STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

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SC Court of Appeals

Appeal from Colleton County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL ANTHONY BODISON,

APPELLANT

APPELLATE CASE NO. 2017-000785

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in denying appellant's motion for a directed verdict because the only evidence was that the complainant consented to sex in exchange for pain pills?

STATEMENT OF THE CASE

On May 19, 2016, a Colleton County grand jury indicted appellant for third-degree criminal sexual conduct. R. 122 – 123. On March 27, 2017, appellant was tried before the Honorable R. Lawton McIntosh and a jury. R. 1. Reed Evans represented the State. R. 2. David Mathews represented appellant. R. 2. The jury convicted appellant. R. 113, ll. 5 – 11. Judge McIntosh sentenced appellant to ten years' imprisonment. R. 119, ll. 6 – 17. This appeal follows.

ARGUMENT

The trial judge erred in denying appellant's motion for a directed verdict because the only evidence was that the complainant consented to sex in exchange for pain pills.

Factual Background

While the facts of this case are morally repugnant, the only evidence presented by the State was that the sixteen-year-old complainant consented to sex with appellant, her grandfather, in exchange for pain pills. R. 11, l. 14 – 46, l. 13. Complainant's testimony on direct-examination was so wholly lacking in evidence that defense counsel elected not to ask a single question on cross-examination. R. 46, ll. 12 – 13. The trial judge denied appellant's directed verdict motion on consent without explanation and without taking argument from the solicitor. R. 110, l. 24. Likely echoing the thoughts of the jurors who convicted appellant because he had sex with his granddaughter and not because the evidence proved coercion, the trial judge said at sentencing, "I can't—if that had been my granddaughter, we wouldn't be having trial, I'm afraid." R. 118, ll. 12 – 14.

Appellant is complainant's maternal grandfather. R. 14, ll. 8 – 9. Complainant had scoliosis. R. 20, ll. 4 – 6. She got ibuprofen from her doctor for the pain, but wanted pain pills (not prescribed for her) from appellant. R. 20, ll. 9 – 20. No dispute existed that complainant was over the age of sixteen at the time of the sex. R. 58, ll. 3 – 9.

On the night in question, appellant took complainant to a Chinese restaurant for take-out. R. 21, l. 7 – 22, 18. Next they went to a gas station. R. 21, l. 7 – 22, 18. When they stopped at the gas station, complainant surreptitiously began recording appellant with her cell phone. R. 23, l. 6 – 26, l. 17. On the recording, appellant and complainant are clearly in a car. State's Ex. 2G. Appellant tells her to change into a pair of shorts with no underwear. State's Ex. 2G. They

discuss complainant getting the pills and appellant tells her not to tell anyone she got the pills from him. State's Ex. 2G. Complainant tells her that he wants to teach her about being a young woman. State's Ex. 2G. They arrive at the house and he tells her to go inside and put on the shorts. State's Ex. 2G. While the conversation between appellant and complainant is repulsive, nothing on the recording proves lack of consent. State's Ex. 2G. The recording does prove complainant had access to a cell phone and was in a house where she could have stayed and refused to go with appellant. Instead, she changes into the shorts and gets back into his car.

The closest complainant came to meeting the coercion element of the statute was when she testified that she went inside the house, put on the shorts, and returned to appellant's car because she was "scared he might hurt me more than what he was going to do." R. 28, l. 17 – 29, l. 1. She expected appellant to hurt her, she was embarrassed, and felt pressure. R. 29, ll. 2 – 7. She did not want to have sex with her grandfather. R. 29, ll. 10 – 12. But, as the solicitor's immediate questioning following this testimony makes clear, complainant never told these things to appellant:

> Q. You're telling us you didn't want to have sex with your grandfather?
>
> A. No.
>
> Q. Have him touch you?
>
> A. No.
>
> Q. What did you tell him? Did you tell him all of these feelings?
>
> A. No.
>
> Q. Do you remember what you did tell him, if anything?
>
> A. No.
>
> Q. Did you tell him it would be okay?

A. No.

R. 29, ll. 10 – 22.

Complainant's testimony was consistent that she agreed to have sex with appellant for pills. R. 27, ll. 6 – 8. The solicitor asked, "Was he offering to give you pills in return for doing things to you?" R. 27, ll. 6 – 7. Complainant answered, "Yes." R. 27, l. 8. They drove to appellant's friend's house, then after receiving a phone call that her aunt was home, they drove to a wooded area where they often went fishing. R. 29, l. 23 – 32, l. 2.

Appellant parked and turned off the car. R. 32, ll. 15 – 19. Complainant knew what was going to happen. R. 32, ll. 20 – 22. Appellant gave her the pills. R. 32, ll. 23 – 25. She did not ingest the pills. R. 33, ll. 8 – 12. He fondled complainant's breasts and genitals. R. 33, l. 17 – 36, l. 18. Appellant unzipped his pants and put on a condom. R. 36, ll. 3 – 4. She heard him tear open the condom package. R. 36, ll. 5 – 7. She knew what a condom was. R. 36, ll. 8 – 9. They began having intercourse. R. 33, l. 17 – 36, l. 18.

Complainant did not say anything even though the intercourse hurt. R. 36, ll. 10 – 22. Appellant had sex with complainant until she pushed him and he stopped. R. 37, ll. 2 – 20. She never said "no" or "stop" and testified, "All I did was cry." R. 37, ll. 12 – 15. When the solicitor asked how appellant knew "that he had to stop," complainant said, "He just kept going, but I kept pushing." R. 37, ll. 19 – 20. Appellant stopped and took her to her grandmother's house. R. 40, l. 16 – 42, l. 15.

The following questioning **on direct-examination by the solicitor** shows that complainant consented to sex for pills and appellant stopped when complainant manifested her lack of consent. Counsel apologizes for the multi-page block quotation, but this testimony cannot be adequately paraphrased:

Q. Do you remember talking to me in this case about the pills and how they relate to what he did to you?

A. Yes.

Q. Did you ever tell me that you told him it would be okay to take the pill—to give you the pills and you would do these things?

A. Yes.

Q. You told me that?

A. Yes.

Q. Did you tell him that?

A. No.

Q. So, which is the truth?

A. What I told you.

Q. Which is what?

A. Me accepting the pills and letting him do whatever.

Q. Okay. It's okay, as long as you tell the truth. So, you told him he could do things if you got the pills?

A. Yes.

Q. That's what you told him, but what did you feel?

A. I wanted to say no and—

Q. Why didn't you?

A. Because I was scared.

Q. So you told him it would be okay at first?

A. Yes.

Q. But it wasn't okay?

A. No.

Q. And did you ever tell him after he started, that it wasn't okay?

A. No.

Q. But you did push?

A. Yes.

Q. And he got off you?

A. Yes.

Q. And you were crying?

A. Yes.

Q. Tell us a little bit more about why you felt that you had to say, even though you didn't feel it inside, that you had to say that it was okay for him to do these things? Do you understand what—that's probably too complicated a question.

A. It was.

Q. I'm sorry. Are you telling us that you didn't feel in your heart that you wanted this, right?

A. Yes.

Q. Because you're old enough where you can make that decision under the law, right?

A. Yes.

Q. But you're also telling us that with your words to him, you told him it would be okay in return for those pills?

A. Yes.

Q. Why did you feel one thing in your heart and tell him another?

A. I was scared and embarrassed.

R. 39, l. 13 – 41, l. 21 (emphasis added). Defense counsel declined to cross-examine complainant. R. 46, ll. 12 – 13.

The police interviewed appellant and the State admitted his recorded statement into evidence. R. 53, l. 12 – 56, l. 1. State's Ex. 1B. Defense counsel accurately described appellant's interview as a "train wreck," but at no point did appellant admit to anything that would establish lack of consent. State's Ex. 1B. Appellant spent the majority of the interview trying to convince the officer that on complainant's cell phone recording, he was actually talking to a girlfriend and not complainant. State's Ex. 1B. The girlfriend unequivocally denied that she was involved in any such conversation. R. 62, l. 22 – 64, l. 17.

After the State rested, appellant moved for a directed verdict on the basis of consent. R. 73, ll. 15 – 23. Appellant argued that the only evidence was that complainant "told him it was okay," never said it was not okay, and appellant stopped when complainant pushed him. R. 73, ll. 15 – 23. Appellant argued, "And I don't see how there could be anything but consent, and I move for a directed verdict." R. 73, ll. 15 – 23. The trial judge summarily ruled, "That's denied," without taking any argument from the State or offering any reasoning. R. 73, l. 24.

Discussion

Despite the repulsive nature of this case, no evidence existed that this sex was nonconsensual. This case is not a credibility contest and the Court need not weigh the evidence. State v. Bennett, 415 S.C. 232, 235-37, 781 S.E.2d 352, 353-54 (2016) (discussing directed verdict standard of review on appeal). All that is required is an analysis of the complainant's testimony and whether, as a matter of law, no evidence exists from which a reasonable juror could infer guilt. Id. Complainant admitted she consented to sex with appellant and when she pushed him, he stopped. R. 39, l. 13 – 41, l. 21. After the affirmative giving of consent, it

cannot be rape if the complainant only "feels in her heart" that she does not want to have sex and this feeling is not communicated to the defendant. R. 39, l. 13 – 41, l. 21.

Third-degree criminal sexual conduct requires the State to prove a defendant used "force or coercion to accomplish the sexual battery." S.C. Code Ann. § 16-3-654(1)(a). The Supreme Court interpreted this element of section 16-3-654 after a defendant challenged it as void for vagueness. State v. Hamilton, 276 S.C. 173, 176-78, 276 S.E.2d 784, 786 (1981). Specifically, the defendant argued that "force and coercion" were such vague terms that the statute criminalized consensual behavior. Id.

The Hamilton Court rejected the defendant's argument, holding, "The argument that consent is not a defense is without merit." Id. "Force and coercion as used in the statute, have basically the same meaning." Id. "They mean to make a person follow a prescribed and dictated course; to inflict or impose: force one's will on someone." Id. (internal quotations omitted). The Court reasoned that the statute contained the requirement that the "sexual battery be committed without the consent of the victim. . . ." Id. Therefore, the State was required to prove complainant did not consent to sex with appellant.

By her express answers to questioning **from the solicitor**, complainant admitted she consented to sex with appellant. R. 39, l. 13 – 41, l. 21. When the solicitor asked her whether she told appellant "it would be okay in return for those pills," complainant unequivocally answered, "Yes." R. 41, ll. 13 – 16. She agreed she felt one thing in her heart and told appellant something else. R. 41, ll. 17 – 21. The solicitor argued to the jury, "If you believe that she gave consent and it lasted the whole time and that was what she wanted, then what [defense counsel] is about to tell you is right. If you believe that, you set him free." R. 87, ll. 6 – 10.

In our state's rape cases rejecting directed verdict arguments based on consent, the victims testified that they refused to have sex with the defendant and the defendants' actions are threatening or used force. In Hamilton, the defendants grabbed the victim and forced her into the back seat of a car. Hamilton at 179, 276 S.E.2d at 787. No such force was used in this case.

In State v. Burroughs, 328 S.C. 489, 494, 492 S.E.2d 408, 410 (Ct. App. 1997), the Court rejected the defendant's directed verdict argument on consent. The defendant argued the victim failed to reject or otherwise resist his advances. Burroughs at 495, 492 S.E.2d at 410-11. The Court easily dispatched this argument because the victim testified she made "repeated refusals and that she was in fear for her life." Id. The victim's testimony created a jury question in Burroughs. Here, complainant unequivocally testified that she assented to sex. Complainant never testified about any refusal to have sex with appellant. When she pushed him, he stopped. No jury question exists.

The closest modern consent case to appellant's is State v. Richardson, 358 S.C. 586, 595 S.E.2d 858 (Ct. App. 2004). The defendant in Richardson told the victim's father, a preacher, that he represented an organization that helped churches obtain federal grants. Richardson at 589, 595 S.E.2d at 859. The defendant stayed at the victim's house. Id. He demanded sexual favors from the victim, who was sixteen years old. Id. He threatened that if she did not have sex with him, he would not help her family or her church and justified his actions "with scriptures." Id. at 589-90, 595 S.E.2d at 859-60.

On appeal, the defendant argued he was entitled to a directed verdict because the State failed to prove force or coercion. Id. The Court rejected his argument that "coercion" only meant "threats of violence." Id. The Court reasoned that the defendant's use of his religious authority and his repeated threat to withhold financial assistance created a jury question on the

coercion element. Id. at 592-93, 595 S.E.2d at 861. Importantly, the victim testified that Richardson "had sexual intercourse with her **despite her refusals** and her questioning whether he was wrong in what he was doing." Id. (emphasis added).

The key factual point in Richardson is that the victim refused. Unlike Richardson, no testimony about any verbal refusal exists in this case. When the complainant manifested a lack of consent by her push, appellant stopped and drove her home. The victim in Richardson verbally refused and her refusals were met with threats. The complainant here never refused.

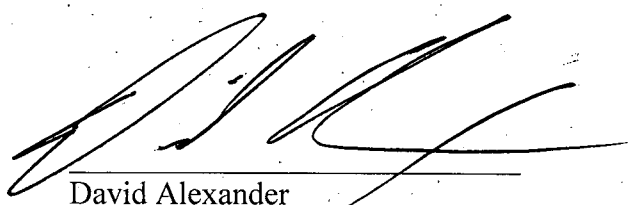
Also unlike Richardson, complainant here admitted she **specifically, verbally consented** to sex. The victim in Richardson never testified that she consented, only that she abandoned her refusal after being threatened. No evidence exists that appellant ever threatened complainant at all, much less with violence. Richardson stands for the proposition that when a person in authority uses threats to overcome a refusal to have sex it creates a question for the jury. Richardson does not mean that a jury question exists when a person verbally consents to sex without threats in exchange for something she wants. Ultimately, Richardson is about what type of threats result in coercion, not consent. Appellant's case is about consent.

The disturbing nature of a grandfather having sex with his granddaughter cannot be allowed to cloud the legal analysis of lawyers and judges. Defendants cannot be convicted because they are bad people, but only because the State proves they have committed the charged crime. Trial judges have the ability to grant directed verdicts precisely because of cases like this—when the facts and character of the defendant are so repugnant that they overcome the jury's ability to apply the law and hold the State to its burden of proof.

The State chose to charge appellant with a crime that required proving lack of consent. The State's witness testified she consented. The State's proof failed as a matter of law. This Court should reverse.

CONCLUSION

For the foregoing reasons, appellant's conviction should be reversed.



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This 27th day of June, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 27, 2018.

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