STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENJAMIN M. RHODES,

APPELLANT

APPELLATE CASE # 2013-001429

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to modify its charge on circumstantial evidence pursuant to State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989) after appellant requested such a charge?

STATEMENT OF THE CASE

On January 12, 2009, a Laurens County grand jury indicted appellant for criminal solicitation of a minor. R. 278. On February 18, 2011, the grand jury indicted appellant for attempted dissemination of obscene material to a person under the age of eighteen. R. 274. On June 17, 2013, appellant was tried before the Honorable W. Jeffrey Young and a jury. R. 1. Bethany B. Miles and Lloyd V. Flores, Jr. of the Attorney General's Office represented the State. R. 1. Rauch Wise represented appellant. R. 1. The jury convicted appellant on both charges. R. 221, ll. 12 – 22. Judge Young sentenced appellant to concurrent terms of seven years' imprisonment suspended upon two years' imprisonment and five years' probation on both charges. R. 237, ll. 4 – 20. After timely filing and service of the notice of appeal, this appeal follows.

ARGUMENT

The trial court erred in refusing to modify its charge on circumstantial evidence pursuant to *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989) after appellant requested such a charge.

Relevant Facts

The facts in this case were largely undisputed. R. 195, ll. 4 – 8. As appellant's attorney told the jury in closing argument, the only dispute was appellant's intent and whether circumstantial evidence proved that appellant "believed the person he was talking to was 13." R. 195, ll. 4 – 11.

Officer Crystal Roberts ("Roberts") of the Clinton Department of Public Safety was the State's only witness. R. 50, ll. 11 – 20. She created an internet profile of a thirteen year old girl by the name of "sc_kriscr8zygurl" and entered a "romance" chat room on Yahoo. R. 54, l. 21 – 58, l. 4. R. 118, ll. 13 – 15. To enter this chat room, a user had to verify that she was over the age of eighteen, which Roberts did. R. 118, l. 16 – 119, l. 15.

A user with the profile of "big_ben29325" approached Roberts in the chat room. R. 59, ll. 1 – 17. This user was appellant. Roberts acknowledged that appellant used his real name and information in his profile and made no attempt to hide his identity. R. 116, l. 16 – 118, l. 6. The State introduced chat transcripts between Roberts and appellant. R. 241 - 261. In these chats, Roberts told appellant she was thirteen. R. 62, ll. 23 – 24. The chats became more suggestive and at several points it was suggested that they meet for sex. R. 69, l. 1 – 76, l. 5; R. 93, l. 9 – 99, l. 5; R. 100, l. 16 – 103, l. 13. During one of the chats, appellant activated his web cam and displayed himself masturbating to Roberts. R. 88, ll. 20 – 24. Roberts admitted multiple times throughout cross-examination that her statements to

appellant could "possibly" be interpreted as something an adult would write. R. 124, l. 5 – 134, l. 20. At no point was a concrete time and place ever settled upon for a meeting and at no point did appellant travel to meet with Roberts' fictional minor. R. 136, l. 19 – 137, l. 1.

Appellant testified in his own defense. R. 147, ll. 8 – 14. He served seven years in the Army and was deployed to Kuwait, Bosnia, and Kosovo. R. 149, ll. 2 – 12. Appellant believed, from the way Roberts' persona interacted with him, that the person he was chatting with was over the age of eighteen. R. 154, ll. 12 – 19. This belief was based not only on the way the person wrote, but also on the fact that the chat room was for people who were over eighteen. R. 155, ll. 12 – 15. While the State emphasized appellant's supposed taped confession, appellant clarified during his testimony that, during the interrogation, he only believed it was a thirteen year old girl because the police told him so. R. 157, ll. 5 – 15. Before the police told him this falsehood, he did not believe that the person in the chat room was thirteen. R. 157, ll. 5 – 23. The police persisted in perpetuating this fabrication to the point they had appellant write a letter of apology to the fictional parents of a girl who did not even exist. R. 157, l. 19 – 158, l. 8. R. 240. Appellant clearly stated that before the police's shenanigans during his interview, he "thought it was just someone over the age of 18 years old just trying to get their jollies." R. 158, ll. 9 – 13.

Discussion

Appellant requested the circumstantial evidence charge from Edwards. R. 268 – 273. R. 181, ll. 9 – 17. R. 220, ll. 3 – 13. The trial judge denied his request. R. 181, ll. 9 – 17. The trial judge only gave the circumstantial evidence charge from State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997). R. 211, l. 14 – 212, l. 8. Refusal of a modified circumstantial evidence charge is error after State v. Logan, 405 S.C. 83, 99, 747 S.E.2d

444, 452 (2013). Even though appellant's case was tried before Logan, he is entitled to the benefit of Logan on direct review. See State v. Brown, 389 S.C. 473, 698 S.E.2d 811 (Ct. App. 2010) (applying rule of Arizona v. Gant, 556 U.S. 332 (2009) which was decided after the defendant's trial and before his appeal was decided) *reversed on other grounds*, 401 S.C. 82, 736 S.E.2d 263 (2013) (applying rule of Davis v. United States, 131 S.Ct. 2419 (2011) which was decided between this Court's decision and the decision of the South Carolina Supreme Court).

Logan discussed the history of South Carolina's circumstantial evidence charge and traced its evolution from State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955) through Grippon. Logan at 94-100, 747 S.E.2d at 450-53. The Court concluded that the Grippon charge insufficiently explained to jurors in some cases how to analyze circumstantial evidence. Id. The Court stated, "[A]t times, a separate framework is necessary to the jury's analysis of circumstantial evidence." Id. at 100, 747 S.E.2d at 453. The Court held that "when so requested by a defendant," the trial court "should provide the following language:"

> There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If the circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

Id. at 99, 747 S.E.2d at 452.

The charge mandated by the Court in Logan mirrors the charge requested by appellant. Appellant's charge cited Edwards and stated:

> Every circumstance relied upon by the State must be proven *beyond a reasonable doubt*; and... *All the circumstances* so proven *must be consistent with each other and taken together, point conclusively to the guilt of the accused* to the exclusion of every other reasonable hypothesis. It is not sufficient that they create a probability, though a strong one and if, assuming them to be true they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, *the proof has failed.*

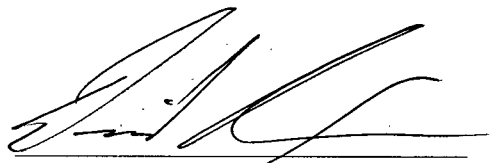
R.268 - 273. All of the italicized language in the above passage also appears in the Court's charge mandated by Logan.

The necessity of this charge was highlighted by the State's reliance on circumstantial evidence to prove intent. Appellant's supposed confession, chat transcripts, and apology letter were converted from direct evidence of his intent into circumstantial evidence by appellant's testimony. Appellant's testimony that he believed that the supposed thirteen year old girl was actually eighteen must be believed for purposes of giving a jury charge. The law to be charged is determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Reversible error is committed if the trial court fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). Because appellant's testimony converted what the State contended was direct evidence of his intent to circumstantial evidence of his intent, appellant's requested charge was absolutely necessary and its absence prejudiced him. The trial court erred in refusing to correctly charge circumstantial evidence as necessitated by the facts.

CONCLUSION

For the foregoing reasons, the Court should reverse appellant's conviction and remand for a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of July, 2014.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Benjamin M. Rhodes states:

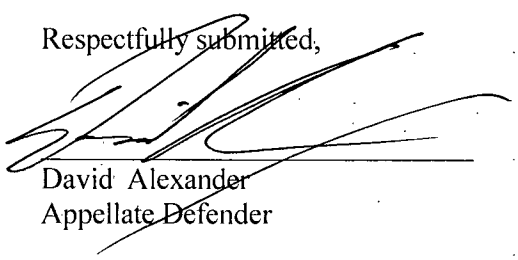
1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge William Jeffrey Young, which was held on June 19, 2013, 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 Benjamin M. Rhodes.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

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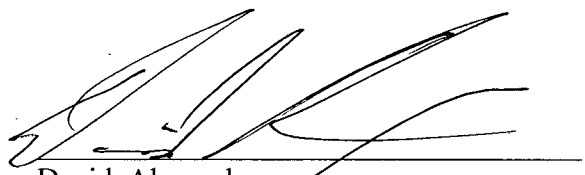
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment(s);
(2) Trial transcript;
(3) State's exhibits # 1 – 11;
(4) State's exhibits # 12 – 14 (to be transported);
(5) Defendant's exhibit # 1;
(6) Court's exhibit # 1.

I certify that this designation contains no matter which is irrelevant to this appeal.

July 17th, 2014



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Appellate Defender

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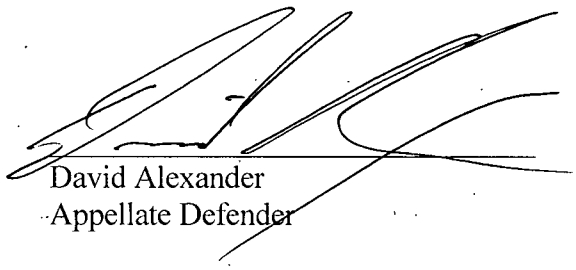
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

July 17th, 2014



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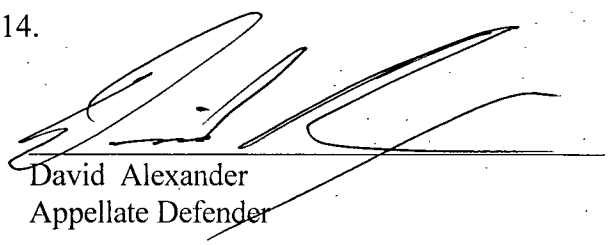
CERTIFICATE OF SERVICE

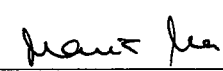
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Benjamin M. Rhodes, at 67 Palmetto Street, Clinton, SC 29325, this 15th day of July, 2014, this 17th day of July, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of July, 2014.


(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.