ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAMUEL DINGLE,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

BREEN RICHARD STEVENS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by failing to grant a directed verdict of acquittal where the language of the indictment charged Appellant pursuant to § 16-3-655(B)(1), yet the State's evidence indicated the alleged conduct occurred after the complaining witness passed her fourteenth birthday?

STATEMENT OF THE CASE

Appellant Samuel Dingle was indicted by the Orangeburg County Grand Jury on June 16, 2010, for second degree criminal sexual conduct with a minor (CSC 2nd). R. 5, ll. 17-21; R.319. Appellant's case was called for trial on May 31, 2011, before the Honorable Edgar W. Dickson and a jury. Ash Chisolm and Douglas Mellard represented Appellant, while the State was represented by Glenn Justice and Harrison Bell. R. 1.

The jury found Appellant guilty as charged. R. 304, ll. 10-12. The trial court imposed a sentence of twenty years incarceration, with credit for time served. R. 317, ll. 7-10.

ARGUMENT

The trial court erred by failing to grant a directed verdict of acquittal where the language of the indictment charged Appellant pursuant to § 16-3-655(B)(1), yet the State's evidence indicated the alleged conduct occurred after the complaining witness passed her fourteenth birthday.

The trial court erred by failing to grant a directed verdict of acquittal. The court's decision was based on a misinterpretation of the statutory language regarding the age range to which the indicted statutory section applies. As acknowledged by the State, Appellant was indicted for CSC 2nd under Section 16-3-655(B)(1) of the South Carolina Code of Laws. R. 22, ll. 15-22. Specifically, the indictment made the following allegation:

> That in Orangeburg County, South Carolina, on or between January 1, 2000 and December 31, 2002, the Defendant, Samuel Dingle, did engage in sexual battery upon a minor who was fourteen (14) years of age or less but who was at least eleven (11) years of age in that the defendant did have sexual intercourse with [Complaining Witness].

R. 319.

Appellant moved to quash the indictment and exclude evidence of conduct occurring after the Complaining Witness's fourteenth birthday. The anticipated evidence supporting the indicted charge under 16-3-655(B)(1) was that a child (Child) was conceived between Appellant and the Complaining Witness when the "[Complaining Witness] was fourteen and a half years old." R. 18, ll. 12-25. He asserted that the plain language of that specific section of the statute requires the conduct to occur between the minor's eleventh and fourteenth birthdates, but not after the fourteenth birthday. R. 17, ln. 6—R. 18, ln. 10. Appellant further asserted that the law allows for prosecution of CSC 2nd with minors between fourteen and sixteen years of age pursuant to 16-3-

655(B)(2); as such, the statutory scheme regarding CSC 2nd reveals that the legislative intent was to have a recognized cutoff dates at the fourteenth year. In this way, it is clear which section and its differing elements should be applied. R. 25, ll. 2-10.

The State argued Section 16-3-655(B)(1) covers conduct occurring from the minor's eleventh birthday until the day before the minor turns fifteen. R. 24, ll. 20-22. It based this position of the lack of "less than" language preceding the "fourteen years of age" language in the statute. R. 23, ll. 4-9.

The trial court ruled that "the plain meaning of the statute allows [the State] to go forward under [16-3-655(B)(1)] as written." R. 26, ll. 1-23. The court preserved Appellant's objections at that time, as well as at the close of evidence when Appellant moved for a directed verdict based upon the same argument, and after the verdict was returned when Appellant renewed all motions and objections. R. 251, ln. 21—R. 253, ln. 11; R. 265, ln. 3-14; R. 309, ln. 2—R. 314, ln. 8.

The cardinal rule of statutory construction is to ascertain and effectuate the intention of the legislature. State v. Thomas, 372 S.C. 466, 642 S.E.2d 724 (2007); State v. Scott, 351 S.C. 584, 571 S.E.2d 700 (2002). The Supreme Court will not construe a statute to do that which is unconstitutional. Ward v. State, 343 S.C. 14, 538 S.E.2d 245 (2000). Penal statutes are to be construed strictly against the State and in favor of the defendant. Id.; see also Blackmon, 304 S.C. at 270, 403 S.E.2d at 660; State v. Dawkins, 352 S.C. 162, 573 S.E.2d 783 (2002). For the purpose of statutory construction, the Supreme Court does not look merely at a particular clause in which a word may be used, but rather should look at the word and its meaning in conjunction with the purpose of the whole statute, and in light of the object and policy of the law. Id. The rule that a penal statute must be strictly construed

is not violated by giving words of statute reasonable meaning according to the sense intended. State v. Firemen's Ins. Co. of Newark, N.J., 164 S.C. 313, 162 S.E. 334 (1931).

In the present case, Appellant asserts the reasonable meaning of the statutory language of Section 16-3-655(B)(1) is that it applies to conduct toward minors between their eleventh and fourteenth birthdays. As previously indicated, the State specifically chose to prosecute Appellant under Section 16-3-655 (B)(1), which provides as follows:

> (B) A person is guilty of criminal sexual conduct with a minor in the second degree if:
>
> (1) the actor engages in sexual battery with a victim *who is fourteen years of age or less but who is at least eleven years of age*;

S.C. Code § 16-3-655(B)(1) (West, Westlaw current through end of 2011 Reg. Sess.) (emphasis added). Thus, the plain language of this section indicates that minor must be between eleven and fourteen. Further, the General Assembly's intent to limit fourteen as the upper cutoff age for prosecution under this subsection is revealed when the entire when statutory scheme of CSC 2nd with a minor is considered. Section 16-3-655(B)(2) also allows prosecution for CSC 2nd with a minor, yet the beginning of the age range is at fourteen:

> (B) A person is guilty of criminal sexual conduct with a minor in the second degree if:
>
> . . . . .
>
> (2) the actor engages in sexual battery with a victim who is *at least fourteen years of age but who is less than sixteen years of age* and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim. However, a person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in

> consensual sexual conduct with another person who is at least fourteen years of age.

S.C. Code § 16-3-655(B)(2) (West, Westlaw current through end of 2011 Reg. Sess.) (emphasis added). The plain language of this section indicates that minor must be between fourteen but not reached the age of sixteen. Accordingly, the statutory scheme reveals the General Assembly's intent to structure the two subsections governing the offense of CSC 2nd with a minor based upon several cutoff ages: if the age of the minor is between her eleventh birthday and fourteenth birthday, then the conduct is prohibited under Section 16-3-655(B)(1); if the age of the minor is between her fourteenth birthday and just under sixteen, then the conduct is prohibited under Section 16-3-655(B)(2).

Moreover, in the event this Court determines the language regarding age limits under Sections 16-3-655(B)(1) and (2) is ambiguous as it applies to factual circumstances such as Appellant's, then the rule of lenity nonetheless requires the statute be construed in Appellant's favor. "When a genuine ambiguity exists as a result of the proposed application of [a statute] to a given situation, the rule of lenity requires that the doubt must be resolved in the defendant's favor." Bryant v. State, 384 S.C. 525, 533, 683 S.E.2d 280, 284 (2009) (citing State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). "[T]he touchstone of the rule of lenity is statutory ambiguity." Bifulco v. United States, 447 U.S. 381, 387, 100 S.Ct. 2247 (1980). Therefore, regardless of whether Sections 16-3-655(B)(1) and (2) unambiguously indicate the upper cutoff age of a minor is her fourteenth birthday in order to prosecute an individual pursuant to Section 16-3-655(B)(1), or whether a genuine ambiguity exists pertaining to application of the appropriate upper cutoff age, the statute should have been resolved in favor of Appellant. As such, the trial court erred when it interpreted Section 16-3-655(B)(1) as permitting prosecution of

Appellant based on his alleged conduct with the Complaining Witness when she was between fourteen and fifteen years of age.

The trial court based its denial of Appellant's motion for directed verdict on its erroneous interpretation of Section 16-3-655(B)(1). In short, the court permitted the State to proceed forward with evidence supporting Section 16-3-655(B)(2), yet based on an indictment tracking the language of Section 16-3-655(B)(1). As such, the court erred in failing to grant Appellant's directed verdict motion, as there was no direct or substantial circumstantial evidence that the alleged CSC 2nd conduct occurred by or before the Complaining Witness's fourteenth birthday.

A trial court must direct a verdict of acquittal when the record does not contain evidence to support every element of the charged offense. See, e.g., State v. Arnold, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004) ("The trial judge should grant a directed verdict, however, when the evidence merely raises a suspicion that the accused is guilty."); see also In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

When considering a motion for directed verdict of acquittal, "the trial court is concerned the existence or non-existence of evidence, not its weight." State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). A trial court must direct a verdict of acquittal when the record does not contain evidence to support every element of the charged offense. See, e.g., Id.; State v. Evans, 376 S.C. 421, 424, 656 S.E.2d 782, 783 (Ct.

App. 2008) ("A defendant is entitled to a directed verdict when the state fails to produce evidence on a material element of the offense charged.").

In the case at bar, the only evidence of sexual battery by Appellant toward the Complaining Witness was after she was well into her fourteenth year of age. Although the Complaining Witness stated she was groped at age 13, and indicated progression after that, she did not testify that Appellant had sexual intercourse with her—the act specifically alleged in the indictment—by or before her fourteenth birthday. R. 130, ln. 11—R. 135, ln. 16. This ambiguity includes the purported 100 times Appellant allegedly had intercourse with the Complaining Witness; the State simply failed to elicit testimony of when or at what age those instances allegedly occurred. R. 135, ln. 18—R. 136, ln. 16. Thus, the only instances of sexual intercourse with Appellant given by the Complaining Witness were when she conceived Child, and several occasions when she was pregnant. R. 138, ll. 16-18. Based upon the age Child was born, it is clear that the conduct leading to Child's birth occurred when the Complaining Witness was between fourteen and fifteen years of age, not between eleven and fourteen as required by the statute.[1]

Therefore, the trial court should have granted Appellant's motion for directed verdict. The statutory CSC 2nd with a minor statutory scheme requires the age of the minor to fall between her eleventh and fourteenth birthdays, yet the State's evidence supporting the charge against Appellant pursuant to Section 16-3-655(B)(1) indicated the alleged actions occurred well after the Complaining Witness turned fourteen. Accordingly, the trial court erred by failing to grant a directed verdict of acquittal, as no

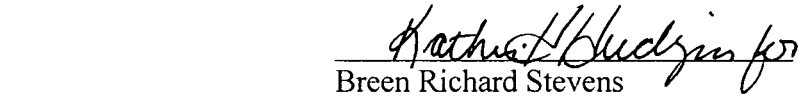
[1] The Complaining Witness was born in May of 1987. R. 140, ll. 15-17. Child was born in July of 2002. R. 130, ll. 9-10.

direct or substantial circumstantial evidence was present to support every element of the charged offense.

CONCLUSION

Accordingly, Appellant Samuel Dingle respectfully requests reversal of his conviction, and remand for entry of a directed verdict of acquittal.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of July, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAMUEL DINGLE,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Samuel Dingle states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Edgar W. Dickson, which was held on June 1, 2011, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Samuel Dingle.

Respectfully submitted,

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of July, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

BREEN RICHARD STEVENS
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County
Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAMUEL DINGLE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on Samuel Dingle, #118673 at McCormick Correctional Institution, this 26th day of March, 2012.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of July, 2012.

(L.S.)
Notary Public for South Carolina
My Commission Expires: May 16, 2021.