ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County
Honorable G. Thomas Cooper, Circuit Court Judge
Appellate Case Tracking No. 2016-000672

The State, Respondent,

vs.

Michael Antwon Fuller, Appellant.

FINAL BRIEF OF RESPONDENT

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Solicitor, Second Judicial Circuit

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in refusing to allow testimony regarding the victim's prior DUI convictions because it did not establish bias or motive, was not relevant, and was prejudicial.

II. The trial court did not err in placing Appellant on the sex offender registry because the jury's verdict of not guilty on the criminal sexual conduct does not preclude a finding the kidnapping included a criminal sexual offense or an attempted criminal sexual offense.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Katie Schlinger, the victim, came from Tallahassee, Florida to Aiken, South Carolina because her brother was in the hospital for open-heart surgery. (T.472; 475; R.233; 236). Before the weekend was over, Katie was in the hospital with fractures to her C-3 and C-6 vertebrae, as well as other cuts and abrasions. (T.395; 397; 407; R.156; 158; 168).

After a long day in the hospital waiting for her brother's surgery to be completed, Katie, her family, and her boyfriend all end up back at the hotel where they were staying. (T.478-479; R.239-240). After getting food, several in the party including Katie, her boyfriend, and her step-father went to the hotel bar, where she had two glasses of wine and a fireball shot over several hours from 10:00 pm until the bar closed for the night. (T.482; R.243). When they got back to their room, Katie and her boyfriend had a fight because he was upset she had spent so much time with her step-father, whom she rarely got to see. (T.483; State's Exhibit 31; R.244). Katie indicated she was in no way injured as a result of the brief altercation with her boyfriend. (T.510; R.271).

Katie left her hotel room and went to her car. Her boyfriend followed, demanding she head back to the room or he was going to leave. She let him leave and remained in the car. (T.484-485; R.245-246). She went to the store to buy some cigarettes and wine, intending to drink a couple glasses of wine, smoke some cigarettes and go to bed. (T.485; State's Exhibit 30; R.246).[1] She drove to a BP gas station close to the hotel to purchase the items. She never drank any of the wine she purchased. (T.489; R.250).

While Katie was at the BP station, so were Appellant and Dominique Paige in Appellant's grandmother's vehicle. (T.607; 612; R.368; 373). Appellant went into the store and

[1] State's Exhibit 30 clearly shows Katie able to walk and function without any signs of intoxication. (State's Exhibit 30; T.505-506; R.266-267).

upon exiting saw Katie in her blue Dodge Durango. (T.320; 612; State's Exhibit 17; R.81; 373). After pumping gas, Appellant got back into the vehicle with Paige and stated "he was going to get" Katie. (T.613; R.374). The two leave following Katie, and ultimately switch seats so Paige is driving. (T.613-614; R.374-375). Katie returned to the hotel parking lot, and Paige pulled in the side parking lot of the hotel. (T.615; R.376). Appellant got out of the vehicle and headed toward Katie. Paige drove around the hotel and saw the two of them talking, and then ultimately saw the blue Dodge leaving with Appellant and Katie. (T.615-616; R.376-377).

Katie was sitting in her blue Dodge when she was approached by Appellant and he asked for a cigarette. (T.486; R.247). Katie indicated she was in town because her brother was in the hospital and Appellant told her a story about his uncle being in the hospital with heart problems. (T.486-487; R.247-248). Appellant asked Katie for a ride to the hospital to visit his uncle, and Katie did not think anything of the request or whether it was visiting hours. (T.487; R.248). Katie drove toward the hospital and when she went to turn into the first entrance, Appellant told her "no, keep going." The same thing happened when they reached the second entrance to the hospital. As Katie continued down the road, she realized they were past all the entrances to the hospital. She turned to tell him that there were no more entrances and realized Appellant held a pistol to her cheek. (T.489; R.250).

Appellant told Katie to drive, and hit her in the head with the pistol. (T.489; R.250). Katie began pleading with Appellant to let her go and just take the car and her money. He again hit her in the head with the gun, told her to shut up and keep driving, and asked if she wanted him to kill her. (T.490; R.251). Katie managed to reach down and open the door and flung herself out of the moving vehicle. She rolled on the ground, and then ran. Appellant managed to stop the car and pursue her, tackling her to the ground. (T.490; R.251). Appellant climbed on top

of Katie and hits her again in the head with the gun. (T.491; R.252). Appellant pulled down his pants and commanded Katie give him oral sex. She kept "spitting out" because she did not want to do it, so instead, Appellant began unbuttoning her pants. Katie begged Appellant to stop and that she would give him the money in her ATM if he would just not rape her. (T.491; R.252).

Appellant then grabbed Katie by the hair, dragged her to the car, and told her to drive. He told her he wanted to go to his friend's house first. (T.491; R.252). Katie could not see anyone in the area to help her, so out of desperation she put the car into reverse to attempt to get to the hospital. Appellant kept hitting her in the back of the neck and head, telling her to stop or he was going to kill her. (T.493; R.254). Katie pushed the gas as hard as she could and crashed the blue Dodge into a tree, causing significant damage to her vehicle. (T.494; State's Exhibit 17; State's Exhibit 18; State's Exhibit 19; R.255). Appellant ended up partially in the back of the vehicle and across the center console. (T.494; R.255). Katie, scared he was going to wake up, crawled out the window and out of the blue Dodge. After hiding for a minute under the vehicle, she tried walking toward the hospital. (T.495; R.256). She hid in some bushes until she saw a vehicle approaching. (T.496; R.257).

Betty Corley, who transported dialysis patients to and from the hospital, drove up in her van to the crash site. (T.284-285; R.45-46). Corley was about to call 911 when Katie came up beating on her window and telling Corley not to go to the car. Katie told her the man in the car had a gun and would kill them. Katie told Corley her name, that Appellant had a gun, and that she was in town visiting her brother. She talked really fast like she was scared. (T.287; R.48). Corley indicated Katie was physically shaking and was clearly "shaken up pretty bad." (T.288; R.49). Corley took Katie to the hospital. At the hospital Katie was still shaken up and telling the nurses that the guy had her and he got a gun and was going to kill her. (T.289; R.50). At that

point, Katie collapsed to the floor. (T.289; R.50). Corley did not believe Katie was intoxicated. She did notice Katie bleeding from the back of her head and her arm. (T.291; R.52).

At the hospital, Katie frantically tried to tell the staff what occurred. A phone call was made to dispatch. Katie kept trying to get behind the security officer's desk while telling them that Appellant was going to kill them. (T.503-504; State's Exhibit 32; R.264-265).

Officer Medlin, with the Aiken Department of Public Safety (ADPS), arrived at the scene after a report of a vehicle collision and a possible man with a gun. (T.300-301; R.61-62). When he arrived Appellant was in the back of the vehicle and appeared unconscious. (T.302; R.63). After other officers arrived they shined lights and yelled at Appellant to rouse him. (T.303; R.64). Appellant exited the vehicle under his own power, climbing over the driver's seat. (T.304-305; R.65-66). In the vehicle near where Appellant originally was located, Officer Medlin located a pistol. (T.306; R.67). Appellant was able to stand and was steady on his feet and did not appear under the influence, though later he would admit smoking marijuana and told authorities he passed out in Katie's vehicle. (T.312-313; State's Exhibit 5; R.73-74).

Officer Drumming, formerly with ADPS, also arrived on scene. He questioned Appellant in his vehicle. During the questioning Appellant indicated he was getting a ride to three different locations. First, he indicated he was getting a ride to his grandmother's house. Then he indicated he asked for a ride to Governor Aiken Park (GAP). Finally, he indicated he was getting a ride to the hospital. (T.370-372; State's Exhibit 4; R.131-133). Officer Drumming did not believe Appellant to be confused or under the influence of anything, instead he felt Appellant changed his story once Appellant was advised they knew of the female in the vehicle. (T.366; 386; R.127; 147).

Katie was seen by Mallory Harmon Smith, a former emergency room nurse. Smith indicated Katie was "very frantic," "very visibly upset," and "very shaken." (T.405; R.166). Katie told the nurse she had given Appellant a ride to the hospital to visit family and that he pulled out a gun on her. Katie told Smith she was trying to get away from Appellant when she wrecked her car. Smith observed lacerations to the back of Katie's head as well as abrasions on her hands and forearms. (T.407; State's Exhibit 28; R.168). Katie also told the nurse that Appellant tried to force himself on her "in and oral, sexual manner." (T.410; R.171). Smith did not press for any more information because she was concerned about Katie's other injuries. (T.410; R.171).

Sergeant Spann met with the victim in the hospital. The victim told him she had been sexually assaulted between the Quality Inn hotel where she was staying and the hospital. (T.450; R.211). He observed grass stains and dirt on her clothing. Further, he did not believe she was under the influence at the time he spoke with Katie. (T.453; R.214).

According to Dr. Dillon, the staff neurosurgeon, Katie had a fracture of her C-3 and a burst fracture of her C-6 which was pushing into the spinal cord. (T.395; R.156). Dr. Dillon surmised the C-6 fracture was consistent with an automobile accident, while the C-3 fracture was consistent with blunt force trauma. (T.397; R.158). After a week or two in the hospital in Aiken, which included surgery to prevent the possibility of permanent paralysis, Katie was transferred to a rehabilitation facility where she had to work on her motor skills walking, speech, memory, and even brushing her teeth. After ten days in rehab in Augusta, Katie finally returned to Tallahassee being transferred to a rehabilitation facility, where she spent another month. (T.500-501; R.261-262).

ARGUMENT

I. The trial court did not err in refusing to allow testimony regarding the victim's prior DUI convictions because it did not establish bias or motive, was not relevant, and was prejudicial.

The trial court did not err in refusing to allow Appellant to cross-examine Katie regarding the number of prior DUI convictions she had because it did not establish bias or a motive to lie. Appellant never established any basis for bias because there was never any deal or promise not to prosecute Katie based on her testimony, nor did her story prevent her from being prosecuted for DUI if the State determined a charge was appropriate. Allowing Appellant to discuss the number of DUI convictions would have been unduly prejudicial and had no probative value. Finally, Appellant was able to fully discuss and raise the fact that DUI is illegal, a person with a blood alcohol content about .08 is presumed intoxicated and could be prosecuted, Katie's blood alcohol level was approximately .9, and that Katie knew driving under the influence was illegal. As a result, there was no harm in preventing the discussion of the level of DUI she faced.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

Rule 608(c), SCRE, provides that "bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c) "preserves South Carolina precedent holding that generally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.' " State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) (quoting State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976)).

Appellant alleges Katie made up the assault and kidnapping in order to avoid being prosecuted for a second or third DUI. He asserts letting the jury know about the fact she has prior convictions for DUI and faced jail time if prosecuted and convicted would establish a bias or motive to lie about the accident. The trial court, however, properly concluded the prior DUI convictions, whether one or two, were irrelevant and not admissible. He correctly determined there was no connection between a motive to lie and the prior convictions. (T.571; R.332).

First and foremost, there is no connection because whether or not she was kidnapped, sexually assaulted, attempted to be sexually assaulted, or crashed to escape Appellant was irrelevant to a possible prosecution for DUI. Nothing prohibited the State from prosecuting her for DUI if the State believed she met the elements for DUI.

Section 56-5-2930 provides:

> It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, or under the combined influence of alcohol and any other drug or drugs or substances which cause impairment to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired.

S.C. Code Ann. § 56-5-2930 (A) (Supp. 2016). The argument presented by Appellant at trial was that Katie was intoxicated and impaired when she offered the ride to Appellant, he passed out, and woke up to find the vehicle crashed into a tree and surrounded by police. Appellant maintains the kidnapping and assault were made up to prevent her from being prosecuted. However, if Katie was shown to be materially and appreciably impaired at the time she offered the ride to Appellant, then she could be prosecuted for DUI without regard to the reasons behind the crash or what took place during the drive. The moment she drove, if there the State believed there was sufficient evidence to warrant charging her based on her being materially and appreciably impaired, the State could have prosecuted her for DUI. Therefore, the trial court correctly determined there was no connection between the prior convictions for DUI and any motive to lie about what took place along the drive because it would be completely irrelevant to whether she could be prosecuted for DUI.

Additionally, the number of prior convictions and amount of jail time she faced would be completely irrelevant and unduly prejudicial. As discussed, there was no evidence of a motive to lie based on the fact she could have still be charged with DUI. Additionally, Appellant has provided zero evidence of any kind of deal or promise in which the State agreed not to prosecute her for DUI. He is trying to create a bias based on hypothetical charges that did not exist at the time and there is no indication Appellant had any knowledge of any penalties she would have faced for conviction.

The cases cited by Appellant are completely inapposite to the situation at hand. In State v. McEachern, 399 S.C. 125, 731 S.E.2d 604 (Ct. App. 2012), the defendant provided financial support to the witness as well as assistance to the witness's mother. The Court found that the

testimony was relevant to show a bias in favor of the defendant.[2] Unlike the instant case, the Court found a connection between the testimony of the financial assistance and assistance to the witness's mother and the likelihood the witness would testify favorably to the defendant for providing that assistance. The common sense connection was clearly established in McEachern unlike in this case.

In State v. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002), the Court found that defense counsel should have been allowed to explore the pending charges faced by a testifying witness. In that case, the witness was a jailhouse snitch who had been promised by the State that if he testified against the defendant, the State would make his judge aware of his cooperation. The Court found: "There was the substantial possibility Peterson would give biased testimony in an effort to have the solicitor highlight to his future trial judge how he had cooperated in the instant case. The excluded evidence had "a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity" of Peterson's testimony." Sims, 348 S.C. 16, 25-26, 558 S.E.2d 518, 523 (quotation omitted). The clear connection in Sims was established because of the agreement to make the witness's future judge aware of his cooperation and the expectation of a lighter sentence when faced with the possibility of a life sentence. In the instant case, there is no agreement not to prosecute Katie for DUI, and absolutely no indication any decision not to prosecute was based upon the kidnapping and assaults occurring.

Additionally, there is no indication Katie knew she faced any further penalties based on the number of convictions on her record. Any alleged bias being created based on the allegation of it being her third offense is mere speculation because there was no indication Katie knew it was her third offense or knew it would result in a greater penalty. This fact clearly distinguishes this case from Sims or State v. Gracely, 399 S.C. 363, 373, 731 S.E.2d 880, 885 (2012) and other

[2] The Court also noted, even if it were error, it was cumulative to other evidence.

similar cases where the witness has been charged with crimes carrying specific known sentences. Any charges and possible sentences are pure hypotheticals in this case. Any connection in this case is mere speculation at best and entirely lacks the common sense connection found in McEachern and Sims.

Finally, the possibility Katie faced prosecution was extensively discussed by Appellant's trial counsel. He spent considerable time questioning the officers involved regarding the law on DUI, when someone can be arrested, the applicable blood alcohol content limits, and the possible penalties for DUI convictions. For example, in questioning Officer Medlin, Appellant asked whether the Katie was arrested or if they had investigated her possible intoxication. Officer Medlin admitted Katie could have been arrested if she met the requirements, even if she were the victim of Appellant's crimes. (T.333-334; R.94-95). Officer Medlin acknowledged that if a person is driving under the influence and sufficiently injures another person they could be prosecuted for felony DUI. (T.335-336; R.96-97). Additionally, Appellant cross-examined Sergeant Spann extensively regarding DUI and DUI requirements. Sergeant Spann indicated a person could be arrested for DUI if there driving is materially and appreciably impaired and are presumed such if they have over a .08 blood alcohol content. He was also extensively questioned about his investigation into Katie's possible intoxication. (T.455-460; R.216-221). However, Sergeant Spann, who had considerable training in DUI detection and made numerous DUI arrests, indicated based on his training and experience that Katie was not under the influence of alcohol. (T.453; R.214).

Katie was cross-examined about her knowledge that driving under the influence is illegal and that she could have been arrested for DUI if she were found under the influence at the time of the accident. (T.552; R.313). Appellant was also able to discuss Katie's past alcohol

problems including the fact she was a recovering alcoholic. (T.573; R.334). There was no need to further unduly prejudice the witness by further impugning her character when Appellant could provide no connection between the past DUI and the current incident and the prior convictions have minimal if any probative value. See Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

Finally, Appellant presented an expert to testify regarding the blood alcohol content found in Katie's medical records. He extrapolated a range of Katie's blood alcohol content at the time of the accident based on the lapse of time between the accident and the time when the blood was taken at the hospital. His range indicated her level would have been above the presumption of .08. As a result, Appellant sufficiently established the possibility Katie could have been charged with DUI. This fact, however, existed whether or not she was kidnapped or assaulted while driving. Through significant testimony, the jury was made well aware there was a possibility Katie could have been investigated and prosecuted but was not. There was no indication, however, the reason she was not prosecuted was because of her being kidnapped and assaulted. Instead, it is more likely the lack of prosecution was because the witnesses having direct contact with her indicated she did not appear intoxicated including Corley, Nurse Smith, and Sergeant Spann. Accordingly, the trial court did not err in refusing to allow Appellant to impugn Katie's character by asking about past DUI convictions.

II. The trial court did not err in placing Appellant on the sex offender registry because the jury's verdict of not guilty on the criminal sexual conduct does not preclude a finding the kidnapping included a criminal sexual offense or an attempted criminal sexual offense.

The trial court properly exercised its discretion in requiring Appellant to be on the sex offender registry notwithstanding the jury's verdict of not guilty on the charge of criminal sexual conduct (CSC). First, the finding of not guilty does not preclude a finding that the kidnapping included a criminal sexual offense or an attempted criminal sexual offense to require the judge to find Appellant should not be placed on the registry. Further, even if the jury's not guilty verdict on the CSC was determinative of whether it included a criminal sexual offense, it did not preclude the trial court from finding the kidnapping included an attempted criminal sexual offense.

Pursuant to section 23-3-430 of the South Carolina Code, any person who has been convicted of an enumerated offense shall be placed on the sex offender registry. S.C. Code Ann. §23-3-430(A) (Supp. 2016). One such stated offense is "kidnapping (Section 16-3-910) of a person eighteen years of age or older except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense." S.C. Code Ann. § 23-3-430(C)(15) (Supp. 2016). The determination of whether the kidnapping involved a criminal sexual offense or an attempted criminal sexual offense is one for the trial judge and should not be reversed absent an abuse of discretion. See e.g., State v. Dawson, 402 S.C. 160, 163, 740 S.E.2d 501, 502 (2013) ("A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law."); Hazel v. State, 377 S.C. 60, 659 S.E.2d 137 (2008).

In this case, the State asked the court to find it included a sexual offense and Appellant's trial counsel asked that the court make a finding that it did not. Appellant's trial counsel argued the court should use the jury's not guilty verdict on the CSC to find Appellant should not be required to register. (T.1038; R.799). The State argued that if a kidnapping conviction was dependent on a separate conviction for CSC to be included on the registry, then there would be no need to have kidnapping listed because the CSC would automatically require registration. (T.1047-1048; R.808-809). The trial court concluded, notwithstanding the jury's verdict on the CSC, that it was within his discretion, after considering all the evidence, whether Appellant should be required to register on the sex offender registry, and ultimately placed Appellant on the registry. (T.1047; 1049; R.808; 810).

The jury's finding does not preclude a determination by the trial court the kidnapping included a criminal sexual offense or an attempted criminal sexual offense. First, the most that can be inferred from the jury's verdict is that the State failed to prove every element of CSC beyond a reasonable doubt. As our Supreme Court has noted: "Under our system of justice, it is possible for the state to fail to prove beyond a reasonable doubt every fact necessary to constitute the elements of the crime charged even though a defendant has admitted the underlying facts of the crime." Solomon v. State, 347 S.C. 635, 640, 557 S.E.2d 666, 669 (2001). Further, it is clear there is a distinction between factual innocence and legal insufficiency resulting in a not guilty verdict. See, e.g., Bousley v. United States, 523 U.S. 614, 623 (1998). Moreover, it is not the jury's role to determine what actually occurred, but instead to determine whether the State has met its burden of proving the elements of the offense beyond a reasonable doubt. See e.g., State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000).

Additionally, the United States Supreme Court (USSC) has recognized that a not guilty verdict does not indicate innocence, but could occur for other reasons. In Dunn v. United States, the USSC, in examining inconsistent verdicts, explained the not guilty verdict could be the result of lenity, compromise, or of a mistake. Dunn v. United States 284 U.S. 390, 393-394 (1932). The USSC has also stressed "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons." Harris v. Rivera, 454 U.S. 339, 346 (1981).

Even if the finding of not guilty meant the State failed to prove every element, it would not preclude the judge from determining the kidnapping included a criminal sexual offense or attempted criminal sexual offense. In the situation discussed in Solomon, if the jury found the defendant not guilty of CSC even though the defendant readily admitted the kidnapping included the sexually violent offense, the trial court certainly could refuse to exclude the kidnapping from the registry.

In the instant case, the jury could have found no sexual battery actually occurred because the evidence indicated Appellant commanded Katie to give him oral sex "[a]nd [she] kept spitting out because I didn't want to do it." (T.492; R.253). The jury could have understood this to mean he did not actually complete the sexual battery. Further, Katie acknowledged Appellant started unbuttoning her pants, but never actually engaged in sexual intercourse with her. (T.492; R.253). The jury could have determined, just as could the trial judge, Appellant attempted to commit the CSC, but did not successfully complete the sexual battery. The jury could find that he intended to commit CSC and even pinned Katie to the ground in an effort to complete the act, but was unable. As a result, the jury's finding of not guilty as it related to CSC does not preclude a finding that Appellant committed an attempted CSC, see e.g., S.C. Code Ann. § 16-1-80 (Supp. 2016), or either an assault with intent to commit CSC, see e.g., S.C. Code Ann. § 16-3-656

(Supp. 2016); State v. Ervin, 333 S.C. 351, 510 S.E.2d 220 (Ct. App. 1998) (finding elementally, the offense of assault with intent to commit first-degree criminal sexual conduct is analyzed as: (1) an assault, and (2) criminal intent to commit criminal sexual conduct in the first degree), both of which are sufficient to satisfy the requirement the kidnapping include a criminal sexual offense or an attempted criminal sexual offense.

Appellant cites to Thompson v. State, 415 S.C. 560, 785 S.E.2d 189 (2016) for the proposition that it is best for the sentencing court to make the determination regarding the character of a kidnapping offense and not leaving it for a later declaratory judgment action. He also asserts the defendant should be given a meaningful opportunity to be heard. The State completely agrees. Further, the Thompson Court makes it clear the victim's opinion is to be considered as well in the determination. Appellant had a full opportunity to be heard, as did the victim. The trial court specifically indicated he was considering all the evidence presented in reaching his conclusion. As a result, he followed the requirements of Thompson exactly as intended by the Court.

Additionally, Appellant cites to Edwards v. SLED, 395 S.C. 571, 720 S.E.2d 462 (2011), a case in which the defendant was ultimately granted a pardon for his underlying crime. In that case, the statute specifically required a pardon to relieve someone of their burden to register. Currently, in order for Appellant to be relieved of his burden to register, he would have to receive a pardon based on a not guilty finding for his kidnapping conviction. This is not the same as a determination initially as to whether that kidnapping conviction involves a sexual offense or an attempted sexual offense.

In this case, there was certainly evidence presented in the record to support the trial court's decision the kidnapping included an attempted criminal sexual offense even if it did not

include a criminal sexual offense. As a result, the trial court did not abuse his discretion in requiring Appellant to register on the sex offender registry.

CONCLUSION

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

Respectfully submitted,

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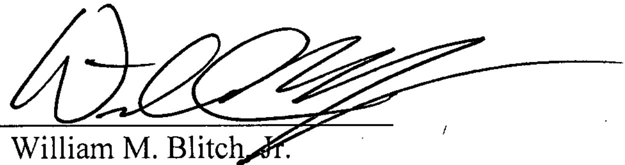

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August 31, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County
Honorable G. Thomas Cooper, Circuit Court Judge
Appellate Case Tracking No. 2016-000672

The State, Respondent,

vs.

Michael Antwon Fuller, Appellant.

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."

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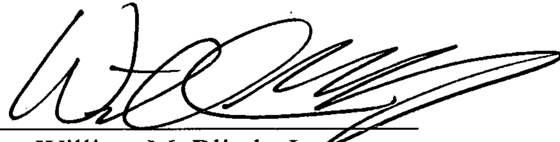

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