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Feb 28 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KRISTY OLYMPIA DAVIS,

APPELLANT

APPELLATE CASE NO. 2021-001017

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to grant appellant's motion for a directed verdict on the domestic violence charge because the element of a household member was not proved to the extent that appellant was the same sex as the alleged victim, and in charging the jury that a person in a same sex relationship would qualify as a household member under the statute?

STATEMENT OF THE CASE

Appellant Kristy Olympia Davis was found guilty of domestic violence in the third degree¹ per jury trial held during the August 2021 term of the Abbeville County General Sessions Court before Judge Donald B. Hocker. Appellant was sentenced to imprisonment for a period of ninety days. Assistant Solicitors Jane H. Merrill and Myreon S. Williams represented appellant at trial, and Assistant Solicitors Micah E. Black and C. Yades Brown appeared on behalf of the state. On August 26, 2021, a post trial hearing was held before Judge Hocker on appellant's new trial motion. Appellant was represented by Attorney Tristan M. Shaffer at the hearing and Assistant Solicitor Micah E. Black appeared on behalf of the state. On September 14, 2021, Judge Hocker issued an Order denying appellant's new trial motion.

Petitioner appealed. This brief follows.

¹ Appellant was charged with domestic violence of a high and aggravated nature per S.C. code Ann. {16-25-65(A)}.

STANDARD OF REVIEW

In criminal cases an appellate trial court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006). An appellate court will not review the trial court's decision regarding a jury instruction unless the trial court abused its discretion. Clark v. Cantrell, 339 S.C. 369 529 S.E.2d 528 (2000).

An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Pittman 373SC527, 647 S.E. 2d 144 (2007). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. Marin, 404 S.C. 615, 745-S.E.2d 148 (2016), amended, 783 S.E.2d 808 (2016). The trial court is required to charge the correct law applicable to the case. State v. Mattison 388 SC 469, 697 S.E.2d 578 (2010).

On appeal of the denial of a directed verdict of acquittal, the appellate court must look to the evidence in the light most favorable to the state. State v. Hepburn, 406 SC 416, 753 S.E.2d 402 (2013) If the state failed to present any direct or any substantive circumstantial evidence, reasonable tending to prove the guilt of the accused, then the appellate court must reverse the lower court's denial of the directed verdict motion. State v. Hepburn, supra.

ARGUMENT

The trial judge erred in failing to grant appellant's motion for a directed verdict on the domestic violence charge because the element of a household member was not proved to the extent that appellant was the same sex as the alleged victim, and in charging the jury that a person in a same sex relationship would qualify as household member under the statute.

Appellant was tried for domestic violence against Belicia Evans. Evans testified that she and appellant (also female) were romantically involved, and that in July 2019, she moved into appellant's home. Evans explained that on January 28, 2020, she and appellant were engaged in a physical altercation. Evans stated that appellant sent a text previously requesting that she (Evans) leave the residence. Then, appellant approached her while they were both inside the residence and started punching her. Evans stated that she responded by pushing appellant into a glass coffee table, and then walking to the bedroom to pack her clothes to leave. Then, as she packed, Evans claimed that appellant punched her, and that she (Evans) punched appellant back in response. Evans added that minutes later, appellant struck her on the head with a golf club (driver). Tr. 73, l. 3 – p. 87, l.9; Tr. 121 lines 9-25. Evans informed the court and jury that she and appellant were not married and did not have children together Tr. 92, lines 6-14.

Dr. Brian Weaver treated Evans at the hospital emergency area and testified that the blow to appellant's head caused a low risk skull laceration. Tr. 58, l. 17 - p. 65, l. 23.

Prior to trial, trial counsel argued that the domestic violence statute upon which appellant was charged was unconstitutionally inapplicable to appellant's case because both appellant and Evans were two females in a same sex relationship. Defense counsel's position was stated as follows:

Defense Counsel: And, your Honor, under 16-25-10, Subsection (3), household member is defined as a spouse, a former spouse, persons who have a child in common or a male and a female who are cohabitating or formerly have cohabitated. Our client does not fit into any of these definitions. She and Ms. Evans were never married. They were not married and then divorced. They did not have a child in common and they are both female, so they are not a male and female who are cohabitating or formerly have cohabitated. So our argument is that this DVHAN statute does not apply because Ms. Davis does not fall into one of those categories.

There is the Doe v. State case that the Court referenced earlier, ...as we discussed in chambers, but just to put it on the record, in the conclusion section I would argue this—this holding is fairly narrow and, in fact, the opinion discusses that this is unconstitutional as applied to this case, and it states that to address this issue it is unconstitutional as applied to Doe. Therefore, the family court may not utilize these statutory provisions to prevent Doe or those in similar same-sex relationships from seeking an order of protection, and this is—the pinpoint of that 510 just for the record, Your Honor.

The Court: Okay.

Solicitor: And we argue that that's a fairly narrow holding and it does not apply and, in fact, it's impermissible for the Court to expand the definition or the meaning of the case to include a criminal statute because—or included in this definition when that case was decided in 2017, it's 2021 and as of now the Legislature still has not acted to change that. Tr. 41, 1.16-p. 42, 1.22.

The trial judge noted that the Court had not completely “throw[n] the statute out” per the Doe² case. Tr. 43, 1.25-p. 44, 1.24.

Appellant was charged in the indictment which read as follows:

...[that appellant] did cause physical harm or injury to Belizia Evans, a household member, or did offer or attempt to cause physical harm or injury to said household member with apparent present ability under circumstances reasonably creating fear of imminent peril. In addition, the offense was committed under circumstances manifesting extreme indifference to the value of human life and great bodily injury to the victim resulted and/or the offense was committed, with or without an accompanying battery, under circumstances manifesting extreme indifference to

² Doe v. State, 421 SC 490, 808 S.E.2d 807 (2017).

the value of human life, which would reasonably cause a person to fear imminent great bodily injury or death.

At the close of the state's case, the defense put forth the ground that the state failed to establish its burden of proof on the element of household member under the domestic violence statute because appellant was not a household member under the definition of S.C. Code Ann. 16-25-10 (3) as appellant was not a spouse, or a former spouse, or a person who had a child in common, or a male and female cohabitating, or a male and female who formerly cohabitated in the case; and therefore, since the statute did not include same sex couples as household members, then the expansion of the household member definition to prosecute appellant violated the due process and equal protection clauses. U.S. Const. 14th Amendment. Tr. 129, 1.24-p. 135, 1.17. The trial judge denied the directed verdict motion. Tr. 138, 1.6-12.

Also, counsel objected to the trial judge's jury charge that a person in a same-sex coupling would qualify as a household member in this case because this was a charge on the facts, and a violation of due process, separation of powers, and the rule of lenity. Tr. 140, 1.12-20. The trial judge's household member jury charge follows:

Household member means a spouse, former spouse, persons who have a child in common, male and female who are cohabitating or formerly have cohabitated together or a same sex couple who are cohabitating or formerly cohabitated together. Tr. 178, lines 1-5.

S.C. Code Ann. {16-25-20 states that it is unlawful to cause physical harm or injury to a person's own household member, and a household member is defined under S.C. Code Ann {16-25-10(3) as

1. A spouse
2. A former spouse
3. Persons who have a child in common
4. A male and female cohabitating or formerly have cohabitated

In Doe v. State, 421 SC 490, 808 S.E.2d 807 (2017), the petitioner was denied an order of protection³ on the ground that she did not qualify as a person who could obtain such an order because she, as female, and her partner, who was female, meant that her same sex relationship excluded her from recognition as a household member who could gain a protection order. See definition of household member under S.C. Code Ann. 16-25-10(3). The Court in Doe found that the definition of household member was unconstitutional as it applied to Doe and that Doe's denial of an order of protection based on the statutory definition that excluded her from being listed as a household member due to her same sex status was unconstitutional. The Doe Court's rationale follows:

We find there is no reasonable basis, and the State has offered none, to support a definition that results in disparate treatment of same-sex couples who are cohabiting or formerly have cohabitated. Because it is clear that the definition of "household member" violates the Equal Protection clauses of our state and federal constitutions, we must declare it unconstitutional.

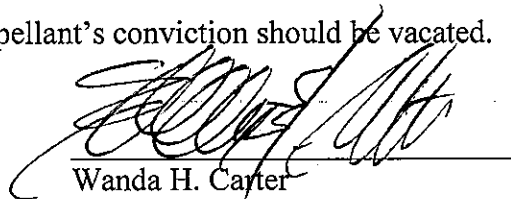
Based on the holding in Doe, appellant's directed verdict motion of acquittal on the domestic charge should have been granted as the state did not prove every element of the domestic offense charged, i.e. household member, because appellant was a person in a same sex relationship, which in turn excluded her as household member under the statute; and since being a household member is an element of the domestic violence statute, the state's case was not proved. Due process requires the prosecution to prove every element of the offense charged beyond a reasonable doubt before a conviction can be obtained. Jackson v. Virginia, 443 U.S. 307 (1979). Also, when considering a motion for a directed verdict, the trial court is concerned with the existence or non-existence of the evidence and not its weight. State v. Burdette, 385 S.C. 34, 515 S.E. 525 (1999).

³ S.C. Code Ann. 24-4-20 (b) defines household member from the domestic violence statute definition of household member under 16-25-10(3).

In addition, it was error for the trial judge to charge the jury that a person in a same sex couple would qualify as a household member under the statutory definition of household member under 16-25-10(3). Again, in Doe it was clearly noted that same sex couples were excluded as household members under the statute. Furthermore, Doe did not judicially amend the statute to include same sex couple as a household member. A trial judge must charge the correct law applicable in the case. State v. Mattison, 388, SC 469 S.E.2d 5-78 (2010). Moreover, the judge's improper jury charge in question violated the rule of lenity and the separation of powers under U.S. Constitution articles I, II, and III and S.C. State Const. article 1, section 8. The rule of lenity applies when a criminal statute is ambiguous and requires any doubts about the scope of the statute to be resolved in the defendant's favor; and furthermore, the rule of lenity is not a device to create ambiguity nor should the court invoke it before considering the words of the statute. State v. Miles, 421 S.C. 154, 805 S.E.2d 204 (2017). Another foundation of the rule of lenity is the separation of powers because criminal offenses are derived solely from the legislative branch. State v. Miles, *supra*. Finally, the trial judge erred in giving the improper charge because it was a prohibited charge on the facts in violation of S.C Const. article V, 21.

CONCLUSION

Based on the foregoing argument, appellant's conviction should be vacated.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of February, 2022.

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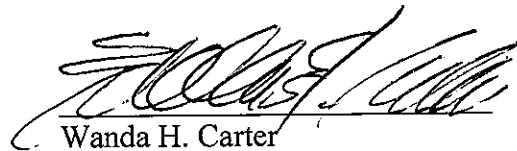
KRISTY OLYMPIA DAVIS,

APPELLANT

APPELLATE CASE NO. 2021-001017

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case have been served upon William M. Blich, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on Kristy Olympia Davis, at 1108 Cambridge St., Apt. 802, Abbeville, SC, 29620, this 28th day of February, 2022.



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