STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County
The Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

Respondent,

vs.

SHANE ALEXANDER WASHINGTON,

Appellant.

Appellate Case No. 2016-000907

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Because all of Appellant's sexual assaults on his victim occurred in a two-month span in the same location, any uncharged acts were admissible as res gestae and under the common scheme or plan as part of a continuous pattern of illicit conduct. Further, Appellant was not prejudiced by the admission of other bad acts and the probative value outweighed the danger of unfair prejudice.

II.

The trial court did not err in denying the motion for directed verdict. Because time is not an element of criminal sexual conduct with a minor, any variance between the indictment and the evidence presented was not a material variance entitling Appellant to a directed verdict.

STATEMENT OF THE CASE

A jury convicted Appellant Washington of criminal sexual conduct with a minor in the first degree following trial on April 6-8, 2015. Washington did not appear for trial and disclosed to Victim's Mother prior to trial that he was going to leave South Carolina. R. pp. 61-63. Following the verdict, the presiding Judge, the Honorable R. Lawton McIntosh, placed the sentence under seal. On April 20, 2016, Washington was brought before the Honorable Donald B. Hocker, who sentenced him to thirty years imprisonment.

STATEMENT OF FACTS

Victim was sexually assaulted by her mother's boyfriend, Appellant Washington, from July until September, prior to her eighth birthday.

One of nine children, Victim lived with several of her siblings, her mother (Mother), and Washington in a trailer. Washington operated a tattoo parlor in the trailer. Mother testified Washington was sometimes up all night, making tattoos, gaming on the game console, or watching movies. He was always there in the tattoo parlor, which was on the other side of the house from the master bedroom. R. pp. 34-37. She described the home as "a fairly large mobile home." R. p. 43, line 4.

Mother explained in September 2010, as she was rushing around and getting the children ready, Victim told her she needed to tell her something, but Victim's biological father (Father) arrived to pick her up, and Victim never had a chance to tell her. R. pp. 43-45. Instead, the Due West Police Department told Mother that Victim disclosed she was sexually abused. R. pp. 44-45. Mother agreed with defense counsel that she stayed in a relationship with Washington even afterwards. R. pp. 47-48. However, Mother explained the disclosure came "shortly after" Washington was no longer living in the home. R. p. 47, lines 12-14.

Charlotte Ehney from the Beyond Abuse Child Advocacy Center testified she interviewed Victim on October 14, 2010. The interview was published for the jury. R. p. 86; p. 92. During the interview, Victim disclosed Washington touched Victim in the "butt" and "privates." Court's Exhibit No. 1 (16:00-16:45). Washington would take her into the tattoo room to sexually assault her. Victim explained Washington would pull her pants down and touch Victim with his hands on the outside of her privates and butt. Washington told Victim not to tell anybody and said DSS would

take her if she told. (18:30-18:45). Victim said this occurred more than one time. (19:15-19:30).

She told the interviewer the abuse started when she was seven years old and occurred day and night. The first time was daytime. (20:00-20:30). She explained the first time, Washington brought her in the tattoo room and made her take her clothes off, and he "was rubbing on her." Washington covered her eyes with a scarf. He told her to not peek. He pulled his pants down and made her bend over. (21:00-22:00). She told the interviewer Washington did something, she did not know what. She told the interviewer she felt something wet on her butt afterwards. Washington told her to pull up her pants and took the blindfold off. (22:30-23:30).

The interviewer asked Victim to describe the last time something happened, and she explained Washington put his private in her butt. He then touched her private with his hand. (25:45-26:45). However, that was only the last time he put her private in her butt – Victim explained this happened more than one time. (circa 28:30). She described another occurrence when Washington picked Victim up while she was sleeping. He stuck his penis in her private and he touched her privates with his hands. She described the penis as feeling soft. (29:00-31:30).

Victim told the interviewer Washington put his penis in her mouth and moved it as if writing in her mouth. She said this occurred in the brother's room. She said this occurred other times when her mother went grocery shopping. (33:00-36:30).

At the time of trial, she was twelve years old and living with her grandfather. R. p. 118. Victim testified she use to live with Mother, Washington, and several of her eight siblings at the time of the assaults. She went to Father's on weekends. R. p. 118, pp. 120-22. The assaults started when she was seven years old. R. p. 124, lines 10-12. While visiting her father, she disclosed to him that "[Washington] was touching me in the wrong place." R. p. 123, lines 9-19. She described it as

going on "every once in a while." R. p. 123, lines 20-22. The sexual abuse was going on for weeks. She testified Washington touched her "private" under clothing with his hand and his private on her skin. The touching started "around summertime in July." She explained the touching was on the outside of her private area. R. pp. 126-27 (direct quote p. 127, lines 13-15). She further testified that "around the same time," he penetrated her in the rear. **This happened more than one time. This also occurred "during July – around July in the summertime."** She explained the anal intrusion occurred in the tattoo room and her mother's bathroom. R. pp. 128-29 (direct quote p. 128, line 25 – p. 129, line 2).

Referencing the forensic interview, defense counsel asked about the first time something happened, Victim confirmed it occurred in the tattoo room, and he touched her butt and private. R. p. 133, lines 16-23. Then defense counsel asked about the last time something happened, and whether it was different from the first time. She confirmed it was. R. p. 134, lines 2-21. She confirmed there was a time Washington put his private in the butt in the master bathroom, and that it was a different time from the first time, which occurred in the tattoo room. R. pp. 134-35. However, note that Victim said that both the digital and penal assaults occurred more than one time. Defense counsel never asked during cross-examination about all the times in between the first and last sexual assaults.

ARGUMENT

I.

Because all of Appellant's sexual assaults on his victim occurred in a two-month span in the same location, any uncharged acts were admissible as res gestae and under the common scheme or plan as part of a continuous pattern of illicit conduct. Further, Appellant was not prejudiced by the admission of other bad acts and the probative value outweighed the danger of unfair prejudice.

Washington complains the trial court erred in allowing testimony about acts other than the acts that occurred on or around July 1. During the forensic interview, Victim accused Washington of anal penetration, making her perform fellatio, and digital and penile touching of her private area. She explained to her interviewer that each of these categories of abuse occurred more than one occasion. The trial court instructed that in order to convict Washington of criminal sexual conduct with a minor, the jury needed to unanimously agree on one of the five categories of sexual battery defined by statute. The jury convicted Washington of (1) fellatio and (2) "any intrusion however slight into any part of her genital or anal openings or any object being inserted into her genital or anal openings." R. p. 201, lines 19-23.

What is clear from her interview and her trial testimony is these acts were intermingled and all occurred more than once in a time period beginning "around summertime" in July until shortly before disclosure in early September. The acts comprising the charged and uncharged conduct are so intimately connected that their admission provides a full picture of the abuse occurring for several weeks during the summer she was seven years old. Accordingly, all the acts are admissible as res gestae. "Evidence of other crimes is admissible under the *res gestae* theory when the other actions are so intimately connected with the crime charged that their admission is necessary for a full

presentation of the case." Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003); State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004) (finding temporal proximity of other acts to the charged crime is important in determining admissibility). "When evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae." State v. McGee, 408 S.C. 278, 288, 758 S.E.2d 730, 735-36 (Ct. App. 2014) (internal quotation marks omitted) (quoting State v. Preslar, 364 S.C. 466, 474, 613 S.E.2d 381, 385 (Ct. App. 2005)).

Further, any subsequent acts are admissible under the common plan or scheme exception of Rule 404, SCRE. In State v. Richey, 88 S.C. 239, 70 S.E.2d 729 (1911), Richey was charged with carnal knowledge of a girl under fourteen years of age. The Supreme Court found evidence that he continued this relationship beyond the age of fourteen years of age admissible, holding: "acts prior and also subsequent to the act charged in the indictment, when indicating a continuousness of illicit intercourse, are admissible in evidence as showing the relation and mutual disposition of the parties." Id. at 242, 70 S.E. at 730.

In State v. Weaverling, 337 S.C. 460, 469, 523 S.E.2d 787, 791 (Ct. App. 1999), this Court favorably quoted Supreme Court precedent that held the common plan or scheme exception "is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit intercourse between the same parties." (quoting State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955)); see also State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (holding the "prosecutrix's testimony regarding prior attacks was admissible under [the common scheme] exception to show the continued illicit intercourse forced upon her by Appellant.").

Additionally, the South Carolina Supreme Court and this Court have both upheld the continuing illicit conduct standard to admit other bad acts as part of a common scheme or plan. See State v. Clasby, 385 S.C. 148, 157, 682 S.E.2d 892, 897 (2009); State v. Kirton, 381 S.C. 7, 36, 671 S.E.2d 107, 121-22 (Ct. App. 2008). As this Court explained in Kirton: "All of Kirton's alleged activity was directed toward the same victim. The six to seven year pattern of escalating abuse of Victim by Kirton is the essence of grooming and continuous illicit activity." Kirton, 381 S.C. at 36, 671 S.E.2d at 121-22 (emphasis added). Similar conduct occurred on multiple occasions in Clasby and the Court found the admission of the uncharged prior bad act evidence "consistent with our jurisprudence." Clasby, 385 S.C. at 158, 682 S.E.2d at 897.

Even if the evidence is clear and convincing and falls within a Rule 404(b) exception, the trial judge must exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Weaverling, 337 S.C. at 468, 523 S.E.2d at 791. In the present case, the probative value of the demonstrated continuous illicit intercourse substantially outweighs any prejudice resulting from its admission. As the Supreme Court explained in Clasby: "Given there was no physical evidence to corroborate [the victim's] testimony regarding the indicted offenses of CSC with a minor, first degree, and lewd act upon a child, we find her testimony of Clasby's sustained illicit conduct was extremely probative to establish the charged criminal sexual conduct underlying the offense of lewd act upon a child." Clasby, 385 S.C. at 158-59, 682 S.E.2d at 898.

In the instant case, in a short period of time, a mere two months, Washington executed a plan to sexually abuse Victim several ways, inside Victim's home, either while Mother and siblings were asleep or elsewhere. The absence of physical evidence made Victim's testimony probative and gave the jury the full picture of the abuse inflicted by Washington on his child victim.

Because the charged and uncharged acts both were solely proven by Victim's testimony, the danger of unfair prejudice was negligible at best. This point was demonstrated in State v. Aiken, 322 S.C. 177, 470 S.E.2d 404 (Ct. App. 1996). In Aiken, the co-defendant on a robbery charge testified as to other robberies Aiken and the co-defendant committed together in the area. The Supreme Court found the testimony admissible under the common plan or scheme exception to Rule 404, SCRE, and then observed the following concerning the danger of unfair prejudice:

> [T]he chance that the admission of this evidence unfairly prejudiced Aiken was small because if the jury found [co-defendant] to be credible, it would likely believe his testimony that Aiken was guilty of the [robbery] he was charged with and have no reason to consider the testimony concerning the other robberies.

Id. at 181, 470 S.E.2d at 406-07. Likewise, the intermingled charged and uncharged conduct is dependent on the same proof, primarily Victim's testimony and forensic interview. If the jury believed Victim's testimony about the charged acts, the jury did not need to consider testimony regarding any other acts.

This simple reality also renders any perceived error harmless. "Harmless error rules . . . 'serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.'" State v. White, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014) (quoting Chapman v. California, 386 U.S. 18, 22 (1967)). The "materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990).

II.

The trial court did not err in denying the motion for directed verdict. Because time is not an element of criminal sexual conduct with a minor, any variance between the indictment and the evidence presented was not a material variance entitling Appellant to a directed verdict.

Washington alleges the trial court erred in declining to grant a directed verdict because the indictment alleged the offense occurred on or around July 1, and Washington contends the evidence shows the offense maybe occurred later. Victim testified the sexual assaults started "around summertime, in July." R. pp. 127, lines 13-15. Since time is not an element of criminal sexual conduct with a minor, Washington was not entitled to a directed verdict for any alleged variance from the indictment.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. Id. The task of the trial court is to simply determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016). The reviewing court should affirm if in viewing the evidence in the light most favorable to the State, "the evidence could induce a reasonable juror to find [the defendant] guilty." See State v. Pearson, 415 S.C. 463, 474, 783 S.E.2d 802, 808 (2016).

Criminal sexual conduct with a minor in the first degree proscribes a sexual battery with a victim less than eleven years of age. S.C. Code § 16-3-655(A). Note time is not an element of the offense.

Sexual battery is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code § 16-3-651(h). "Penetration of the vagina is not necessary or required." State v. Morgan, 352 S.C. 359, 373, 574 S.E.2d 203, 210 (Ct. App. 2002) (emphasis removed).

In State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986), the South Carolina Supreme Court found the six year-old victim's testimony that the defendant touched her with his penis, but could not remember whether he put it inside her body, sufficient to survive directed verdict where she also testified it hurt. Mathis found that this was sufficient evidence of an intrusion.

In State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999), the Supreme Court similarly found evidence of an intrusion sufficient to survive directed verdict on the issue of intrusion as to the victim named Betty where Betty testified that Johnson touched Betty and it hurt, and the physical examination revealed an injury inside Betty's vagina. Johnson, at 85-86, 512 S.E.2d at 799.

In the instant case, Victim testified the first time she was assaulted, Washington touched her digitally and with his penis on the outside of her private area and butt. During the forensic interview, she explained he made her pull down her pants and began "rubbing" on her. He blindfolded her and pulled down his pants. He made her bend over. She testified that she felt something wet on her butt. He then told her to pull up her pants and take her blindfold off. Therefore, sufficient evidence of an intrusion exists to survive directed verdict on this incident alone. Johnson, Mathis. Further, she also testified that more than one time, Washington stuck his penis in her butt. So this likewise constitutes an intrusion. Id. Finally, the jury unanimously found Washington violated the statute by making her

perform fellatio on him.

Washington claims only the first occurrence may be considered for evidence of an intrusion that constitutes a battery. However, time is not an element of the offense. "Where time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly occurred." State v. Nicholson, 366 S.C. 568, 574, 623 S.E.2d 100, 103 (Ct. App. 2005) (quoting State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App. 1991)). "The legal system cannot depend on young children for dates and times. Fortunately, the time when abuse occurred is not an element of the crime. Courts understand children's difficulty with time." Myers, John E.B., Myers on Evidence Interpersonal Violence, § 1.05 Children's Understanding of Time and Number.

In the instant case, Victim's testimony established the abuse occurred in July, "around summertime." A reasonable juror could find the testimony established that Washington sexually assaulted Victim "on or around" July 1. Pearson.

To the extent there is a variance of proof from the indictment, Washington was not entitled to a directed verdict. A material variance between the indictment and proof entitles a defendant to a directed verdict. State v. Watts, 321 S.C. 158, 168, 467 S.E.2d 272, 278 (Ct. App. 1996). However, a variance is not material if the matter alleged is not an element of the offense. Id. For instance, in Watts, the indictment alleged a different person was the accomplice than the person proven to be Watts' accomplice at trial. This Court concluded that the trial court correctly denied directed verdict since the identity of the accomplice was not an element of the offense. Id.

Likewise, a variance of time between an indictment and the State's proof does not entitle a defendant to a directed verdict because "it is not necessary to prove the precise day laid in an

indictment except where time enters into the nature of the offense, or is made a part of the description of it." State v. Rutledge, 232 S.C. 223, 229-30, 101 S.E.2d 289, 292 (1957). In Rutledge, the Supreme Court rejected the appellant's argument that a material variance existed because of several weeks difference between the times alleged in two receiving goods indictments. Id.

In State v. Peak, 134 S.C. 329, 133 S.E. 31 (1926), the indictment alleged the deceased was shot by appellant and died on December 7, 1924, when the deceased did not die until several days later. The appellant objected to the State's motion to amend the indictment. The Supreme Court held, "The indictment was free from fault in the first instance, **and did not need any amendment**. Any date could have been alleged prior to the time of giving out the bill to the grand jury, and the true date could have been proven." Peak, 133 S.E. at 34 (emphasis added).

In State v. Howard, 32 S.C. 91, 10 S.E. 831 (1890), about sixty to seventy pounds of cotton were stolen from a gin-house by Howard and his accomplice after the accomplice pushed Howard, "a mere boy" through a hole in the floor of the gin-house. The indictment alleged the larceny occurred on November 19, 1888, however, the evidence was the larceny occurred on December 10, 1888. The Supreme Court found it sufficient to prove the substantive offense alleged by the indictment, holding, "It is not necessary to prove that an offense was committed on the precise day or even year laid in the indictment except when time enters into the nature of the offense, or is made part of the description of it." Id. at 832.

In State v. Reynolds, 48 S.C. 384, 26 S.E. 679 (1897), the Supreme Court rejected an argument that the trial court erred in allowing evidence that Reynolds committed incest with his daughter seven years earlier than the date alleged in the indictment, holding, "It is well settled that it

is not necessary to prove the precise day, or even year, laid in the indictment, except where time enters into the nature of the offense, or is made part of the description thereof." Id.

In the instant case, assuming the assaults occurred later than "on or around" July 1, the proof was not a material variance from the indictment because time is not an element of criminal sexual conduct with a minor. Therefore, the trial court did not err in declining to grant a directed verdict on the basis of the purported variance. Washington's conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

Respectfully submitted,

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