

ORIGINAL

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OCT 29 2013
SC COURT OF APPEALS

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Oconee County

Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHARLES M. HARRIS,

APPELLANT

APPELLATE CASE NO. 2012-212797

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to direct a verdict of acquittal on the charge of criminal solicitation of a minor where the talk of sex was vague, and the state failed to offer the requisite evidence appellant's criminal intent consisted of knowingly contacting a person he reasonably believed to be under eighteen years of age with the intent of enticing that person to engage in sexual activity?

STATEMENT OF THE CASE

Appellant was indicted at the July 16, 2007 term of the Oconee County Grand Jury for the offense of criminal solicitation of a minor pursuant to S.C. Code § 16-15-342, and S.C. Code § 16-15-375(5). R. 189. His case was called to trial on August 13, 2012 before the Honorable Alexander S. Macaulay and a jury. R. Daniel Day represented appellant. Jason Anders and Kyle Senn were the Assistant Attorney Generals. R. 1.

On August 14, 2012 the jury found appellant guilty. R. 163, ll. 1-5.

Judge Macaulay sentenced appellant to ten years imprisonment suspended, on five years probation with one year of home detention. R. 168, ll. 7-25.

This appeal follows.

ARGUMENT

The court erred by refusing to direct a verdict of acquittal on the charge of criminal solicitation of a minor where the talk of sex was vague, and the state failed to offer the requisite evidence appellant's criminal intent consisted of knowingly contacting a person he reasonably believed to be under eighteen years of age with the intent of enticing that person to engage in sexual activity.

Relevant Facts

The state's case consisted of one witness, Officer Casey Bowling. R. 2, l. 4 – 3, l. 9. In appellant's defense he offered the testimony of his ex-wife of twenty-nine years, Helena Dorothy Harris. At the time of trial he had been separated from Helena for the last five years. Their seventeen year old daughter, Sabrina, lived with appellant. R. 81, l. 2 – 83, l. 14. Mrs. Harris said in their twenty-four years of marriage, and living together, she never feared nor saw any inappropriate behavior by appellant towards their children or any other girls. R. 83, l. 11 – 84, l. 7.

Appellant's daughter, Sabrina, testified appellant never acted inappropriately towards her, her sisters, or any other girls. R. 86, l. 21 – 91, l. 5. Sabrina testified that Officer Bowling told her when appellant was arrested at their house that "he tried to set up a meeting to meet with my Dad and he refused to meet him, so he came and arrested him because he was talking to a minor on the computer." R. 89, l. 25 – 90, l. 3.

Candace Roberts was twenty-years-old. Her mother was dating appellant. She lived with appellant from 2009 until March of 2012. Two of her sisters, fourteen and sixteen now, also lived with them. Appellant never acted inappropriately towards any of them. R. 93, l. 17 – 97, l. 10.

Fifteen-year-old Samantha R. also testified that appellant never acted inappropriately towards her, her sisters, or anyone else. R. 98, l. 19 – 101, l. 15. Carrie C. appellant's daughter, Brittany R. and Cynthia R. all testified consistently that appellant never acted inappropriately towards girls or young women. R. 101, l. 12 – 112, l. 11. Defense counsel renewed his directed verdict motion at the conclusion of his case.

Officer Bowling was a narcotics officer at the time of trial. He had previously worked internet cases in 2007, and he posed undercover on the computer as a thirteen-year-old girl, Amy. R. 2, l. 4 – 5, l. 8. Bowling said his investigation in this case lasted three days: March 14, 2007 through March 17, 2007.

He testified that appellant's screen name was "Mr. Lover love me," and that appellant contacted him on Yahoo. Appellant used a Yahoo terms of Service document, for documentary purposes, that stated all people agreed they were of age, and that they would only provide accurate information. R. 181. (Defendant's #2 for Identification: Yahoo terms of service document). Bowling testified this talk on the internet ultimately led to appellant asking him if he – pretending to be a she -- wanted to have sex. R. 8, l. 6 – 10, l. 8.

Bowling read from his copy of the conversation with appellant. It talked about the weather (rain), shopping, "hanging out" and other mundane matters. R. 12, l. 7 – 15, l. 7.

Appellant allegedly told Bowling that some men were only out for sex and "don't let them do anything to you." R. 15, ll. 13-19. Bowling told appellant - - as Amy - - that "she" would not let that happen. "She" lived in Anderson, and appellant corresponded that he owned a "Z28 with T tops." R. 16, l. 12 – 22, l. 4.

Bowling further said, as Amy, at another point, that he told appellant that "my mom and dad just left for work." He said appellant told him that wished "she" were older and the

character posing as Amy said: "I don't care." Then appellant said it was not right to not care. The Amy character countered: "Whatever that's stupid." R. 22, ll. 5-24. The Amy character repeatedly said: "You're sweet." Appellant allegedly asked her if she had ever seen a male nude, to which the Amy character responded: "Once."

Appellant once again allegedly told "her": "If you were older it would be alright." R. 26, l. 2 – 28, l. 20. Appellant also said: "I don't want to go to jail" and the Amy character responded: "I'm no cop." At one point appellant typed: "You want to have sex?" The Amy character said: "If you want. Will you be careful?" R. 29, l. 15 – 31, l. 10.

The Amy character then told appellant she lived behind Hardee's on "Earl Street West Union." R. 31, ll. 10-21. Appellant typed he was "coming now." However, it was undisputed, as Bowling admitted, that there was no evidence "appellant traveled" anywhere. Appellant never showed up at "her" house. R. 35, ll. 20-24.

On cross-examination Bowling admitted there were deputies waiting to arrest appellant at "Amy's" place, but he stated appellant never showed up for the alleged encounter. R. 57, l. 23 – 58, l. 4. Bowling denied he ever told appellant's father or brother that he may have made a mistake in bringing a case against appellant on these facts. R. 64, l. 22 – 65, l. 6. Bowling admitted that when he interviewed appellant, appellant told him that "his intentions were just to teach her a lesson and that he was sorry for what he did and he had made a mistake." R. 41, ll. 13-23.

Defense counsel moved for a directed verdict of acquittal. He argued the state had failed in its burden of showing appellant knowingly intended to have sex with someone he should have known was under the age of eighteen. Appellant took no action in furtherance

of knowingly enticing someone he believed to be under eighteen-years-old to have sex. R. 74, l. 24 – 77, l. 8.

Discussion

In State v. Logan, Op. No. 27296 (filed August 14, 2013), the Supreme Court discussed its decisions in State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), and State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011) as to the standard relied on by the trial judge in assessing circumstantial evidence.¹ The Court repeated that under settled principles the trial court should grant a directed verdict when the evidence merely raises a suspicion of the defendant's guilt.

If there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced, the case should be submitted to the jury. See State v. Mitchell, 341 S.C. 406, 409, 535 S.C. 126, 127 (2000); State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984).

In State v. Odems the Court noted that the traditional circumstantial evidence charge from State v. Edwards, 298 S.C. 272, 274-76, 379 S.E.2d 888, 889 (1989), illustrated the lack of evidence against Odems the state had provided. In State v. Edwards the instruction stated that “every circumstance relied on by the state must be proven beyond a reasonable doubt; and . . . all the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.”

Applying that standard from State v. Odems it should be apparent that all of the circumstances here are not consistent with each other and they do not point exclusively to

¹ That opinion was released on the day the initial brief in this case was filed.

appellant's guilt pursuant to the elements of S.C. Code § 16-15-342, and S.C. Code § 16-15-375(5). Appellant recognizes that in State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008) the Supreme Court held that no overt act needs to be done in furtherance of the charge of criminal solicitation of a minor. This case illustrates why that is such a disturbing holding and should be revisited.

Officer Bowling admitted appellant never showed up at the scene and there was no evidence he "traveled." If appellant ever had the fleeting intention to solicit sex with a minor as envisioned under the statute, he abandoned it seemingly without leaving his computer screen. He never traveled. A fundamental tenant of our criminal justice system has been -- hopefully not in the past tense -- that we do not punish people for their thoughts. We only punish people for their evil deeds.

Further, under a correct directed verdict analysis the state's circumstantial evidence is *not substantial circumstantial evidence* showing appellant had the criminal intention of enticing a person he reasonably believed to be under eighteen-years-old to have sex with him.

Further, unlike State v. Green, 397 S.C. 268, 724 S.E.2d 664 (2012) and State v. Reid, 393 S.C. 325, 713 S.E.2d 274 (2011) appellant was not caught "red-handed."² Appellant offered the explanation, which came out during the state's case-in-chief, that he was trying to teach the young woman on the other side of the chat room "a lesson." The state simply did not provide the requisite direct or substantial circumstantial evidence to

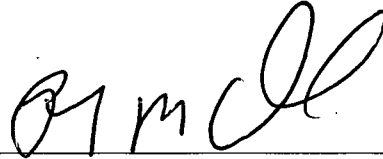
² Appellant understands the distinction in the crime of attempted criminal sexual conduct with a minor.

show appellant reasonably knew he was attempting to entice someone he believed to be thirteen-year-old (under eighteen) to have sex with him and that he had the criminal intent to commit that crime. The judge abused his discretion by refusing to direct a verdict.

CONCLUSION

By reason of the foregoing argument, an order of acquittal should be issued, or this case remanded to the Oconee County court of General Sessions with an order to issue a verdict of acquittal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

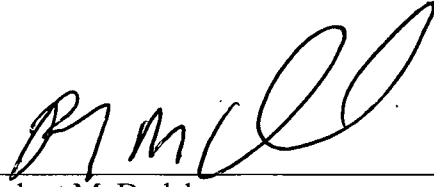
ATTORNEY FOR APPELLANT

This 29th day of October, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

October 29th, 2013



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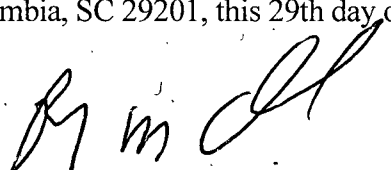
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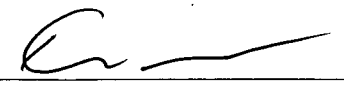
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of October, 2013.


Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of October, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023