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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Richland County
Hon. R. Knox McMahon, Circuit Court Judge
Appellate Case Tracking No. 2019-000215

The State,

Respondent,

v.

Timothy Alan Oertel,

Petitioner.

Opinion No. 2018-UP-454 (S.C. Ct. App. filed December 12, 2018)

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals correctly affirmed the trial court's denial of Petitioner's motions for directed verdict on the charges of attempted dissemination of material to a person under the age of eighteen, criminal solicitation of a minor, and attempted sexual exploitation of a minor first degree. (Petitioner's Questions I-III).

STATEMENT OF THE CASE

Procedural History

The Richland County Grand Jury returned four true-billed indictments against Petitioner for attempted dissemination of obscene material to a person under the age of eighteen. Petitioner was also indicted for one count of criminal solicitation of a minor and one count of attempted sexual exploitation of a minor in the first degree. He proceeded to trial on August 31, 2016 before the Honorable R. Knox McMahon and a jury. He was found guilty as charged on all counts. The court sentenced Petitioner to six years on each count of attempted dissemination, the sentences to run concurrent. The court sentenced Petitioner to six years on criminal solicitation of a minor, the sentence to also run concurrent. Finally, the court sentenced Petitioner to three years in prison on the attempted sexual exploitation of a minor charge, the sentence to run consecutive to all other sentences.

Petitioner filed a timely Notice of Appeal. The Court of Appeals affirmed in an unpublished opinion without oral argument. State v. Oertel, Op. No. 2018-UP-454 (S.C. Ct. App. filed December 12, 2018). Petitioner filed a Petition for Rehearing and the State filed a Return after request by the Court. The Court denied the Petition on January 17, 2019. Petitioner served a Petition for Writ of Certiorari on February 14, 2019, and this Return follows.

Factual Background

Deputy Sara Parry Hood, a deputy with the Richland County Sheriff's Department and at the time assigned as a school resource officer to Heathwood Hall, created a Facebook profile representing to be a high school student. (App.25; 28). Her profile represented herself as Emmy Robinson, a fictitious fifteen-year-old female who attended A.C. Flora High School in Columbia.

(State's Exhibit 1; App.28-29; 170-174). On her profile page she indicated she was born in April 2000. (State's Exhibit 1; App.170-174).

Petitioner contacted Emmy Robinson on Facebook on August 28, 2015. (State's Exhibit 1; App.170). In order to contact her, he went through her profile page, which was the page indicating she was born in April 2000. (App.33-34). After making initial contact and discussing where they live, Petitioner sent the fifteen-year-old a picture of him in the shower. He then asked her for more pictures. Petitioner later sent a full body picture of himself in the shower, and asked "What do u think?" Emmy responded "I like! you look good." (State's Exhibits 1 and 2; App.40-41; 171; 175). Petitioner then stated: "Thanks baby U like my dick" and after Emmy responded: "Yes it look very nice," Petitioner sent several close up pictures of his erect penis, including one beside a measuring tape and one partially inserted into a sex toy. (State's Exhibits 1, 3, 4, and 5; App.41-42; 173-174; 176-178).

The conversation continued after Petitioner sent the pictures of his penis:

Petitioner: Maybe one day he will be all yours
So can I see what u look like

Emmy: I just have to get some pictures but yea and I hope so

Petitioner: What would u do if I was with you naked in front of u right now

Emmy: Probably start kissing you after that i'm not sure not really experienced

Petitioner: Lol I love to kiss by the way

Emmy: good, bc I'm good at that lol

Petitioner: Well maybe this weekend we can hang out
Well I will be the judge of that

.....

Petitioner: So what do u like to do to my dick baby

Emmy: hmm probably kiss around it again I'm not experienced i guess i would need help

Petitioner: LOL Well you know what I would do if you were in front of me naked?

Emmy: What would you do?

Petitioner: I would push your naked body against mine as you feel my rock hard dick slide between your legs I slam you agency [sic] the wall holding your head kissing those soft wet lips. I run my hands down your body to your legs then to your beautiful butt to grab them and pulls you onto me
Something like that

(State's Exhibit 1; App.44-47; 172-173).

Emmy asks Petitioner what he does and he indicates he is an engineer. When he asks, she responds "I'm still in school." (State's Exhibit 1; App.48; 173-174). Petitioner then asks "How old r u," to which Emmy responds "15 but will be 16 in February." (State's Exhibit 1; App.49; 174). Petitioner responds by stating: "Really I should have never sent u pics of me naked. I'm 26." (State's Exhibit 1; App.50; 170-174). Emmy assures him her profile picture is her and that she is really just 15. His response is not to terminate the conversation, but instead to request more pictures—naked pictures. Specifically, he states: "But seeing u have seen me naked I wanna see u naked." (State's Exhibit 1; App.51; 174).

Petitioner gave a statement to Investigator Carter which was typed while Petitioner was being asked the questions. In it, Petitioner admitted seeing Emmy's profile picture and several other pictures. (State's Exhibit 7; App.89-90; 181-182). He indicated he became friends with Emmy and sent her messages including "a dick picture." (State's Exhibit 7; App.90; 181). Investigator Carter then asked Petitioner about requesting the naked pictures of Emmy even after she indicated she was only 15 years old and Petitioner stated: "Just because I was horny. I was not thinking at the time." (State's Exhibit 7; App.91; 182).

STANDARD OF REVIEW

“On appeal from the denial of a directed verdict, [the Appellate] Court views the evidence and all reasonable inferences in the light most favorable to the State.” State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). As this Court recently reiterated: “[W]hen ruling on a directed verdict motion, the trial court views the evidence in the light most favorable to the State and must submit the case to the jury if there is “any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.”” State v. Bennett, 415 S.C. 232, 236-37, 781 S.E.2d 352, 354 (2016) (quoting State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955)).

“Therefore, although the jury must consider alternative hypotheses, the court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt.” Id. “Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.” Id.

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. See State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding “any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt” in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)).

This Court has recently reaffirmed the fact neither the trial court nor the appellate court are concerned with the weight of the evidence. The Court stated: “In reviewing a motion for directed verdict, the trial court is concerned with the existence of evidence, not with its weight.”

State v. Phillips, 416 S.C. 184, 192, 785 S.E.2d 448, 452 (2016). This is consistent with the rulings of the United States Supreme Court:

[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Jackson, 443 U.S. at 319 (italics in original).

ARGUMENT

- I. The Court of Appeals correctly affirmed the trial court's denial of Petitioner's motions for directed verdict on the charges of attempted dissemination of material to a person under the age of eighteen, criminal solicitation of a minor, and attempted sexual exploitation of a minor first degree. (Petitioner's Questions I-III).**

The Court of Appeals correctly affirmed the trial court's decision to deny each of Petitioner's motions for directed verdict as to the three charges. The State presented sufficient evidence Petitioner knew or should have known the person to whom he was communicating and sending obscene material was under the age of eighteen. As a result, the trial court properly denied Petitioner's motion for a directed verdict as to the attempted dissemination and criminal solicitation charges on that ground. The State presented ample evidence of all the elements of the attempted dissemination, criminal solicitation, and attempted sexual exploitation charges to warrant sending the charges to the jury. As a result, the trial court properly denied the motions for a directed verdict.

Attempted Dissemination of Obscene Material

Petitioner contends the trial court should have granted his motion for a directed verdict because the State failed to present any evidence he attempted to disseminate the obscene material—nude pictures of himself and pictures of his penis—to a person he knew was under the age of eighteen. However, the State presented sufficient evidence Petitioner knew he sent the pictures to the Facebook account belonging to someone claiming to be under the age of eighteen.

The statute criminalizing the dissemination of obscene material provides:

An individual eighteen years of age or older who knowingly disseminates to a person under the age of eighteen years material which he knows or reasonably should know to be obscene within the meaning of Section 16-15-305 is guilty of a felony and, upon conviction, must be imprisoned for not more than ten years.

S.C. Code Ann. § 16-15-345 (Supp. 2016). Petitioner does not contest the fact he disseminated obscene material when he sent the pictures of his penis and him naked in the shower. He solely contests whether the State proved he *knowingly* attempted to disseminate the material to a person under the age of eighteen. Petitioner seems to argue as long as he ultimately denies that he thought the recipient was under eighteen then the State cannot prove its case because it cannot establish he knew the recipient was eighteen at the time he sent the material.

The facts of this case demonstrate Petitioner knew or should have known the age of Emmy prior to his dissemination of the obscene material. In his statement, Petitioner admitted he viewed her main profile picture. (State's Exhibit 7; App.182). Deputy Parry Hood testified if someone clicked on her picture in Facebook the first page they would see would be her profile page, which clearly indicates she was born in April 2000. (State's Exhibit 1; App.31-32). Further, in his apology letter to Emmy, Petitioner indicates: "I will NEVER send and [sic] friend request to other people I do not know, **specialy [sic] when they look to [sic] young.**" (State's Exhibit 8; App.185) (emphasis added).

This Court has construed the knowledge requirement in several situations. In construing the obscenity law's requirement of knowingly exhibiting the material: "One may be found to knowingly violate the statute when it appears that he shuts his eyes to avoid knowing what would otherwise be obvious." State v. Thompkins, 263 S.C. 472, 484, 211 S.E.2d 549, 554 (1975). The Court in construing a "knowing" *mens rea* in a securities fraud case, explained: "one cannot escape liability by "shutting one's eyes to what would otherwise be obvious." State v. Sterling, 396 S.C. 599, 617, 723 S.E.2d 176, 186 (2012).

Years ago in Feldman v. South Carolina Tax Commission, this Court considered the definition of "knowingly" as it related to the sale of alcohol to a minor. Feldman v. S.C. Tax

Comm'n, 203 S.C. 49, 26 S.E.2d 22 (1943). The statute at issue indicated: “No retail dealer shall knowingly sell, . . . any alcoholic liquors to any person when drunk or intoxicated, nor to a minor, . . . and upon violation of any of these provisions, upon conviction, shall suffer the penalties hereinafter provided . . .” Feldman, 26 S.E.2d at 24. The defendant alleged he believed the purchaser was over the age of 21 and never asked to confirm his age. As a result, he alleged the State failed to demonstrate sufficient evidence he knowingly sold the alcohol to a minor. Id. at 25. This Court rejected the defendant’s argument, finding:

Within the meaning of the term, “knowingly,” as used in this statute, if the clerk knew that the negro boy was a minor **or had such information, from his appearance or otherwise, as would lead a prudent man to believe that he was a minor, and if followed by inquiry must bring knowledge of that fact home to him**, then the sale was made knowingly.

Id. (emphasis added).

Petitioner maintains Thompkins and Feldman, the case law primarily relied upon by the Court of Appeals, are inapplicable because the person who received the material in this case was law enforcement over eighteen and not an actual minor. However, the fact the person who ultimately received the material was law enforcement and not an actual minor is why it is an attempted dissemination charge and not an actual dissemination charge. The rationale expressed in Thompkins, Feldman, and Sterling regarding what the State is required to demonstrate to show a knowing *mens rea* is still applicable.

Additionally, the Feldman case is remarkably similar to this case. The defendant claims he did not know the age of the person. He could have easily determined the age, and had the information presented to him which would have established the age, but chose not to do so. The holding by the Supreme Court makes it clear one cannot avoid prosecution because they choose not to know what they could have easily learned—they cannot shut their eyes to the obvious.

Petitioner closed his eyes to the obvious inclusion of Emmy's birthdate on her profile page and the fact she listed A.C. Flora High School on her page when he sent her clearly obscene materials. He cannot escape prosecution for disseminating obscene material when he was presented the information necessary to know the person he was communicating with was a minor but chose to ignore the facts.

Accordingly, the State presented evidence from which a rational jury could conclude Petitioner knew, or should have known, Emmy represented a person under the age of eighteen when he attempted to disseminate obscene material to a minor. The Court of Appeals properly affirmed the trial court's denial of the motion for directed verdict. This Court should deny the Petition for Writ of Certiorari as to Question I.

Criminal Solicitation of a Minor

Petitioner raises two grounds for finding the trial court erred in failing to direct a verdict in his favor. First, he asserts he did not communicate with Emmy "for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) . . . , or with the intent to perform a sexual activity in the presence of the person" Further, he again asserts the State failed to present evidence he knowingly communicated with a person under the age of eighteen or reasonably believed to be under eighteen.

Initially, it should be noted Petitioner only raised the second of these two grounds in his Petition for Rehearing to the Court of Appeals. In his Petitioner for Rehearing after the decision of the Court of Appeals, Petitioner never challenged the finding the State presented sufficient evidence he communicated with the proscribed purpose. He merely raised the issue regarding whether the State provided sufficient proof he knew or reasonably should have known Emmy

was under eighteen. As a result, any argument related to the failure to establish he committed the proscribed actions is not preserved for review by this Court. See Rule 242(d)(2), SCACR (“Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari....” (emphasis added)); Camp v. Springs Mortgage Corp., 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (declining to address issue not addressed by the court of appeals and not raised in petition for rehearing); Holly Hill Lumber Co. v. McCoy, 210 S.C. 440, 442, 43 S.E.2d 143, 144 (1947) (holding issue not raised in petition for rehearing is the law of the case).

Even if preserved the issue fails on the merits. The statute at issue provides:

A person eighteen years of age or older commits the offense of criminal solicitation of a minor if he knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) . . . , or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen.

S.C. Code Ann. § 16-15-342(A) (Supp. 2016). Sexual activity is defined as:

“Sexual activity” includes any of the following acts or simulations thereof:

- (a) masturbation, whether done alone or with another human or animal;
- (b) vaginal, anal, or oral intercourse, whether done with another human or an animal;
- (c) touching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female;

(d) an act or condition that depicts bestiality, sado-masochistic abuse, meaning flagellation or torture by or upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals, or female breast nipples, or the condition of being fettered, bound, or otherwise physically restrained on the part of the one so clothed;

(e) excretory functions;

(f) the insertion of any part of a person's body, other than the male sexual organ, or of any object into another person's anus or vagina, except when done as part of a recognized medical procedure.

S.C. Code Ann. § 16-15-375(5) (Supp. 2016).

The chats between Petitioner and Emmy serve as sufficient evidence indicating Petitioner was seeking to persuade, induce, entice, or coerce Emmy to engage or participate in a sexual activity. Petitioner and Emmy begin the chats discussing where they live. Shortly thereafter, Petitioner sends the pictures of himself naked in the shower and of his erect penis. Petitioner then asks the fifteen-year-old girl if she likes his penis and indicates: “Maybe one day he will be all yours.” He then asks Emmy, “What would u do if I was with you naked in front of u right now[?]” (State’s Exhibit 1; App.173). This appears to be persuading, inducing, or enticing her to participate in a sexual activity—in particular section 16-15-375(5)(c)—with him, especially given the nature of the chats involving his erect penis.

Petitioner then states: “Well maybe this weekend we can hang out” clearly indicating a desire to meet in person with Emmy. He follows up by asking: “So what do u like to do to my dick baby” which again demonstrates a desire to persuade, induce, or entice Emmy to touch his penis, which would again be covered as a sexual activity under section 16-15-375(5)(c). Petitioner asks: “Well you know what I would do if you were in front of me naked?” He then states:

I would push your naked body against mine as you feel my rock hard dick slide between your legs I slam you agency [sic] the wall holding your head kissing those soft wet lips. I run my hands down your body to your legs then to your beautiful butt to grab them and pulls you onto me[.]

(State's Exhibit 1; App.173). Again a rational juror could certainly infer from this portion of the chat that when Petitioner and Emmy get together he would like to have sexual intercourse with her, a sexual activity under section 16-15-375(5)(b). As a result, the chats themselves were sufficient evidence warranting sending the charge of criminal solicitation of a minor to the jury.

Further, on the issue that is preserved regarding the application of Thompkins and Feldman, the State presented sufficient evidence he knew or reasonably should have known Emmy was under eighteen. As discussed above, Petitioner knew or should have known the age of the person he was communicating with because it was displayed on her profile page and he admitted viewing her profile picture. As with the dissemination charge, the trial court properly found sufficient evidence existed from which a rational juror could find Petitioner knew Emmy was under the age of eighteen.¹ Any further argument that because the individual was luckily a law enforcement agent and not a young girl is foreclosed by the statute itself, which provides: "It is not a defense to a prosecution pursuant to this section, on the basis of consent or otherwise, that the person reasonably believed to be under the age of eighteen is a law enforcement agent or officer acting in an official capacity." S.C. Code Ann. § 16-15-342(D) (Supp. 2016).

The trial court properly denied the motion for a directed verdict, and this decision was correctly affirmed by the Court of Appeals. Accordingly, the Court should deny the Petition for Writ of Certiorari as to Petitioner's Question II.

¹ The State incorporates all facts and arguments from the previous section.

Attempted Sexual Exploitation of a Minor

Petitioner finally contends the State failed to present evidence he sought to produce material depicting Emmy in a state of sexually explicit nudity or for a live performance. The chat themselves belie this argument and the Court of Appeals properly affirmed the trial court's denial of Petitioner's motion for a directed verdict.

Attempted sexual exploitation of a minor in the first degree would require an attempt by a person "knowing the character or content of the material or performance," who:

(1) uses, employs, induces, coerces, **encourages**, or facilitates a minor to . . . appear in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation for a live performance or for the purpose of producing material that contains a visual representation depicting . . . a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation

S.C. Code Ann. § 16-15-395(A)(1) (Supp. 2016) (emphasis added).

The statute as written does not require Petitioner to be the person ultimately producing the visual representation of the minor in a state of sexually explicit nudity. The statute merely requires him to have used, employed, induced, coerced, **encouraged**, or facilitated the minor to appear in the state of sexually explicit nudity for material to be produced that will be used for sexual stimulation. The material can be material produced by the minor at the encouragement of the person charged with the crime. Petitioner certainly encouraged Emmy to produce digital images in which she appeared naked and send them to him.

After talking about Emmy's profile picture, he indicates he wants to see more of her. This is also after he has explicitly been told she is only 15 years old. She tells him she will have to wait until she gets home to post more pictures. His request was: "But seeing u have seen me

naked **I wanna see u naked.**” He clearly wanted Emmy to send him, as he had already sent her, digital pictures—material containing a visual representation—and he clearly wanted to see Emmy naked in those pictures. A rational juror could reasonably find Petitioner, through his request to see her naked, sought Emmy to produce material showing her naked to send to him. Further, his statement to police made it clear the purpose behind the pictures was sexual stimulation because when asked why he requested naked pictures of a fifteen-year-old girl, he responded: “Just because I was horny.²” As a result, the chats and Petitioner’s own statement make it clear he attempted to have a fifteen-year-old girl pose naked for pictures and send those pictures to him for the purpose of his sexual stimulation. Accordingly, the trial court did not err in denying his motion for a directed verdict on the charge of attempted sexual exploitation of a minor in the first degree.

As a result, this Court should deny the Petition for Writ of Certiorari as to Petitioner’s Question III.

² Merriam-Webster dictionary defines “horny” as 1) of or made of horns; 2) having horns; or 3) desiring sexual gratification or excited sexually. See <https://www.merriam-webster.com/dictionary/horny> (last visited September 19, 2017). It is certainly reasonable for the jury to infer Petitioner was referring to the third definition when he made the statement to Investigator Carter.

CONCLUSION

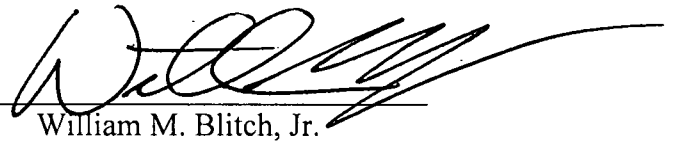
For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Attorney General
S.C. Bar No. 15608

BY:


William M. Blich, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 13, 2019

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PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

James W. Boyd, Esquire
Post Office Box 36425
Rock Hill, South Carolina 29732

I further certify that all parties required by Rule to be served have been served.
This 13th day of March, 2019.


ANNE A. MUELLER
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727