STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of General Sessions
Steven H. John, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Appellate Case No. 2018-000110

THE STATE, ...RESPONDENT,

v.

ALQI DHIMO, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge properly denied Appellant's motion for a directed verdict on attempted third degree criminal sexual conduct because there was substantial circumstantial evidence of Appellant's guilt.

STATEMENT OF THE CASE

On September 17, 2015, the Horry County Grand Jury indicted Appellant for attempted third-degree criminal sexual conduct and indecent exposure. On January 8–10, 2018, Appellant proceeded to a jury trial before the Honorable Steven H. John. John Reuben Long, II, Esquire, represented Appellant; Assistant Solicitors Mary–Ellen Walter, Esquire, and C. Leigh Andrew, Esquire, represented the State. The jury acquitted Appellant of the indecent exposure charge, but found him guilty of attempted third-degree criminal sexual conduct. The trial judge sentenced Appellant to eight years' incarceration and ordered him to register as a sex offender.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On June 21, 2015, Victim and her boyfriend Justin Stephenson attended a barbecue at Victim's Mother's house. By 10:00 p.m., the time Stephenson and Victim left the party, the latter was intoxicated. On the way home, Victim and Stephenson got into an argument over smoking cigarettes inside the vehicle and loud music when Stephenson pulled into a gas station. Victim exited the vehicle and refused to return home with Stephenson. Victim texted Stephenson and informed him she would take a cab home. (Tr.p.54, line 16–Tr.p.58, line 8).

Security guards Benjamin Thompson and Joyce Chestnut Dixon were on patrol at the Grand Shores Ocean Front Tower when they observed a taxi cab parked at the building with the engine still running. Concerned, they began looking around the area to see if they could find the driver or someone associated with the cab in the vicinity. As they approached the beach, thye heard someone "hollering" at them to stop moving and stay away. Looking around, they saw a male figure approximately twenty-feet away "either kneeling or laying down on his side" who then jumped up. He was wearing a dark-colored shirt and white underwear pulled down around his knees, but was not wearing any clothing around his crotch area; they both observed Appellant's uncovered penis. Additionally, they saw a human-shaped figure on the ground by Appellant. Thompson asked Appellant whether "everything was okay," but did not receive a response to his question. Instead, Appellant moved over towards a "white object" and started to get dressed. Thompson maintained visual contact with Appellant the entire time and contacted the police. (Tr.p.109, line 1–Tr.p.127, line 23; State's Exhibit 12).

Officer Daniel Eddy was the first officer to respond to the scene. When he arrived, he observed a taxi cab parked sideways in the beach access and spoke with security guards who confirmed they reported the man. Officer Eddy began walking down the beach to locate the

reported man when he located Appellant standing up. He also found Victim, laying with her face down in the sand, almost as if she were in the fetal position. He noticed Victim's bathing suit bottom/underwear were pulled to the side, exposing her privates. When he tried to wake Victim, she was unresponsive. He called for backup and EMS while he detained Appellant. (Tr.p.64, line 12–Tr.p.68, line 2).

When Officer Eddy's backup arrived, they were able to wake Victim using smelling salts. However, she was heavily intoxicated, unable to walk by herself, and could not provide answers to basic questions such as her name or where she lived. She was placed inside the ambulance when it arrived. While placing Appellant in his vehicle, Officer Eddy observed scratch marks behind his left shoulder and bite marks down his arm. After returning to the ambulance, Officer Eddy discovered Victim was still unable to answer basic questions. However, she was now visibly upset and crying. Later, in Appellant's cab, Officer Eddy found Victim's purse and cellular phone. (Tr.p.68, line 2–Tr.p.74, line 4; Tr.p.77, line 23–Tr.p.78, line 23; State's Exhibit 19; State's Exhibit 36).

Officer Zachary Cooper, the officer who used smelling salts to wake Victim, testified that in addition to being unable to provide basic information, Victim also threw up. Her speech was slurred and she was distraught the entire time officers spoke with her. Emotional, Victim constantly reiterated she just wanted to go home and get back to her boyfriend. She also had a powerful "odor of alcohol." (Tr.p.89, line 20–Tr.p.108, line 7; State's Exhibit 36).

Officer David Bailey, a crime scene specialist with the Myrtle Beach Police Department took Photos of Appellant after the crime and photographed bruising, scratches, and a bite mark on Appellant's left upper arm. (Tr.p.256, line 13–Tr.p.266, line 8 State's Exhibits 27–33).

Officer Scott Williamson collected evidence from Appellant's cab, including the dashboard camera in the vehicle. Officer Williamson viewed the video recorded by the record and noted it shows: (1) Appellant turning off the camera soon after initialing picking up Victim; (2) Victim, intoxicated, flirting with Appellant and telling him she "loved [him]"; (3) Appellant requesting Victim that she "[l]et [him] love [her]"; (4) Victim passing out in the driver's seat of the cab and Appellant getting her out of the vehicle, at which time she told him to "stop it," "get away from me," and other statements. (Tr.p.161, line 19–Tr.p.177, line 18; State's Exhibit 16).

Chad Morenus, a bar tender at Jimmagan's Pub in Myrtle Beach, was working on the night of June 21/22, 2015 when he saw Victim and Appellant at the bar. He served them three or four shots of Crown Royal Apple to Victim and a similar amount to Appellant. (Tr.p.132, line 23–Tr.p.140, line 13).

Emily Hennig-Ryan, a nurse with Grand Strand Medical Center, treated Victim when she was taken to the hospital that night/morning. She collected various samples, including fingernail scrapings, from Victim. She testified Victim consented to the use of the kit and she was prohibited to use rape kits on the victims of sexual assault without their consents. Jennifer Michelle Brown, a forensic toxicologist with SLED, tested blood samples obtained from Victim at the hospital and concluded her blood alcohol concentration (BAC) was 0.169 percent at the time it was drawn, and would have been around 0.332 percent at the time of her assault. According to Brown, someone with such a significant BAC loses control of her motor functions, is usually unconscious and asleep and at risk for death. Catherine Leisy, a forensic scientist with SLED, analyzed Victim's fingernail scrapings. The partial DNA profile developed from the major contributor to the mixture under Victim's right fingernails matched Appellant; the partial

DNA profile developed from Victim's left fingernails was insufficient for interpretation. (Tr.p.194, line 2–Tr.p.219, line 5; Tr.p.240, line 20–Tr.p.251, line 25; State's Exhibit 40).

Detective Carol Allen interviewed Victim and Appellant after they were taken to the police station in the early hours of June 22, 2015. Victim was loud, screaming, and crying and not in "any shape to be interviewed at that time." Appellant, however, did not appear to be intoxicated and was able to answer all of her questions. He did not inform Detective Allen that he and Victim stopped by Jimmagan's Pub or that his interaction with Victim transitioned from a cab ride to a date. He eventually admitted Victim was "completely passed out and would not wake up." (Tr.p.270, line 11–Tr.p.301, line 1 State's Exhibit 3).

Detective Hugh Jones reviewed the dash cam video of Appellant's cab. Notably, Appellant picked up Victim at approximately 1:09 a.m., and had a brief conversation before the video stopped. The recording resumed approximately thirty minutes later at 1:39 a.m., when the two are leaving Jimmagan's. Appellant chose to drive around rather than take Victim directly home. After a second stop, Victim enters the driver's seat and begins driving towards her home, but ended up stopping at the beach access where the cab was found. Further, Detective Jones observed Appellant never activated the fare meter in his cab. Victim was unable to recall any of the events which occurred after the stop at Jimmagan's. (Tr.p.304, line 16–Tr.p.328, line 15; State's Exhibit 16).

At the close of the State's case, trial counsel moved for a directed verdict, arguing there was no direct or substantial circumstantial evidence that Appellant tried to sexually assault Victim that night because there was not any evidence of an overt act supporting such a conviction or that Victim was impaired at the time said conduct occurred. In response, the State noted there was substantial evidence of both Victim's impairment and Appellant's intent to

assault Victim, including: (1) the video recording showing Victim unconscious in the cab; (2) Appellant's statement to police indicating Victim was passed out on the beach; (3) Security guards observed Appellant naked around the waist, on the ground near Victim; (4) the officers' testimonies that Victim was unconscious and could not be woken up without the use of smelling salts; (5) officers also observed that Victim's bathing suit bottoms were pulled to the side, exposing her genitals; (6) various injuries on Appellant's left arm which were not observable in the video recording of the cab ride; and (7) Appellant's DNA was found under Victim's fingernails. The trial judge denied the motion, noting the State presented evidence which, viewed in favor of the State, indicated Appellant was guilty of attempted third-degree criminal sexual conduct. (Tr.p.333, line 23–Tr.p.340, line 19).

STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. Weston, 367 S.C. at 292–93, 625 S.E.2d at 648; State v. Cherry, 361 S.C. 588, 593–94, 606 S.E.2d 475, 477–78 (2004). The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling or if the ruling is based on an error of law. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002); State v. Dantonio, 376 S.C. 594, 603, 658 S.E.2d 337, 342 (Ct. App. 2008). Indeed, "unless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Curtis, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004); State v. Condrey, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App.

2002). Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements of the crime beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)). The task of the trial court is to simply determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016). The reviewing court should affirm if in viewing the evidence in the light most favorable to the State, "the evidence could induce a reasonable juror to find [the defendant] guilty." See State v. Pearson, 415 S.C. 463, 474, 783 S.E.2d 802, 808 (2016); also State v. Richburg, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968) ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury.").

S.C. Code Ann. section 16-3-654(1)(b) states a person is guilty of third degree criminal sexual conduct if the actor sexually batters the victim and the actor knows or has reason to know the victim was mentally defective, mentally incapacitated, or physically helpless but the actor did not use aggravated force or aggravated coercion to accomplish the battery. S.C. Code Ann. section 16-3-651(h) defines "sexual battery" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or any object into the genital or anal openings of another person's body . . . ."

"Intent" is a question of fact reserved for jury determination. State v. Lee-Grigg, 374 S.C. 388, 403, 649 S.E.2d 41, 49 (Ct. App. 2007). "Intent may be shown by acts and conduct from which a jury may naturally and reasonably infer intent." Id. "In the context of an attempt

crime, specific intent means the defendant consciously intended the completion of acts compromising the choate offense. In other words, the completion of such acts is the defendant's purpose. State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000). Pursuant to S.C. Code Ann. section 16-3-656, assaults performed with the intent to commit criminal sexual conduct are punishable as if the attempted criminal sexual conduct was completed.

In State v. Reid, 393 S.C. 325, 713 S.E.2d 274 (2011), the Supreme Court of South Carolina affirmed the defendant's conviction for attempted CSC with a minor, second degree. In Reid, the defendant "clearly indicated" his desire to engage in sexual relations with an undercover officer whom he believed to be a fourteen-year-old girl. Id. at 329, 713 S.E.2d at 276. The court found that by agreeing to meet a fictitious minor at a designated place and time and traveling to that location at the agreed time constituted an overt act which justified the denial of Reid's motion for a directed verdict.. Id. at 330–32, 713 S.E.2d at 277. Similarly, in State v. Nesbitt, 346 S.C. 226, 550 S.E.2d 864 (Ct. App. 2001), this Court found the trial court properly denied a motion for a directed verdict for the defendant's attempted armed robbery charge, noting the defendant's actions of approaching a convenience store masked and armed constituted an overt act for the purposes of attempted robbery. Id. at 233–35, 550 S.E.2d at 868–69.

ARGUMENT

The trial judge properly denied Appellant's motion for a directed verdict on attempted third degree criminal sexual conduct because there was substantial circumstantial evidence of Appellant's guilt.

Appellant argues the trial judge erred in failing to grant his motion for a directed verdict because the evidence merely raised the suspicion of his guilt. The State disagrees with this allegation of error. The State provided substantial evidence of Appellant's guilt at trial, and the only reasonable conclusion which could be drawn from the facts of the case was that Appellant attempted to sexually assault Victim while she was mentally incapacitated, the very crime for which he was charged and convicted.

As noted above, a person is guilty of third-degree criminal sexual conduct if that person sexually batters a person and is aware the victim is mentally defective, mentally incapacitated, or physically helpless. S.C. Code Ann. § 16-3-654(1)(b). Here, both direct and substantial evidence demonstrated Victim was mentally incapacitated and physically helpless. The video recording from Appellant's cab showed Victim pass out in the driver's seat before he removed her from the car. The officers who found Victim testified she was unconscious and unresponsive to their efforts to rouse her. They were only able to do so with the use of smelling salts, and at that time Victim was incoherent and unable to provide even basic information such as her name. Substantial circumstantial evidence supported this testimony, including Appellant's statement to police indicating Victim was unconscious and Brown's testimony that the amount of alcohol which was likely in Victim's blood at the time she was found would have affected her ability to control her motor functions, rendered her unconscious, and put her at risk of death. In her state, Victim was unable to engage in consensual sexual acts.

Further, there is substantial circumstantial evidence that that Appellant attempted sexual contact with Appellant while she was unconscious. The video recording of the cab ride shows Appellant telling Victim that he wished to "love" her. After she passes out in the driver's seat of the vehicle, he removes her from the vehicle. After this exchange, security guards witness Appellant, without pants and his penis exposed, next to Victim's unconscious body. After officers arrived, they discovered Victim's swimsuit was pulled to the side around her vaginal area. Further, Appellant had bruising, scratches, and a bite mark on his left arm and the DNA recovered from Victim's fingernails matched his profile, indicating Victim was trying to resist Appellant's advances on the beach before she fell unconscious. Similar to Reid and Nesbitt, the evidence provided at trial demonstrated Appellant took a substantial step towards sexual assaulting Victim while she was unconscious. See Reid, 393 S.C. at 329, 713 S.E.2d at 276; Nesbitt, 346 S.C. at 233–35, 550 S.E.2d at 868–69

Accordingly, the trial judge did not abuse his discretion in denying Appellant's motion for a directed verdict.

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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PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

Joanna K. Delany, Esquire
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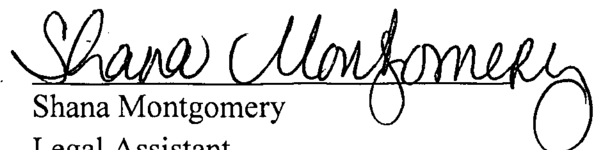
I further certify that all parties required by Rule to be served have been served this 18th day of January, 2019.



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RE: State v. Alqi Dhimo – Appellate Case No. 2018-000110

Dear Ms. Delany:

I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

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WFS/ssm
Enclosures

cc: Honorable Jenny A. Kitchings
(original and one enclosed)
Victim Advocacy Division

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