STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Jul 27 2020
SC Court of Appeals

Appeal from Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JASON CARLTON BOOTH,

APPELLANT

APPELLATE CASE NO. 2019-001429

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to direct a verdict where there was no direct evidence or substantial circumstantial evidence that appellant committed a "sexual battery," a critical element of the offense of criminal sexual conduct with a minor in the first degree?

STATEMENT OF THE CASE

Appellant was indicted at the February 21, 2017 term of the Greenville County Grand Jury for the offense of criminal sexual conduct with a minor in the first degree. This indictment alleged that appellant committed a "sexual battery" on D.B., a minor of less than eleven years of age. R. 348-349. Appellant was also indicted at the February 21, 2017 term of the Greenville County Grand Jury for the offense of criminal sexual conduct with a minor in the third degree. This indictment alleged appellant committed a lewd and lascivious act on the same minor, who was less than sixteen years of age. R. 350-351.

Appellant's case was called to trial on August 12, 2019 before the Honorable Letitia H. Verdin, and a jury. Randall Chambers represented appellant. Alexa Kluska and Christine Kednocker Sustakovitch were the assistant solicitors. R. 1.

On August 15, 2019, the jury found appellant guilty on both counts. R. 342, ll. 12-18. Judge Verdin sentenced appellant to thirty-two years' imprisonment for criminal sexual conduct with a minor in the first degree, and fifteen years concurrent for criminal sexual conduct with a minor in the third degree. R. 346, ll. 13-14.

This appeal follows.

STANDARD OF REVIEW

"On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state." State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. Hepburn, 406 S.C. at 416, 429 S.E.2d at 409. "A case should be submitted to the jury when the evidence is circumstantial '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. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)).

ARGUMENT

The court erred by refusing to direct a verdict where there was no direct evidence or substantial circumstantial evidence that appellant committed a "sexual battery," a critical element of the offense of criminal sexual conduct with a minor in the first degree

Relevant Facts

Greenville county sheriff's deputy Chyna Nunez went to the house where appellant was living in Travelers Rest on November 16, 2016. At the time appellant and his eight-year-old daughter were living with his brother, Joel Booth, and Joel's girlfriend, Libby. R. 69, ll. 4-24.

Nunez remembered that Libby, the child's aunt, was "super upset" at the time. Libby told Nunez that appellant was "sleeping in the house." R. 70, ll. 3-22. Nunez testified that since appellant was sleeping, she went "a couple minutes down the road" to Tigerville Elementary School, where appellant's daughter went to school. Once there, she and an investigator talked to the child. Deputy Nunez and the investigator then returned to talk to appellant.

Joel awoke appellant, and Nuzez "told him [appellant] he wasn't under arrest, that he didn't have to talk to us. He sat down and spoke with us about what was going on." R. 70, l. 10 – 73, l. 1. Nunez remembered that appellant was acting normally, and "he pretty much thought it was unfounded, and he said that the only reason she was making these allegations was because she wanted to live with her mother." R. 73, ll. 3-6.

Tiffany "Rose" Stone was the thirty-one-year-old mother of the child and appellant's former girlfriend. Rose worked at the Waffle House, which is where she met appellant while they were co-workers. R. 74, l. 9 – 75, l. 22. Rose confirmed that appellant had been living with his brother Joel and Joel's girlfriend, Libby.

Rose testified that when the child started school at five or six years old, they decided that appellant would stay home and homeschool the child while she worked long hours at the Waffle House. R. 78, l. 5 – 80, l. 15. Rose offered that while the child was homeschooled by appellant, the child did not have any friends or other children to play with. R. 80, ll. 6-18. Rose confirmed that corporal punishment was often inflicted on the child while using a belt, and, in addition Rose once, accidentally according to Rose, burned the inside of the child's hand while she was being disciplined. R. 81, l. 3 – 82, l. 19.

Rose admitted she smoked a lot of marijuana, and she sold marijuana, but she asserted she rarely drank. Things were not going well at that point, and Rose decided it was "best that I'd move out." R. 83, l. 6 – 85, l. 3. Rose recalled they had "a family meeting together, and I told her, I said, 'I'm moving into an apartment. You are more than welcome to come with me or you can live with your father. It's up to you.' And she told me without a hesitation that she wanted to live with her father. So I said 'okay.'" R. 86, ll. 2-17. Rose testified that this decision was made calmly. She later found out appellant and the child had moved in with appellant's brother, Joel, and his girlfriend, who was the child's Aunt Libby. R. 87, l. 5 – 92, l. 2.

Rose testified that in November of 2016, appellant showed up at her apartment unannounced. She asked appellant where their daughter was at the time. Appellant told her the child was at his brother's house. Rose claimed appellant also told her that Joel had kicked him out of the house because of a money dispute. Rose let appellant move in with her given the circumstances, and since it was cold outside. R. 92, l. 3 – 95, l. 6.

Rose testified that she did not know at the time that their child had accused appellant of sexual abuse, and that the police were investigating. Appellant was arrested at Rose's home on December 22, 2016. R. 95, ll. 4-24. Rose's mother was then granted temporary custody of the

child. The child was living with Rose at the time of appellant's trial under a myriad of conditions from DSS. R. 96, l. 10 – 97, l. 12.

On cross-examination, Rose admitted she had many problems recalling events as her disjointed testimony had revealed. Rose blamed her memory problems on a head injury she suffered while working at the Waffle House. R. 110, l. 21 – 111, l. 10.

Olivia "Libby" Watson was the child's aunt. She was living with appellant's brother, Joel Booth, at the time the investigation of the sexual abuse began. The minor was eight years old at the time. R. 113, l. 7 – 116, l. 20. Libby recalled that she slept with Joel in one bedroom, her two children slept in the second bedroom, and appellant was forced to share the third bedroom with his eight-year-old daughter. R. 116, l. 12 – 117, l. 20.

Libby remembered that the child made her allegation of sexual abuse against appellant, and Libby asked appellant's mother if she could help out with the situation. R. 120, l. 12 – 121, l. 25. Libby recalled the police coming to her house to talk to appellant. The police told appellant "that he wasn't going to be staying at our house and that he had to leave" pending the outcome of the investigation. R. 122, ll. 1-19.

Libby told the solicitor on direct examination that the child was a problem because "she did not really understand personal space, personal boundaries, and my girls didn't like that." R. 125, ll. 17-20. Libby explained that the minor was unable to handle "pretty set rules about things that your children were supposed to do and not do," that the child often threw temper tantrums and was punished for her unruly behavior. R. 125, l. 13 – 127, l. 20.

Libby's minor son testified that appellant's daughter first alleged that appellant molested her after he brought a sex education textbook from school to their house. R. 133, l. 6 – 136, l. 17.

Nancy Henderson worked at the Julie Valentine Center, and she did a physical examination on the child there in March of 2017. R. 144, l. 18 – 148, l. 23. Henderson testified the child was on medication for ADHD and allergies. R. 152, l. 4 – 153, l. 2.

Henderson also told the jurors that while the child did not share the details of the forensic interview, "she had shared about who had done something and not wanting to see that person again." R. 153, ll. 3-10. Henderson received a summary of the forensic interview, and she said the child also disclosed the abuse to her. R. 153, l. 3 – 154, l. 23. The following occurred with Henderson at the conclusion of her testimony on direct examination by the solicitor, without objection:

> Q So in your expert opinion, can you tell us whether or not your findings are consistent with the sexual contact that [D.B.] reported?
>
> A In my opinion, I felt her having a normal exam could absolutely be consistent with disclosures that she has shared during her forensic interview.
>
> MS. KLUSKA: Thank you, Dr. Henderson. Please answer any questions the defense may have.

R. 160, ll. 14-21. Thus, the state knowingly presented an opinion that the child's disclosures of abuse during the forensic interview were "absolutely consistent" with the normal exam performed by Henderson. Another backdoor method of signaling that Henderson believed the child after watching the forensic interview. That interview is on file with this Court.

The minor child, D.B., testified she was eleven years old at the time of trial. She was in sixth grade. R. 167, ll. 6-14. The minor remembered when she was younger that her mother worked a lot at the Waffle House, and appellant watched her and homeschooled her. R. 169, l. 1 – 171, l. 7. The minor said she chose to live with appellant rather than her mother "because he had a PS3" video game console. R. 175, ll. 17-22.

The minor alleged when she was eight years old, while sleeping in the same bedroom as appellant at the home of Joel Booth and her Aunt Libby, that appellant "rubbed up against her from behind in a sexual manner." The minor did not tell anybody this had happened, but she said it felt funny, and it hurt. R. 179, l. 3 – 185, l. 5.

The minor remembered that later one of her older cousins brought "home a human body book." She said a man in a picture in the book made her think "about the defendant doing something inappropriate" to her. R. 186, ll. 1-19. The minor denied making up the allegation against appellant because she wanted to live with her mother or because she hated following the rules in the home of appellant's brother and her Aunt Libby. R. 188, ll. 2-7.

The minor confirmed on cross-examination that her allegation of sexual abuse regarded this single occasion. The minor said this apparent sexual act physically hurt her. R. 189, l. 5 – 191, l. 2.

The minor confirmed on cross-examination that she had practiced her testimony in the courtroom with the solicitor on prior occasions. The minor also claimed when she decided to live with appellant because he had "a PS3," rather than her mother, she did so because, "I did not know that he was bad at that time." R. 192, l. 1 – 193, l. 24. The minor's testimony ended with her confirming that she been beaten with a belt on different occasions by appellant, by her mother, and by her Aunt Libby. R. 194, l. 3 – 195, l. 4; r. 199, l. 7 – 200, l. 1.

Directed Verdict Motion

At the conclusion of the state's case, defense counsel made a motion for a directed verdict as to both indictments. The judge denied the motion for a directed verdict. R. 237, ll. 6-9.

The Defense Cases

The minor's grandmother, appellant's mother, testified that Rose, the child's mother and appellant's former girlfriend, was hostile to her. R. 242, l. 21 – 243, l. 21. The grandmother said that the accusing child was known not to tell the truth, although she said the child was "very bright" and "creative." R. 245, ll. 13-21.

Appellant's brother, Joel Booth, observed many behavioral problems with the child, including bullying his children and the fact that "she loved to terrorize the cats. She would come out to complain that the cats would bite her" when the cats "would retaliate." R. 257, l. 13 – 259, l. 8.

Appellant testified in his own defense. Appellant acknowledged that at some point he and his girlfriend Rose, the child's mother, had serious problems. The decision was made that their daughter would live with appellant. R. 274, l. 17 – 276, l. 13. Appellant related how he and his eight-year-old daughter moved in with his brother and Libby in April of 2016 until he was forced to move in November of 2016 when accused. Appellant and his daughter shared a bedroom. His brother Joel worked from home, and appellant noted that Joel was almost always there. R. 276, l. 10 – 278, l. 6.

Appellant testified there was a lot more discipline and structure in his brother's house and that the minor "had difficulty adjusting to that." R. 278, l. 3 – 279, l. 1. Appellant denied that he ever touched or abused his daughter in a sexual manner. R. 280, l. 3 – 290, l. 18.

On cross-examination, the solicitor asked appellant if he thought the child was making up the allegations because "she hated the rules at Joel and Libby's [house]." Appellant answered, "I honestly have no idea why she's making it up." R. 290, ll. 19-22. Appellant also told the solicitor he did not have any choice in sharing a bedroom with his daughter at his brother and

Libby's house, and that he would rather have had his daughter share a room with their children. R. 292, ll. 3-25.

Discussion

The state alleged appellant committed a "sexual battery" upon his daughter, who was less than eleven years old in the form of "anal intercourse." R. 337, l. 16 – 338, l. 2; r. 348-349 (Indictment). However, there was no direct or substantial circumstantial evidence in this case that appellant committed a sexual battery upon the child. The child in her testimony never alleged penetration, and there was not substantial circumstantial evidence showing penetration ever occurred.

As seen, the child only alleged that appellant put his body against her person while he was behind her, but she never alleged penetration. She said it "felt funny" and that it "hurt." This was not any direct or substantial circumstantial evidence of anal intercourse or penetration as required for that element of S.C. Code § 16-3-665, first degree criminal sexual conduct with a minor. See State v. Mitchell, 341 S.C. 406, 409, 506 S.E.2d 126, 127 (2000); State v. Williams, 321 S.C. 327, 332, 468 S.E.2d 626, 629 (1996)(standard for a directed verdict).

Where, as here, the state fails to provide substantial circumstantial evidence of the defendant's guilt, the judge abuses his or her discretion by refusing to direct a verdict. See State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011); State v. Shrock, 283 S.C. 129, 322 S.E.2d 450 (1984).

In State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2012), our Supreme Court held that the state failed to present the substantial circumstantial evidence necessary to withstand a directed verdict motion, even though Odems fled the get away car the burglars were fleeing the police in, and where Odems asked a witness to lie to the police after he fled. The Supreme Court held that

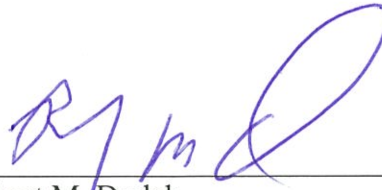
this circumstantial evidence was insufficient to constitute the substantial circumstantial evidence necessary to survive a motion for a directed verdict for the crime of burglary. While seemingly strong evidence of consciousness of guilt, it was not substantial circumstantial evidence that Odems acted with other convicted burglars at the time the victim's house was burglarized. The Supreme Court in Odems relied on its precedent in State v. Bostick and State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001).

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), the Supreme Court also held the judge should have directed a verdict of acquittal. Bostick had gasoline on his pants after the victim, who lived next door, died in an arson. Some of the victim's personal effects were also found in a burn pile behind Bostick's house. Our Supreme Court held this was not substantial circumstantial evidence of Bostick's guilt, and that the trial judge should have directed a verdict.

The judge in this case erred by refusing to direct a verdict of acquittal on the allegation of criminal sexual conduct in the first degree since the state failed to present substantial circumstantial evidence of penetration which was necessary to prove appellant's guilt for the offense of criminal sexual conduct with a minor in the first degree.

CONCLUSION

By reason of the foregoing argument, appellant's conviction for criminal sexual conduct with a minor in the first degree should be vacated, and an order of acquitted issued for that offense.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of July, 2020.

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APPELLANT

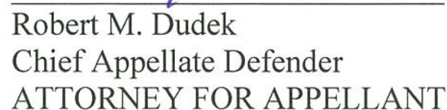
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jason Carlton Booth states:

1. He is Chief 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 Letitia H. Verdin, which was held on August 12 - 15, 2019, 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 Jason Carlton Booth.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 27th day of July, 2020.

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JASON CARLTON BOOTH, APPELLANT

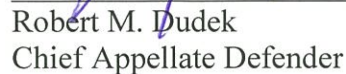
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) True-billed indictments:
(2) Entire transcript of trial held August 12-15, 2019;
(3) State's Exhibit #2 (Forensic Interview)

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

July 27, 2020



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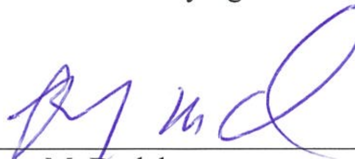
ATTORNEY FOR APPELLANT

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 27, 2020.



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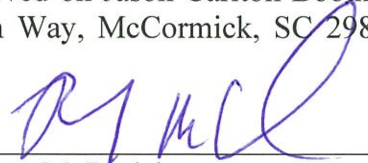
CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 27th day of July, 2020; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Jason Carlton Booth, #381106, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 27th day of July, 2020.



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