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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Horry County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALQI DHIMO,

APPELLANT

APPELLATE CASE NO 2018-000110

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to grant appellant a directed verdict on the charge of attempted third degree criminal sexual conduct where it was undisputed the complainant was voluntarily engaging in foreplay with appellant prior to being found unconscious on the beach, where there was no direct evidence and no substantial circumstantial evidence that appellant attempted to commit an overt sex act on a physically helpless, mentally defective, or mentally incapacitated person?

STATEMENT OF THE CASE

Appellant was indicted by an Horry County Grand Jury on September 17, 2015, for attempted third degree criminal sexual conduct. R. p. *. The indictment alleged that on June 22, 2015, appellant attempted to engage in a sexual battery with J.K., when he knew or had reason to know she was mentally defective, mentally incapacitated or physically helpless. R. p. *. Appellant was also indicted for indecent exposure.

Appellant proceeded to trial before the Honorable Steven H. John and a jury January 8 – 10, 2018. Tr. II, 1. Appellant was represented by John Reuben Long, II, and the state was represented by Mary Ellen Walter and C. Leigh Andrew. Tr. II, 1. Appellant was found not guilty of indecent exposure, but was found guilty of attempted third degree criminal sexual conduct and was sentenced to incarceration for eight years and ordered to register as a sex offender. Tr. II, 403, ll. 10-13; R. p. *.

This appeal follows.

STANDARD OF REVIEW

"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. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *State v. Larmand*, 415 S.C. 23, 29, 780 S.E.2d 892, 895 (2015). "In ruling on a motion for a directed verdict, a trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Reid*, 383 S.C. 285, 292, 679 S.E.2d 194, 197 (Ct. App. 2009).

If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011); *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402, 409 (2013). "The trial judge should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984).

ARGUMENT

The trial court erred in refusing to grant appellant a directed verdict on the charge of attempted third degree criminal sexual conduct where it was undisputed the complainant was voluntarily engaging in foreplay with appellant prior to being found unconscious on the beach, where there was no direct evidence and no substantial circumstantial evidence that appellant attempted to commit an overt sex act on a physically helpless, mentally defective, or mentally incapacitated person.

Statement of facts

J.K., the complainant, passed away from a heart attack in November 2015, prior to appellant's trial. Tr. II, 59, l. 13 – 60, l. 1.

On June 21, 2015, the twenty-two-year-old complainant was drinking alcohol at a barbeque in Myrtle Beach while only dressed in a bathing suit and tank top, which is the way she remained dressed throughout the evening. Tr. II, 55, l. 24 – 56, l. 3; Tr. II, 56, l. 24 – 57, l. 3; Tr. II, 56, ll. 8-9. The complainant left the party with her boyfriend around 10:00 p.m. but the couple got in "an argument over cigarette smoke in the car and the music." Tr. II, 57, ll. 6-7. The complainant hit her boyfriend while he was driving, so he became upset and pulled over. Tr. II, 57, ll. 9-10. The complainant got out of the car and her boyfriend followed her, but she kicked the car and he eventually drove away. Tr. II, 57, l. 10 – 58, l. 1.

Alqi Dhimo, the appellant, was from Albania but had been a taxi cab driver for about fifteen years. State's exhibit #3.[1] The complainant flagged down appellant's taxi. State's exhibit #16. Video footage of much of the interaction between appellant and the complainant was

[1] State's exhibit #3 is a CD of appellant's interview with law enforcement and is on file with this Court.

captured on the dashboard camera (dash-cam) of appellant's taxi cab and comprises State's exhibit #16, which is on file with this Court.[2] Appellant had no prior criminal record. Tr. II, 343, ll. 1-3.

The dash-cam footage shows that the complainant got in the back seat of appellant's cab, said she was going to 77th Avenue, and offered that she had a fight with her boyfriend. State's exhibit #16. The recording stopped but resumed thirty minutes later. State's exhibit #16. The state believed the two went to a bar in the intervening minutes, and presented the testimony of a bartender at Jimmagan's Pub who said he remembered serving appellant and the complainant three or four shots of Crown Royal Apple that night, and that it looked like they were on a date. Tr. II, 133, ll. 7-10; Tr. II, 136, l. 23 – 137, l. 18; Tr. II, 140, ll. 6-8

The dash-cam footage showed that upon reentering the cab after leaving Jimmagan's, the complainant sat in the front seat beside appellant. State's exhibit #16. The video showed the two driving around for about twenty minutes and engaging in foreplay. State's exhibit #16.

The footage showed the complainant repeatedly telling appellant, "I love you," appellant saying, "I love you," in response, and the two kissing. State's exhibit #16. Officer Williamson agreed the video reflected the complainant scratching appellant with her fingernails in a "loving manner," caressing his body, licking his face, and rubbing his crotch. Tr. II, 174, l. 9 – 175, l. 7. Appellant suggested the two go to the beach and said, "Let me love you." State's exhibit #16.

The video reflects that the complainant told appellant he was a "good kisser" and was "fucking hot." State's exhibit #16. At times, the complainant said "stop" or "not now," but continued to reinitiate foreplay with appellant afterwards. State's exhibit #16. This went on for

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[2] The dash-cam was installed in appellant's cab as a condition of bond when appellant was charged with first degree criminal sexual conduct in 2014. Tr. I, 20, ll. 19-23.

about twenty minutes, until the complainant exited the cab to urinate, reentered the cab on the driver's side, briefly drove the taxi cab, and stopped at the beach. State's exhibit #16.

The state argued the complainant appeared to pass out after she parked the cab, when her head hung down. Tr. II, 364, ll. 13-16. Nevertheless, the two exited the vehicle. State's exhibit #16.

Subsequently, security guards reported a man lying on his side on the beach wearing only a shirt, and said he might have someone with him. Tr. II, 115, ll. 5-6. Tr. II, 117, ll. 4-25. According to security guards, the man said to stop and not come any closer. Tr. II, 114, ll. 2-3. None of the security guards reported seeing physical contact between appellant and the complainant. Tr. II, 123, ll. 13-15; Tr. II, 132, ll. 2-4. One of the security guards said appellant was "leaning over" the complainant when he stood up. Tr. II, 126, ll. 8-11; Tr. II, 127, ll. 10-11.

Detective Daniel Eddy went to the beach in response to the call from the security guards—Eddy turned on his body-worn camera to record the incident.[3] Tr. II, 66, ll. 7-25. Detective Eddy could not tell if appellant was intoxicated due to his accent, and appellant was clothed by the time Eddy arrived. Tr. II, 70, ll. 5-7; State's exhibit #36.

The complainant was unconscious on the beach, lying on her side with her bikini bottom pulled to the side and her privates exposed. Tr. II, 67, l. 7-18. The complainant's swimsuit was not ripped or torn. Tr. II, 104, ll. 13-19. The defense argued her bikini bottom could have been pulled to the side by the complainant when she earlier urinated off-camera. Tr. II, 176, ll. 12-20. According to Detective Eddy, the complainant smelled of alcohol. Tr. II, 68, l. 2. Officers awakened her with smelling salts, and she refused to go to the hospital. Tr. II, 68, ll. 3-4; Tr. II, 105, ll. 1-6.

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[3] The footage from officers' body-worn cameras comprises State's exhibit #36 and is on file with this Court. Tr. II, 8, l. 24.

The complainant was briefly recorded by an officer's body camera in an ambulance, and she repeatedly said, "This is embarrassing." State's exhibit #36. After an officer told her she may have been sexually assaulted, the complainant replied, "I'm not; I don't want to be; No, I have not." State's exhibit #36.

Officers arrested the complainant for public drunk and appellant for indecent exposure. Tr. II, 77, ll. 14-18; Tr. I, 58, ll. 11-14. According to a forensic toxicologist, the complainant's blood alcohol concentration was 0.169 percent and using retrograde extrapolation, would have been about 0.334 eleven hours earlier (when officers saw her on the beach). Tr. 214, ll. 10-16; Tr. II, 217, l. 23 – 218, l. 10.

Appellant did not try to flee and he cooperated with police officers. State's exhibit #36. Appellant gave a somewhat unintelligible statement to law enforcement, due to his Albanian accent and possibly due to intoxication.[4] State's exhibit #3. The state argued appellant's statement was suspicious, because he "didn't mention any of the physical contact" with the complainant in the taxi and said he had turned on the fare meter but had not. Tr. II, 369, ll. 2-3; Tr. 369, ll. 19-20.

Detective Hugh Jones, who was assigned the next day to follow up on the case, met with the complainant and **incorrectly** told her that appellant was "arrested for indecent exposure for **being on top of her**, and her being exposed . . ." Tr. I, 47, ll. 11-16; Tr. I, 48, ll. 2-6; Tr. I, 59, ll. 15-18 (emphasis added). After speaking with Jones, the complainant agreed to go to the hospital for a sexual assault exam. Tr. II, 323, ll. 1-8.

Medical personnel performed a rape kit on the complainant Tr. II, 198, ll. 4-11. Hospital staff called the complainant's mother, and her mother was present during the exam. Tr. II, 205,

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[4] The poor quality of the recording and the complainant yelling in the background contribute to the confusion. State's exhibit #3.

ll. 18-23. Appellant had what appeared to be scratches and bite marks on his arms, and his DNA was found in fingernail scrapings from the complainant's right hand. Tr. II, 68, ll. 22-25; Tr. 247, ll. 1-9. However, a forensic serologist from SLED testified the complainant's rape kit was negative for sperm or semen. Tr. II, 222, ll. 6-9; Tr. II, 234, ll. 16-23.

Defense counsel moved for a directed verdict at the close of the state's case, and argued the state failed to present "substantial circumstantial evidence proving that there was any type of touching or attempted touching on the beach . . ." Tr. II, 335, ll. 13-17. Defense counsel argued, "There's no proof of the mens rea of attempted CSC third, that he consciously intended the completion of any overt act constituting an attempt of criminal sexual conduct. No evidence proves that there was an overt act committed in the effort to commit the crime." Tr. II, 335, ll. 21-25. Defense counsel correctly noted, "The State has failed to give any direct or substantial circumstantial evidence proving that there was any type of touching or attempted touching on the beach . . ." Tr. II, 335, ll. 13-16.

The state argued that the video showed the complainant "passed out," in the cab when the video ended, and that appellant was seen nude lying on the beach beside her. Tr. 337, ll. 19-25. Defense counsel said, "That's a misrepresentation of the facts, Your Honor." Tr. II, 338, ll. 1-2.

The solicitor argued the complainant's bathing suit bottom was pulled to the side revealing her privates, and **incorrectly** told the trial judge that Detective Eddy had testified the complainant "had red marks on her inner thighs." Tr. II, 338, ll. 12-14. Although Hugh Jones said during pretrial motions that he thought Detective Eddy had seen marks and abrasions around the complainant's genitalia, the state did not present any evidence of this at trial.[5] Tr. I, 61, ll. 6-

[5] During pretrial, Hugh Jones also claimed that according to Detective Eddy, the complainant's bikini bottom was on backwards. Tr. I, 61, ll. 12-16. No evidence of this was presented at trial, and Detective Eddy testified at trial. Tr. II, 2, l. 11.

11. Nevertheless, the solicitors argued to the jury in opening statement and in closing argument that the complainant had red marks and abrasions near her genitals, despite no evidence of this being presented at trial. Tr. II, 44, ll. 23-25; Tr. II, 362, ll. 13-15.

The state also argued the marks on appellant's arms and his DNA under her fingernails contributed to "enough" evidence. Tr. II, 338, l. 22 – 339, l. 9. The court denied defense counsel's directed verdict motion and stated there was "some direct evidence and clearly **enough** circumstantial evidence." Tr. II, 340, ll. 10-18 (emphasis added).

Defense counsel argued in closing that just because the complainant had gotten drunk and lost her inhibitions in the taxi did not mean that appellant later attempted to commit a sexual battery upon her. Tr. II, 374, l. 24 – 375, l. 8; Tr. 377, l. 25 – 378, l. 1.

Appellant was found guilty of attempted third degree criminal sexual conduct and was sentenced to eight years' incarceration and ordered to register as a sex offender for life. R. p. *. The jury found appellant not guilty of indecent exposure. Tr. II, 403, ll. 10-13.

Discussion

The trial court should have granted appellant a directed verdict because the evidence only raised a suspicion appellant was guilty. "The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *Id.*

"[A] jury weighs evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). When the state relies exclusively on circumstantial evidence, the trial court should direct a verdict in favor of the defendant unless the circumstantial evidence is substantial. *Id.*

Substantial circumstantial evidence is evidence which "reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." *Id.*

In *State v. Rogers*, 405 S.C. 554, 564, 748 S.E.2d 265, 270 (Ct. App. 2013), this Court explained, "[D]irect evidence is that which requires only the factfinder's determination that the evidence is credible before it may find the existence of a disputed fact." "Direct evidence is based on personal knowledge or observation and, *if true*, proves a fact without inference or presumption." *Id.* at 563, 748 S.E.2d at 270 (internal alterations and quotations omitted) (emphasis in original).

If, for example, the state had presented eyewitness testimony that appellant pulled the complainant's bikini bottom to the side and attempted to sexually assault her, this would be direct evidence, since the jury would only have to determine the testimony was credible in order to conclude that a fact in issue had been proven.

"Circumstantial evidence, on the other hand, requires the factfinder not only to determine that it believes the evidence, but also to make at least one additional inference from the evidence before concluding the fact has been proven." *Id.* at 564, 748 S.E.2d at 270. Evidence is circumstantial, rather than direct, where "[a]t least one additional inference is necessary before any of the evidence proves [the offense]." *Id.*

Appellant was tried for attempted third degree criminal sexual conduct. "The law does not concern itself with mere guilty intention, unconnected with any overt act." *State v. Quick*, 199 S.C. 256, 19 S.E.2d 101, 102 (1942). "To prove attempt, the State must prove that the defendant had the *specific intent* to commit the underlying offense, along with some *overt act,* beyond mere preparation, in furtherance of the intent." *State v. Reid*, 393 S.C. 325, 329, 713

S.E.2d 274, 276 (2011) (citing *State v. Nesbitt,* 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001)) (emphasis in original).

Although, as this Court noted in *State v. Reid*, 383 S.C. 285, 293, 679 S.E.2d 194, 198 (Ct. App. 2009), "South Carolina jurisprudence in the area of attempt law is sparse," the appellate courts of this state have discussed the overt act requirement in the directed verdict context. *State v. Nesbitt*, 346 S.C. at 235, 550 S.E.2d at 868 (approaching a convenience store masked and armed constituted an overt act for purposes of attempted robbery); *State v. Reid*, 393 S.C. at 330-31, 713 S.E.2d at 277 (agreement to meet fictitious minor at designated place and time, coupled with traveling to that location, may constitute overt act); *State v. Rallo*, 304, S.E.2d 258, 269, 403 S.E.2d 653, 659 (1991) (Toal, J., dissenting) (in prosecution for attempted criminal sexual conduct with a minor, overt act met where defendant told twelve-year old boy he wished to perform fellatio on the boy and grabbed at the boy's crotch); *State v. Quick*, 199 S.C. at 256, 19 S.E.2d at 102-03 (in trial for unlawful manufacture of intoxicating liquor, no overt act where defendant was stopped driving down a dead-end road one hundred yards away from stills on his land with five hundred pounds of sugar, a sack of mill feed, and three cases of yeast cakes in his automobile).

In *State v. Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 405 (2001), the South Carolina Supreme Court concluded that in a prosecution for murder and attempted armed robbery, evidence the accused was near the crime scene, was with two others where three people were seen running towards the crime scene around the time of the incident, and evidence that the accused's codefendants had earlier talked about getting a "lick" and getting some "cheese" was not substantial and merely raised a suspicion of guilt. Here, like in *Buckmon*, the circumstantial evidence relied upon by the state is not substantial and merely raises a suspicion of guilt.

The state did not present direct evidence or substantial circumstantial evidence that appellant committed an overt act in an attempt to commit criminal sexual conduct. The evidence presented by the state proves only that: (1) appellant wanted to "love" the complainant on the beach; (2) appellant was partially nude near the complainant on the beach; (3) the complainant's swimsuit was pulled to the side; and (4) at some point the complainant became unconscious.

While appellant was undoubtedly at the scene when the complainant was found unconscious, there was no evidence appellant attempted to or even intended to sexually batter the complainant while she was in that state. The state's circumstantial evidence did not reasonably tend to prove appellant's guilt, nor could his guilt be fairly and logically deduced from the evidence. *Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127.

Pursuant to Rule 19(a), SCRCrimP,

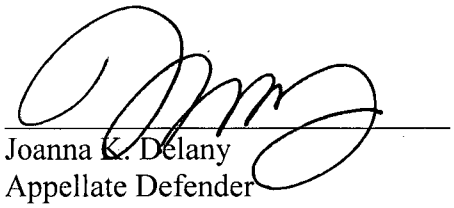
> On motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment. In ruling on the motion, the trial judge shall consider only the existence or non-existence of the evidence and not its weight.

A directed verdict "motion should be granted where a jury would be speculating as to the accused's guilt, or where the evidence is sufficient only to raise a strong suspicion of guilt." *State v. Ballenger*, 322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996) (internal citations omitted).

Appellant submits the trial court erred in submitting the case to the jury, since there was no direct evidence appellant committed an offense, and no **substantial** circumstantial evidence that appellant committed an overt act in an attempt to commit criminal sexual conduct against a physically helpless, mentally defective, or mentally incapacitated person. The evidence was only sufficient to raise a suspicion of guilt.

CONCLUSION

Based on the foregoing argument, appellant respectfully requests this Court reverse his conviction and sentence and remand for entry of a verdict of acquittal.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of October, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALQI DHIMO,

APPELLANT

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 has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Alqi Dhimo, #375097, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 5th day of October, 2018.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of October, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028