence against King was circumstantial. Id. at 514, 514 S.C. at 583.

The unindicted acts of sexual misconduct in this case similarly show Appellant's propensity to commit sexual battery and were not admissible under any of the exceptions of Rule 404(b) or under the *res gestae* theory. The sexual abuse that allegedly occurred "on or about" July 1, 2010 was a completely separate event from the later uncharged crimes, which involved escalating allegations of misconduct. Unlike in State v. Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009), where our Supreme Court held testimony about four *prior* incidents of uncharged misconduct was admissible under Rule 404(b), SCRE, as evidence of a common scheme or plan,

the conduct here occurred *subsequent* to the indicted act and was not similar to the facts of the indicted charge.

The admission of this subsequent uncharged conduct was unfairly prejudicial to Appellant because the acts involved escalating allegations of sexual misconduct that were dissimilar to the indicted act. See Rule 403, SCRE. Moreover, the evidence was indisputably used by the state to prove Appellant committed the crime for which he was indicted. Despite the limiting instruction given by the judge before the admission of the evidence, the assistant solicitor urged the jury to consider the uncharged conduct as substantive evidence of the indicted offense during his closing argument:

> Now, the argument will be made, because I'm not dumb and I've done this for a long time, what evidence did they [the state] have that it happened on July 1st. She [Minor] said it had been going on for a couple of months and that ***the first incident was touching*, and then later it was sticking something inside her.** Folks, that's the reason the indictment says what it says. On or about July 1st. On or about, he engaged in sexual battery on Minor. **If you find as a jury that he stuck his penis in her bottom, he struck his penis in her mouth like she testified, if you find that she told the truth, then you find the Defendant guilty.**

Tr. 276, l. 15 – 277, l. 1 (emphasis added).

This argument could only have confused and misled the jury as to the purpose the trial judge admitted the evidence of the unindicted subsequent acts and how the jury was permitted to consider the evidence. See Tr. 197, l. 16 – 198, l. 5. The solicitor's argument is further evidence of how the admission of the uncharged misconduct prejudiced Appellant and is proof that the jury likely improperly considered the subsequent acts as evidence of Appellant's guilt or innocence.

Respectfully, this Court should hold the trial judge erred by admitting evidence of the subsequent uncharged conduct, reverse Appellant's conviction and sentence, and remand for a new trial.

2.

The trial judge erred by refusing to direct a verdict when the state failed to present any evidence that Appellant engaged in sexual battery, which is a material element of first degree criminal sexual conduct with a minor, on or about July 1, 2010, the date alleged in the indictment.

How the Issue was Presented Below

At the conclusion of the state's presentation of evidence, Appellant moved for a directed verdict. Defense counsel argued there was no evidence Appellant engaged in sexual battery with Minor on or about July 1, 2010, which is the conduct for which he was indicted. Specifically, counsel asserted that during her testimony and during the forensic interview, Minor claimed that the first episode of abuse, which is alleged to have occurred at the beginning of July, happened in the "tattoo room" and strictly involved touching on the outside of her "private" and "butt," which would constitute only third degree criminal sexual conduct with a minor. Tr. 234, l. 4 – 235, l. 10. Counsel concluded, "[D]espite the other things [subsequent acts] that have been alleged, [Appellant is] not charged with those. You've [the judge has] explained to the jury that they can't consider those as evidence of guilt or innocence and we would ask for a directed verdict of acquittal." Tr. 235, ll. 11-14.

Citing State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991), which involves the sufficiency of an indictment, the assistant solicitor argued that "date and time is not an element of the offense of criminal sexual conduct. The solicitor maintained that the "on or about" language in the indictment put Appellant on notice that a timeframe was alleged. He concluded, "[Date and time is] not an element of the crime, and therefore the jury ca[n] convict if

they find it happened on or about that timeframe, which is what the child [Minor] testified to." Tr. 235, l. 16 – 237, l. 8.

The judge ultimately ruled, "I'm not looking for anything but existence of evidence or nonexistence of evidence, and I think that viewing that standard there is evidence upon which the jury could find that that event with penetration, however slight as provided by the statute, took place on or around the July timeframe. I don't necessarily think it's a requirement, but I think that they could, regardless of the subsequent acts. For that reason I'm going to deny your motion. And for the reason stated by Mr. Sheek [the assistant solicitor] on the record as well." Tr. 237, ll. 9-22.

Discussion

The trial judge erred by refusing to direct a verdict when the state failed to present any direct evidence or substantial circumstantial evidence that Appellant engaged in a sexual battery with Minor "on or about the 1st of July, 2010," the date alleged in the indictment. See R. *.

"When a motion for a directed verdict of acquittal is made in a criminal case, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004) (citing State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984)). The accused is entitled to a directed verdict when the state fails to present evidence on a material element of the offense charged. Id. (citing State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001)). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001 (citing State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000 and State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000).

Appellant was indicted for criminal sexual conduct with a minor in the first degree pursuant to S.C. Code Ann. § 16-3-655(A), which states in relevant part: "A person is guilty of criminal sexual conduct with a minor in the first degree if: (1) the actor engages in sexual battery with a victim who is less than eleven years of age." 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 such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h).

"Sexual battery" is a material element of the offense of first degree CSC with a minor. The state failed to present any evidence that Appellant engaged in sexual battery with Minor on or about July 1, 2010, the date specified in the indictment. When Minor first disclosed on September 3, 2010, she claimed Appellant had been sexually abusing her since the beginning of July, approximately two months prior. During her forensic interview, and later during her testimony before the jury, Minor alleged that the first time Appellant assaulted her was in the "tattoo room" when Appellant touched the "outside" of her "private" and "butt." See Tr. 206, l. 23 – 209, l. 25; Tr. 221, ll. 13-22; Tr. 225, l. 3 – 226, l. 6; Tr. 229, ll. 5-21; Court's Exhibit No. 1 (DVD of Forensic Interview). This conduct does not constitute sexual battery. Consequently, Appellant was entitled to a directed verdict.

In State v. Brown, 360 S.C. 581, 602 S.E.2d 392 (2004), our Supreme Court held Brown was entitled to a directed verdict on three counts of first degree criminal sexual conduct when the state failed to present any evidence Brown committed the acts through the use of aggravated force, which was a material element of the offense, on the dates specified in the indictment. Id.

at 590, 602 S.E.2d at 397. Brown physically and sexually abused his daughters, who were adults at the time of trial, repeatedly over a period of years. He was convicted of numerous counts of first degree CSC with a minor, second degree CSC with a minor, lewd act upon a minor, incest, and the three counts of first degree CSC which were the subject of the appeal. The Supreme Court held while there was evidence in the record in the form of testimony from each daughter that Brown physically beat them at various times for disobedience, refusing to have sex with him, or revealing or attempting to reveal the sexual abuse, there was no evidence Brown used any aggravated force while sexually assaulting his daughters on the dates specified in the indictment. Id. at 590, 602 S.C. at 397. Accordingly, the Court held Brown was entitled to a directed verdict on the three counts of first degree CSC. Id.

Here, while there was evidence Appellant engaged in sexual battery with Minor on subsequent occasions, there was no evidence he engaged in sexual battery "on or about the 1st of July, 2010" as alleged in the indictment. Because there was no evidence Appellant engaged in sexual battery on the date specified in the indictment, the trial judge erred by refusing to grant a directed verdict. Respectfully, this Court should direct a verdict of acquittal in Appellant's favor. See Brown, 360 S.C. at 590, 602 S.E.2d at 397 ("It is a fundamental concept of criminal law that the State must prove beyond a reasonable doubt all the elements of the offense charged against the defendant. When the State fails to present sufficient proof of all the elements, a conviction must be reversed and a judgment for the defendant must be rendered.").

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court direct a verdict of acquittal. In the alternative, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of June, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
JUN 12 2017
SC Court of Appeals

Appeal from Abbeville County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHANE ALEXANDER WASHINGTON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case have been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served upon Shane Alexander Washington, #367946, at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 12th day of June, 2017.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of June, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.