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IN THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO: 2016 305286 CFDB

STATE OF FLORIDA

VS.

MARK FUGLER,
DEFENDANT.
_____/

MOTION TO RECONSIDER ORDER GRANTING MOTION FOR RELEASE ON SUPERSEDEAS BOND

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and files this Motion to Reconsider the Court's Order Granting the Defendant's Motion for Release on Supersedeas Bond pursuant to Florida Rule of Appellate Procedure 9.140 and Florida Statutes 924.07 and 924.071. As grounds for this motion the State alleges:

1. On June 6, 2019, the Defendant, Mark Fugler, was convicted by a jury of his peers of three counts of lewd and lascivious exhibition, second degree felonies, three counts of lewd and lascivious conduct, second degree felonies, and three counts of showing obscene material to a minor, third degree felonies.
2. The jury took just one hour and sixteen minutes to find the Defendant guilty as charged.
3. During the trial, the child victim was required to testify in front of the Defendant in open court.
4. On August 14, 2019, the Court conducted a sentencing hearing.
5. During the sentencing hearing, extensive testimony was presented by the State with regards to the emotional impact that the Defendant's actions and this court process have had on the family and the child victim.
6. The child victim herself testified at the sentencing hearing as to the emotional toll the Defendant's actions have taken on her.

7. After hearing the testimony at the sentencing hearing, this Honorable Court sentenced the Defendant to fifteen years in Florida State Prison on each count for counts one through six and five years in Florida State Prison on each count on counts seven through nine.
8. This Honorable Court sentenced the Defendant to the statutory maximum on each and every count.
9. On August 16, 2019, the Defense filed a Motion for Release on Supersedeas Bond.
10. On September 12, 2019, the Court conducted a hearing on the Defendant's motion.
11. At the hearing, the Defendant testified and was cross examined by the State as to his background and ties to the community.
12. Pursuant to the authority of *Youghans v. State*, 90 So.2d 308 (Fla. 1956), the Court granted the Defendant's Motion for Release on Supersedeas Bond.
13. One of the factors the Court relied on in the Court's order is in reference to the Defendant's ties to the community and Volusia County.
14. The State disagrees that the Defendant has significant ties to the community and would argue the following based on the testimony presented during the hearing on September 12, 2019:
    a. The Defendant came to the State of Florida for his employment.
    b. The Defendant was a tenured professor at Embry Riddle Aeronautical University.
    c. The Defendant has subsequently been terminated from Embry Riddle Aeronautical University at the inception of this case and is no longer employed.
    d. The Defendant's only family in Volusia County is his wife, Jane Fugler.
    e. While the Defendant and his wife own a home in Volusia County, that home's equity has been severely diminished based on the legal fees, expert witness fees, and amount of bond the Defendant has been required to post throughout the legal process that the Defendant has put the victim's family through since the beginning of the case in November of 2016.
    f. The Defendant has family across the country including New Jersey, Colorado, and Louisiana.
    g. The only other local attachment that the Defendant presented as evidence was his involvement with cycling at the YMCA.

h. The YMCA is where the Defendant first met the victim's family and gained the family's trust over fifteen years ago.

i. As a now convicted and registered sexual offender, the Defendant will no longer be allowed to visit the YMCA as it is a location where children congregate regularly.

j. Based on his dismissal from Embry Riddle Aeronautical University and restrictions to his former recreational activities at the YMCA, the Defendant has menial ties to Volusia County.

15. The Court also made findings that the Defendant is unlikely to flee if released on a supersedeas bond.

16. The State disagrees that the Defendant is not a flight risk for the following reasons:

a. The Defendant has been sentenced to a day for day term of fifteen years Florida State Prison.

b. The Defendant is sixty one years old.

c. The Defendant is required to register as a sexual offender.

d. It is clear from the Defendant's testimony at the sentencing hearing and the hearing on the motion for supersedeas bond that the Defendant places great stock in his reputation and prior achievements.

e. The Defendant's mugshot and what he has been convicted of has been highlighted in the media throughout the community and the Defendant essentially wears a "Scarlet Letter" on his chest at this point.

f. The Defendant has had significant monetary resources throughout this trial including posting a $200,000 bond at the beginning of the trial, paying a private attorney for the duration of this case and at trial, paying a digital forensics expert $450 an hour who worked extensive hours on this case, paying a private appellate attorney for his appeal, and posting a second $200,000 bond for his release on September 17, 2019. This shows that the Defendant has the financial resources to flee the jurisdiction of the Court.

g. The Defendant faces a large portion of the remainder of his life in Florida State Prison. The defendant has been sentenced to fifteen years prison and is sixty one

years old. This is tantamount to a life sentence. He has every reason to make sure he never enters the Florida Prison System.

h. These circumstances place him in a significantly different position compared to when he was on pretrial release awaiting trial.

i. Based on the severity of the punishment imposed for the offenses the State argues that the Defendant faces great temptation to remove himself from the jurisdiction of the Court and serve the sentence that he has been found guilty of by a jury of his peers.

j. The conditions the Court has placed on the defendant allow him contact with any biological grandchildren which is a further danger to the public.

17. The Court stated that the grounds for appeal are made in good faith.

a. The State submits that the appeal is NOT made in good faith. While the defense has yet to file an appeal, one of the main issues discussed by the defense at the hearing is the argument the Defendant's age was not proven by direct evidence and a judgment of acquittal was improperly denied. This simply is not true. The State would note the jury did find by their verdict the age was in fact proven. The State was required to prove the Defendant was over the age of eighteen. Like any element, this fact can be proven circumstantially or through direct evidence. In this case ample circumstantial evidence was presented to show he was over eighteen years of age. The Defendant is sixty one year old with gray hair and nearly bald. Evidence was presented he was a tenured Embry Riddle Professor, the Defendant is married, and evidence was presented the Defendant met the victim's family over fifteen years ago in a cycling class at a YMCA before the victim was even born. The victim called the defendant Uncle Mark. The jury also sat in a room observing the defendant for multiple days and was able to observe his physical appearance.

b. This argument on appeal is addressing a denial of the trial court to grant a judgment of acquittal. The Supreme Court of Florida held, "In reviewing a motion for judgment of acquittal, a de novo standard of review applies. Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. If, after viewing the evidence in the light most favorable to the State, a

rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction." *Pagan v. State*, 830 So.2d 792 (Fla. 2002).

c. The law is clear that an element may be proven circumstantially and is a common occurrence. The age of a defendant may be proven circumstantially in cases such as this like any other element. In *State v. Surin*, 920 So.2d 1162 (2006) the Third District Court of Appeal held, "circumstantial evidence presented in this case was sufficient to support the jury's verdict that the defendant was eighteen years of age or older at the time of the offense. First, and most notably, the jury had the opportunity to observe defendant throughout the trial. Second, there was evidence that defendant married the victim's mother in 1993. Third, there was evidence that he cared for his wife's children (including the victim) while she was at work. Fourth, the victim repeatedly referred to defendant as "daddy." Fifth, there was evidence that defendant was old enough to enter the country without his parents or any other family members. Sixth, defendant's wife referred to him as an adult during her testimony. We believe that this combination of the ability of the jury to observe the defendant throughout the trial taken together with the other circumstantial evidence offered was sufficient." Citing *Zeringue*, 862 So.2d at 193, ("[J]ury observation and circumstantial evidence can be used to infer the age of a defendant when no direct evidence of the defendant's age is presented.")

d. The Fourth District Court of Appeal agreed that age can be proven by circumstantial evidence. In *Dedominicis v. State*, 267 So.3d 422 (2019), "we agree with the state that competent substantial evidence supports the required finding that the defendant was eighteen years of age or older when the offense occurred. Viewed in the light most favorable to the state, the mother's testimony that the defendant 'was an older man' and '[m]uch over eighteen,' plus the jury's opportunity to observe the defendant not just in court, but also in the photo lineup and video surveillance which the mother identified, was sufficient to allow the jury to find beyond a reasonable doubt that the defendant was eighteen years of age or older when the offense occurred."

e. Numerous other State and Federal Courts agree that age can be proven by circumstantial evidence. See *Hadley v. Arkansas*, 322 Ark. 472, 910 S.W.2d 675, 677 (1995) (permitting circumstantial evidence of age in a case of rape and incest); *Louisiana v. Zeringue*, 862 So.2d 186, 192–93 (La.Ct.App.2003) (permitting circumstantial evidence of age in a case of carnal knowledge); *Commonwealth v. Miller*, 441 Pa.Super. 320, 657 A.2d 946, 947 (1995) (permitting circumstantial evidence of age in a case of corruption of minors); *Houston v. Alabama*, 565 So.2d 1263, 1264 (Ala.Crim.App.1990) (permitting circumstantial evidence of age in a case of felony sexual abuse).

f. The facts presented to a jury were more than sufficient to prove the Defendant was over the age of eighteen. The most obvious is he is 61-year-old and appears to be sixty one years old. No rational juror could mistake a sixty one year old man with gray hair and nearly bald for under the age of eighteen. The victim called him Uncle Mark and would take her to McDonalds and Toys-R-Us. The defendant has adult children and pictures of them were shown during the search warrant. The evidence that he met the family over fifteen years ago at a YMCA in a cycling class with his wife clearly shows that for him to be under eighteen he would have had to be under 3 and married when he met the family. He is also a tenured professor at a major university. He moved to town for his employment which was over fifteen years ago. He obviously was not employed as a professor as an infant.

g. The Defendant was found guilty of nine counts including three counts of showing obscene material to a minor. All three of these counts are third degree felonies punishable by five years in prison. This court did sentence the defendant to the statutory maximum of five years in prison on each count. None of these counts require proof of the Defendant's age as an element. Even if the Defendant won an appeal on counts one through six he still would be serving a five year sentence on the remaining counts. The requirement of good faith for a supersedeas bond is not met when the appellate issue is irrelevant to multiple convictions.

h. The defense mentioned child hearsay as an appealable issue. A child hearsay motion and hearing were heard by a circuit court judge prior to the trial. After a full

hearing with testimony on July 24, 2018, the Court ruled child hearsay was admissible and filed an order detailing its admissibility. The child also testified in trial which mitigates child hearsay issues since the child was subject to both direct and cross examination and was in fact was crossed extensively by the defense.

WHEREFORE, the undersigned respectfully requests this Honorable Court reconsider and rescind the Court's Order Granting Motion for Release on Supersedeas Bond.

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By: s/ASHLEY D. TERWILLEGER
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to JOHN S HAGER, HAGER AND SCHWARTZ P.A., 140 SOUTH BEACH STREET SUITE 310, DAYTONA BEACH, FL 32114 and JASON T FORMAN, P.A., 110 SE 6TH STREET, SUIT 1734, FORT LAUDERDALE, FL 33301, on September 18, 2019.

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