RECEIVED
MAY 20 2015
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2014-001390

THE STATE,

Respondent,

v.

RICHARD TODD CULBERSON,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SUSANNAH R. COLE
Staff Attorney

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

180 Magnolia Street
Spartanburg, SC 29306
(864) 596-2575

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF ISSUE ON APPEAL

The trial court properly denied the defense's motion for a directed verdict on the attempted armed robbery charge when the evidence, viewed in the light most favorable to the State, reasonably proved Appellant's guilt when Appellant attacked Victim in the morning, in a public area, and on the same side of the body as her purse, and her purse was found across the room from the assault.

STATEMENT OF THE CASE

Appellant was indicted for Assault with Intent to Commit Criminal Sexual Conduct, First Degree, Attempted Armed Robbery, Kidnapping, and Assault and Battery First Degree on March 29, 2013 in Spartanburg County. (Indictments) His jury trial was presided by the Honorable Roger L. Couch on June 16, 2014. Appellant was represented by Mathew Shealy, Esq. and the State was represented by Solicitor Barry Barnette. (T. p. 1.) Appellant was found guilty of all four charges. (T. part 2, p. 138, lines 6-18.) Judge Crouch sentenced Appellant to ten years' imprisonment for the Assault and Battery First Degree, and twenty years' imprisonment for the remaining three charges, all to run concurrently. (T. part 2, p. 146, lines 14-21.) This appeal follows.

STATEMENT OF FACTS

Victim, an employee of Carolina Ob-Gyn for approximately thirty years, arrived early to work on the morning of January 24, 2013. (T. p.142, lines 9-16.) She was meeting a maintenance man before the office opened at 8:00 a.m., and she arrived around 7:05 a.m. (T p. 144, lines 12-18.) Victim was wearing scrubs, a corduroy coat, and gloves. (T. p. 144, lines 22-24.) Her purse was on her right arm. (T. p. 148, lines 5-7). Victim walked to the entrance of the building. (T. p. 146, line 12.). She felt a tug on her coat, and as she turned, Appellant stabbed her in the right shoulder with a screwdriver. (T. p.146, lines 2-313-16.) Appellant grabbed Victim's breast, and pushed her against the glass door. Victim testified at this point she didn't know where her purse was. (T. 146, lines 19-23.) She struck her head and back on the glass, and slid down to the floor. (T. p. 146, lines 24-25.) As Victim was lying on the ground, Appellant started pulling at the waistband of her pants. (T. p. 147, lines 3-4.) When Victim realized what Appellant was doing, she began kicking him. (T. p. 147, line 7.) Appellant stabbed Victim again on her right side under her rib, and "that's about the last thing I knew." (T. p. 147, lines 8-9.) Victim testified she was in shock, and didn't know how long she was lying on the ground. (T. p. 161, lines 13-18.) She was found later by an elderly couple who called 911. (T. p. 147, lines 12-13.). Her purse was found on the opposite corner of the room, diagonally across from where Victim was attacked. (T. p. 151, lines 11-19.)

Victim was able to describe her attacker to law enforcement. (T. p.168, lines 10-11.) A BOLO went out that morning with Appellant's description. (T. p. 258, lines 10-12) At one point, city officers stopped Appellant four miles away for questioning about another matter, but let him go. (T. 195, lines 11-16.) Officers found Appellant again later that day and recognized him from the BOLO. (T. p. 259, lines 7-12.) The officer

obtained his identification, but did not yet detain him, and Appellant walked across the street to another business. (T. p. 261, lines 1-10.) When officers followed Appellant across the street, they were told by the employees of the business that Appellant had exited the rear of the building. (T. p. 262, lines 1-12.) When officers arrived at his address, which was his parent's house, they found Appellant's mother cutting his hair (T. p. 214 lines 15-21.) Investigators also found the hoodie and jacket that matched the Victim's description. (T. p. 217, lines 18-19.) Appellant was taken into custody and arrested later that day. (T. 218, lines 5-6.) Victim was able to identify Appellant from a photo lineup. (T. p. 197, lines 1-25.)

ARGUMENT

The trial court properly denied the defense's motion for a directed verdict on the attempted armed robbery charge when the evidence, viewed in the light most favorable to the State, reasonably proved Appellant's guilt when Appellant attacked Victim in the morning, in a public area, and on the same side of the body as her purse, and her purse was found across the room from the assault.

In his appeal of his conviction for attempted armed robbery, Appellant argues the trial court should have granted defense's motion for a directed verdict. The trial court, finding sufficient evidence of his intent to rob Victim from the locus of his attack and the final resting place of her purse, properly sent the charge to the jury to determine his guilt on the attempted armed robbery charge, in addition to three others[1].

When ruling on a motion for a directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999); State v. Wakefield, 323 S.C. 189, 197, 473 S.E.2d 831, 835 (Ct.App.1996). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury. State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001). On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis. State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402, 409 (2013) (quoting State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004) (citations and internal quotations omitted)

---

[1] Appellant has not challenged his kidnapping, assault and battery, and assault and battery with intent to commit criminal sexual conduct convictions on appeal, and has a concurrent, aggregate twenty-year sentence based on his other convictions. His appeal, even if granted, does not change his circumstances from a practical standpoint. In Benton v. Maryland, 395 U.S. 784 (U.S. 1969) the Supreme Court concluded that the concurrent sentence doctrine could not, be justified on mootness grounds but stated that it "may have some continuing validity as a rule of judicial convenience."

"Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." State v. Mann, 560 S.E.2d 776, 781 (N.C. 2002). "Substantial evidence" is evidence that is existing and real, not just seeming or imaginary. State v. McAvoy, 417 S.E.2d 489 (N.C. 1992). Thus, the substantial evidence standard, as used by the courts in Mann and McAvoy requires enough evidence of substance to be reasonably persuasive to a jury of a defendant's guilt, even if another reasonable hypothesis exists, as stated in Hepburn. This is consistent with the United States Supreme Court's observation concerning circumstantial evidence:

> Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt we can require no more.

Holland v. United States, 348 U.S. 121, 137-38 (1955) *cited with approval in* Jackson, at 317 n.9.

In the instant case, the question is whether the State offered substantial evidence of Appellant's intent to rob Victim of her purse, or any other belongings, when he attacked her with the screwdriver. On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. State v. Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001); State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999). By that standard of review, the location of the attack on the right side of her body, where she carried her purse, and the final resting place of the purse support a reasonable hypothesis of Appellant's intent to commit armed robbery.

Likewise, the fact that the attack occurred directly in front of the entry to an urgent care facility, in an open and public area, at around 7:00 am further supports a reasonable conclusion Appellant intended to rob Victim, as opposed to sexually assault her, in an open, public location. The evidence supports another plausible hypothesis: Appellant intended to sexually assault Victim. The existence of such a hypothesis does not entitle Appellant to a directed verdict by Hepburn standards. The State submits, however, that the attempted sexual assault was not an alternative explanation but an additional one.

Robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear." State v. Bland, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995). An attempt to commit a robbery has been defined by our Courts as "the doing of acts towards the commission of a robbery and with such intent, but falling short of actual perpetration of the completed offense". State v. Hiott, 276 S.C. 72, 80. 276 S.E.2d 163, 167 (1981). Additionally, "it must appear that the circumstances were such that the crime would have been robbery had the attempt been successful." In the instant case, the State presented evidence to suggest several crimes would have been committed had Victim not fought off her attacker.

Regarding the element of intent in general, a defendant cannot be convicted unless it is proven he acted with the required criminal intent for a particular criminal offense. State v. Fennell, 340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000). In State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971), the South Carolina Supreme Court examined criminal intent:

> The question of criminal intent with which an act is done is one of fact and is ordinarily for jury determination except in extreme cases where there is no evidence thereon. The intent with which an act is done denotes a state

> of mind, and can be proved only by expressions or conduct, considered in the light of the given circumstances. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred.

(citation omitted). Without an entirely truthful statement of intent by an actor, proof of intent must naturally be determined by inferences from conduct. State v. Haney, 257 S.C. 89, 91, 184 S.E.2d 344, 345 (1971).

Appellant argues because Victim never heard a demand for money, nor was anything taken from her purse, there is no evidence of intent to commit the crime. By comparison, Appellant made no demand for sex, nor was Victim sexually assaulted, but the jury had no trouble finding evidence of Appellant's attempt in that crime. Appellant need not have demanded money if the jury believed he grabbed her purse from her. Similarly, nothing needed to have been missing from her purse for Appellant to have made the attempt. His intent can otherwise be inferred from the evidence presented at trial.

Victim was attacked at the entrance of the building shortly after 7:00 a.m. (T. p. 146, line 12.). She testified her purse was on her right arm. (T. p. 148, line 7.) Appellant approached Victim from behind, and grabbed her coat. (T. p. 146, lines 12-13.) Appellant stabbed Victim in the right shoulder, then stabbed her again in the right side -- the same side of her body as her purse. (T. p. 147, lines 7-8.) Victim testified when she hit her head and he grabbed her breast, she lost track of her pocketbook at some point. (T. p. 146, line 20.) She further testified she was in shock, and remained on the floor for some time before anyone else arrived on the scene. (T. p. 147, lines 11-12.) Her purse, however, was across the room. (T. p. 147, lines 25.) The defense questioned Victim as to whether the "suspect did never attempt to get to your purse or other belongs?" (T. p, 175, lines 19-

20.) Victim stated, "That's – could be." (T. p. 175, line 21.) She did not testify that she dropped her purse; instead, she was consistent in her testimony she did not recall how her purse landed across the room. Victim's purse traveled by some means, and it was for the jury to decide if Appellant took it from her in the scuffle or if she threw it somehow with her injured right shoulder.

Appellant asks the court to see the forest and ignore the trees, as if indication of intent of one crime necessarily precludes intent of another. The evidence supporting the attempted sexual assault, kidnapping, and assault and battery arguably overshadows the evidence supporting the attempted armed robbery, but it should not diminish its existence. Put another way, suppose Appellant did not grab Victim's breast and the waistband of her pants, and Victim was only attacked with the screwdriver, and her purse was found lying across the room. Suppose the attack also occurred in an open, public location. A court would likely have no trouble finding sufficient evidence of an attempted armed robbery to send the charge to the jury. In this case, the evidence of the attack supports Appellant's intent to commit multiple crimes. Though he may have abandoned his efforts to rob and sexually assault Victim, there is sufficient evidence Appellant intended to take Victim's property from her, in addition to committing the other crimes for which he was charged. Thus, the jury, as the finder of fact, could have fairly and logically deduced from the evidence presented by the State Appellant intended to rob and sexually assault Victim when he began his attack.

CONCLUSION

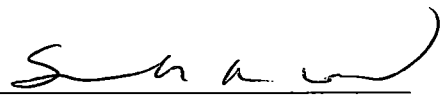
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

SUSANNAH R. COLE
Staff Attorney

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

BY: 
Susannah R. Cole
Bar # 68383

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

May 20, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable Roger l. Couch, Circuit Court Judge

Appellate Case No. 2014-001390

THE STATE,

Respondent,

v.

RICHARD TODD CULBERSON,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tiffany L. Butler, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 20th day of May, 2015.

Anne Mueller

ANNE MUELLER
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727