

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

LESLIE TWYMAN,

APPELLANT

Appellate Case No. 2011191186

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FINAL BRIEF OF APPELLANT

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS ..... 1

TABLE OF AUTHORITIES..... 2

STATEMENT OF ISSUES ON APPEAL..... 3

STATEMENT OF THE CASE ..... 4

ARGUMENT

I.

The trial court judge erred when he did not grant appellant’s motion for a directed verdict for criminal sexual conduct, 3<sup>rd</sup> degree because the language in the body of the indictment indicated that the state was proceeding under a theory that appellant “forcibly” penetrated the accuser which negated the aggravated component of the CSC 3<sup>rd</sup> statute which also proscribes sexual conduct against persons who are “mentally incapacitated.” ..... 5

II.

The trial court judge erred in not granting appellant's motion for a directed verdict because the accuser was not mentally defective or incapacitated as defined under S.C. Code Ann. §16-3-651 (e) or (f). ..... 8

CONCLUSION..... 10

CERTIFICATE OF COUNSEL..... 11

TABLE OF AUTHORITIES

**Cases**

In re Winship, 397 U.S. 358 (1970) .....9

State v. Jackson, 338 S.C. 565, 527 S.E.2d 367 (Ct. App. 2000).....5

State v. McKnight, 352 S.C. 635 (2003), *cert denied*, 540 U.S. 819 (2003).....5

**Statutes**

S.C. Code Ann. § 16-3-652.....6

S.C. Code Ann. § 16-3-654.....5, 6

S.C. Code Ann. §16-3-651 .....8

STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court judge erred when he did not grant appellant's motion for a directed verdict for criminal sexual conduct, 3<sup>rd</sup> degree because the language in the body of the indictment indicated that the state was proceeding under a theory that appellant "forcibly" penetrated the accuser which negated the aggravated component of the CSC 3<sup>rd</sup> statute which also proscribes sexual conduct against persons who are "mentally incapacitated?"

II. Whether the trial court judge erred in not granting appellant's motion for a directed verdict because the accuser was not mentally defective or incapacitated as defined under S.C. Code Ann. §16-3-651 (e) or (f)?

## STATEMENT OF THE CASE

Leslie Twyman was indicted by the Colleton County grand jury on April 14, 2011 for criminal sexual conduct, 1st degree and criminal sexual conduct, 3rd degree. He was tried before the Hon. Perry M. Buckner, III and a jury between April 18-20th, 2011. Appellant was represented by Harris S. Beach, Esquire. The Solicitor's office was represented by Benjamin T. Shelton, Esquire. Appellant was convicted and sentenced to 25 years for CSC, 1<sup>st</sup> degree and 10 years for CSC, 3rd degree. The sentences were ordered to be served concurrently.

This appeal timely follows.

## ARGUMENTS

I. The trial court judge erred when he did not grant appellant's motion for a directed verdict for criminal sexual conduct, 3<sup>rd</sup> degree because the language in the body of the indictment indicated that the state was proceeding under a theory that appellant "forcibly" penetrated the accuser which negated the aggravated component of the CSC 3<sup>rd</sup> statute which also proscribes sexual conduct against persons who are "mentally incapacitated."

The CSC, 3<sup>rd</sup> degree indictment at issue in this case stated:

That in Colleton County, South Carolina, on or about August 21, 2010, the defendant, Leslie Twyman, did commit a sexual battery upon the victim . . . with knowledge or reason to have knowledge that the victim was mentally defective, mentally incapacitated or physically helpless where aggravated force or aggravated coercion was **not used**, to wit: **the Defendant did forcibly penetrate the victim with his penis**; all in violation of Section 16-03-654, Code of Laws of South Carolina, (1976), as amended. (emphasis added).

At the conclusion of the State's case, the appellant asked the trial court to direct a verdict in regard to CSC, 3<sup>rd</sup> degree. R. 241-242. Appellant renewed this motion at the conclusion of the defendant's case, and after the defendant testified on his own behalf. R. 273-275. The trial court judge denied the motions. R. 247-248.

A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. State v. McKnight, 352 S.C. 635, 642 (2003), *cert denied*, 540 U.S. 819 (2003). Therefore, "where the facts of the case, even if proved, do not constitute the alleged criminal conduct, a directed verdict must be granted." State v. Jackson, 338 S.C. 565, 569, 527 S.E.2d 367, 369 (Ct. App. 2000).

The trial court judge erred by not granting appellant's directed verdict motion with respect to CSC, 3rd degree because the State failed to present evidence which would tend to prove that he even **could** be guilty of both CSC, 1st degree and CSC, 3rd degree.

S.C. Code Ann. § 16-3-654, Criminal sexual conduct in the third degree states:

(1) a person is guilty of criminal sexual conduct in the third degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:

(a) The actor uses force or coercion to accomplish the sexual battery **and the absence of aggravating circumstances.**

(b) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless **and aggravated force or aggravated coercion is not used** to accomplish the sexual battery.

The state, however, in the indictment indicates that the accuser was victimized by the appellant's **forcibly** inserting his penis into her. Under the plain language of the statute, he cannot be guilty of CSC, 3rd degree because conduct proscribed by the statute specifically states that aggravating circumstances, aggravated force, or aggravated coercion is not used. In addition to criminal sexual conduct, 3rd degree, the state also indicted appellant with criminal sexual conduct in the first degree. The indictment states:

That in Colleton County, South Carolina, on or August 21, 2010, the Defendant, Leslie Twyman, did commit a sexual battery upon the victim . . . and the victim did submit to sexual battery while also the victim of forcible confinement, kidnapping, robbery, extortion, burglary or any other similar offense or act, to wit; the Defendant did lure the mentally challenged victim into his home by false pretense and did prevent her from leaving; all in violation of Section 16-3-652, Code of Laws of South Carolina, (1976), as amended.

S.C. Code Ann. §16-3-652 Criminal sexual conduct in the first degree states:

(1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven: (b) the victim submits to sexual battery by the actor under circumstances where the victim is also the victim of **forcible confinement, kidnapping**, trafficking in persons, robbery, extortion, burglary, housebreaking, or any other similar offense or act.

Because the state decided to go forward with an accusation accusing appellant of essentially aggravated criminal sexual conduct, they could not also indict him under a statute where the aggravation is expressly removed from the definition. The trial court judge erred in denying appellant's motion for a directed verdict, and appellant asked this court to vacate his conviction for criminal sexual conduct, 3<sup>rd</sup> degree.

II. The trial court judge erred in not granting appellant's motion for a directed verdict because the accuser was not mentally defective or incapacitated as defined under S.C. Code Ann. §16-3-651 (e) or (f).

At the time of trial, the accuser was 18 years old. R. 73, ll. 20-23. The State called Patty Lohr, a speech pathologist to testify. She testified that the accuser has a diagnosis of “verbal apraxia” which is a motor impairment. R. 107, l. 21-108, l. 22. The State also called Carol Marks to testify. Ms. Marks is a special education teacher and has been teaching the accuser for 3 or 4 years. R. 115, ll. 18-25. She testified that the accuser is mildly mentally disabled and has an IQ between 50 and 70. R. 119, ll. 5-17. She testified that the accuser's emotional needs are equivalent to a 6 or 7-year-old. R. 121, ll. 6-16.

For the future, I would say I don't -- I -- I think [Accuser] always going to need someone to be looking after her, and always being with her at some point. I mean, she can -- she can feed herself, make small, easy meals, that kind of thing.

But she's always going to need someone to probably live with her. And -- she'll be able to do a simple job. She could maybe perhaps work at McDonald's or maybe something at Wal-Mart. But I don't know about -- the money aspect would not be -- be able to be dealt with. It would have to be something besides money.

R. 123, ll. 14-24.

S.C. Code Ann. §16-3-651(e) and (f) defines “mentally defective” and “mentally incapacitated.”

“Mentally defective” means that a person suffers from a mental disease or defect which renders the person temporarily or permanently incapable of appraising the nature of his or her conduct. “Mentally incapacitated” means a person is rendered temporarily incapable of

appraising or controlling his or her conduct whether this condition is produced by illness, effect, the influence of the substance or from some other cause.

The State did not prove that the accuser fell within the statute. The testimony at trial, in fact, suggested that the accuser is actually very high functioning. The statute does not criminalize conduct directed at someone with a diagnosis of mental retardation, but rather that condition would have to render the victim “incapable of appraising the nature of his or her conduct.” The state failed to prove that the statute applies for this particular accuser and therefore they did not prove an element of the crime. In re Winship, 397 U.S. 358 (1970). For this reason too, the trial court judge should have directed a verdict of acquittal for criminal sexual conduct, 3rd degree.

CONCLUSION

For the preceding reasons, appellant respectfully asks this Court, with respect to Issue 1, to vacate his conviction for criminal sexual conduct, 3<sup>rd</sup> degree. With respect to Issue 2, appellant asks this Court to reverse his conviction.

Respectfully submitted,



Susan B. Hackett  
Appellate Defender

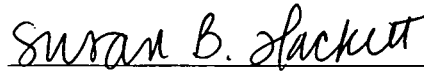
ATTORNEY FOR APPELLANT

This 21th day of August, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 21<sup>st</sup>, 2012



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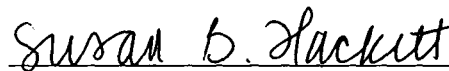
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CERTIFICATE OF SERVICE

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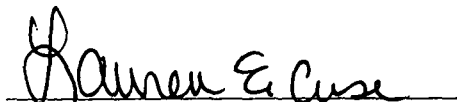
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 21st day of August, 2012.



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 21st day of August, 2012.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: August 23, 2014.