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August 14, 2012

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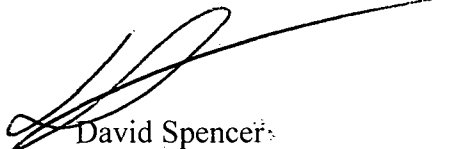
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: **State of South Carolina v. Leslie Twyman**

Dear Ms. Kitchings:

Enclosed please find the original and nine (9) copies of the **Final Brief of Respondent** in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this brief today.

Sincerely,



David Spencer
Assistant Deputy Attorney General

DS/nb
Enclosures

cc: Susan B. Hackett, Esquire (2 copies enclosed)
Trisha Allen, Victim Services (1 copy enclosed)

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Colleton County
Perry M. Buckner, Circuit Court Judge

THE STATE,

Respondent,

vs.

LESLIE TWYMAN,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in denying the motion for directed verdict on the grounds the State failed to prove that neither aggravated force or aggravated coercion was used to accomplish the sexual battery.

II.

Evidence supports that the victim was mentally incapacitated or mentally defective and therefore, the trial court did not err in denying the motion for directed verdict.

STATEMENT OF THE CASE

Appellant Twyman was indicted for criminal sexual conduct in the first degree (CSC 1st) and criminal sexual conduct in the third degree (CSC 3rd). Trial began on April 18 and the jury found Twyman guilty on April 20, 2011. The Honorable Perry M. Buckner, III, sentenced Twyman to concurrent sentences of twenty-five years imprisonment for CSC 1st and ten years imprisonment for CSC 3rd.

STATEMENT OF FACTS

Twyman was staying at Jessie Mae Gooding's residence. He lured his eighteen year-old victim (Victim) into the residence under false pretenses and proceeded to rape her. Victim has an I.Q. of 55 and is emotionally developed at the equivalent to a six or seven year old. ROA. p. 119, p. 121.

Jessie Mae Gooding was the State's first witness. Her involvement with her church's outreach program led to her letting Twyman and sometimes his wife to stay with her after he lost his home. Gooding's son Conrad is a disabled, bedridden veteran. Victim lived down the street. Sometimes, Victim would come to the house and sit with Conrad. However, Gooding supervises her and brings Victim back and forth from the house when Victim sits with Conrad. Gooding would ask Victim's mother first before asking Victim over to the house. ROA. pp. 40-43.

On August 21, 2010, Gooding was away while Twyman was home with Conrad. Twyman called Gooding on the cell phone and said a friend was picking him up at the house and he would have Victim sit with Conrad. Gooding gave it some thought and then called back because Twyman told Gooding the night before that he had no friends. Victim answered the phone. Victim said Twyman was outside. Later, Victim's mother called Gooding and consequently, Gooding called Twyman and said an accusation was made against him. Twyman denied the accusation. Gooding went to Victim's house, where police were already interviewing Victim. Victim was upset and said she was feeling pain. ROA. pp. 44-50.

Victim's stepfather (Stepfather) testified that he was outside in the yard when Victim

came running to the house and said “Mamma, Mamma, something happened to me down the street, this man attacked me.” ROA. p. 65. Victim’s Mother (Mother) testified Victim came home disturbed and too upset to speak clearly, it took her ten minutes to calm down. Stepfather called 911. Mother took Victim to the bathroom and saw white semen in her underwear. ROA. pp. 76-81.

The forensic DNA analyst was able to determine there was semen in the underwear, but because there was no sperm, she was unable to complete a DNA analysis. ROA. pp. 148-150.

The sexual assault examination revealed extensive swelling and redness in the vaginal and anal areas. Specifically, the findings were redness and swelling in the labia majora, perineum and labia minora, with swelling in the vestibule and redness in the posterior fourchette. There was swelling and redness in the vagina in general. There was redness and bleeding in the cervix. ROA. pp. 225-226. Maria Flynn, an RN, testified that the injuries were consistent with a vaginal assault and blunt force trauma on the cervix. ROA. pp. 238-239.

Mother testified that Victim is not allowed to leave the house without permission, which she did that day. ROA. pp. 85-86. Mother explained, “She has to realize she can’t do what she want to do because she 18.” ROA. p. 89.

Officer Brandon Craven responded to the 911 call. He testified he never met Victim before, but he quickly determined that she not only had a speech impediment, but that she was mentally handicapped as well. Victim was upset and shocked. ROA. pp. 90-93. Detective Gathers, who also came to the house, testified that Victim was upset the entire time

he was there, which was about two hours. ROA. pp. 98-99.

Patty Lohr is a language pathologist who has worked with Victim for four years. Victim has verbal apraxia. ROA. pp. 107-108. On cross-examination, Lohr was asked about Victim's cognitive functioning, to which she responded: "Jessica is more on a child-like level. Academically, her levels are lower. But as far as common sense type things, she's right on the money." ROA. p. 111, lines 14-16.

Carol Marks is Victim's special education teacher. Victim's overall I.Q. is 55. She is mildly mentally disabled. Her reading is at a third grade level, her math at a second grade level. Marks was asked about an equivalent age for Victim's emotional needs and she responded that Victim's emotional needs were equivalent to a six or seven year old. ROA. pp. 119-121. Marks further testified as follows:

Q: Psychological. Or her ability to experience the world around her and comprehend the world around them. How they're – specifically, what they do today, how is it going to affect them tomorrow? Is she able to grasp, the decisions that she makes today, what bearing that's going to have tomorrow?

A: Somewhat. I . . . wouldn't say it would be like an adult, like her age level, an 18 year old, no, absolutely not but the basic age level of a six or seven year old, they know if they break the TV, that they're going to be in trouble for a couple days. She has that ability. But long term, I would say no. She's not able to do that.

Q: Is she able to comprehend the effect on herself and others of her own action, to the point of a normal functioning person.

A: No.

Q: Can you be specific about that?

A: Just the fact that, like I said, she's a six or seven year old in her mind. So she's not – she is looking out for herself, just like any six year old will do. They're – they're in their own time frame, their own kind of world.

Q: So she's not, to a certain degree, able to appraise the nature of her actions?

A: To a certain degree.

ROA. p. 121, line 17 - p. 122, line 15. Marks testified that she thought Victim would always need someone to take care of her. ROA. p. 123, lines 14-24.

Marks also testified that since August, 2010, Victim has retreated into herself. ROA. p. 126.

Elizabeth Schein-Pearson testified that Victim qualifies for special services at her school with a primary disability of mental disability. Victim had an I.Q. of 56 on December 8, 2010. Pearson testified that Victim does not think fast on her feet. Pearson opined Victim will always need someone to assist her in understanding her world. ROA. pp. 133-134. On cross-examination, Pearson testified that often times she does not appreciate the outcome of her actions. Pearson also testified, when questioned about whether Victim knew right from wrong, that Victim can appreciate the parameters of what is expected of her: “[b]ut if she's to infer that something she has not experienced before or no one's told her about before, she's deferred the outcome of that. She's not going to be able to.” ROA. p. 137, lines 2-9.

Victim testified that she was at home watching television when Twyman knocked on the door and asked her to watch Ms. Gooding's son. She went to Gooding's house and was watching a cartoon. Twyman said he wanted her to be a model. Then he unzipped Victim's pants, took a picture of her privates with a cell phone. She went into the bathroom. When

she came out, Twyman put his penis in her mouth and put his penis in her butt two times. Then he put his penis in her private part. Twyman threatened Victim by telling her she could go to jail if she told what happened. Victim ran out the back door after Twyman blocked her from going out the front door. She ran home and told her mother what happened. ROA. pp. 164-177.

Twyman testified on his own behalf. He testified he was staying with Gooding because he and his wife had a bad drug habit. The wife went to jail because they had a domestic violence incident, and they lost their apartment. Twyman confirmed that he called Gooding to let her know he was going to have Victim watch her son. In his version of events, when he went to ask Victim to sit with Conrad, Stepfather answered the door. Victim's sister walked Victim half-way to Gooding's house and Twyman took her the rest of the way. According to Twyman, while they both smoked, they had a conversation about school, Victim said she was going to college. Twyman testified Victim complemented Twyman on a suit he wore previously. Twyman claimed Victim asked Twyman about his wife and their relationship. Twyman testified, "we was just talking cool, regular and stuff." ROA. pp. 259-260 (direct quote: ROA. p. 259, lines 20-21). Twyman also testified that Victim said she had intercourse with her stepfather. ROA. p. 261, lines 1-4.

The jury took less than an hour to reach a verdict. ROA. pp. 319-320.

ARGUMENT

I.

The trial court did not err in denying the motion for directed verdict on the grounds the State failed to prove that neither aggravated force or aggravated coercion was used to accomplish the sexual battery.

Twyman argued that the trial court erred in failing to direct a verdict on the grounds that the State failed to show that aggravated force or coercion was not used in accomplishing the sexual battery. Twyman argues that the indictment alleges the battery was “forcible” and then hopes this Court fails to notice that the indictment does not allege the forcible battery was aggravated. The argument lacks merit.

In reviewing the denial of a directed verdict motion, the reviewing court views the evidence in the light most favorable to the State and determines if any direct or substantial circumstantial evidence exists that reasonably tends to prove defendant’s guilt or from which appellant’s guilt may logically be deduced. State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000). On motion for directed verdict, the trial court is concerned only with the existence of evidence, and not its weight. Id.

Criminal Sexual Conduct in the third degree is defined in relevant part as follows:

(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. . .

(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 was not used to accomplish sexual battery.

S.C. Code §16-3-654 (1)(b).

“Aggravated coercion” means that the actor threatens to use force or violence of a high and aggravated nature to overcome the victim or another person, if the victim reasonably believes that the actor has the present ability to carry out the threat, or threatens to retaliate in the future by the infliction of physical harm, kidnapping or extortion, under circumstances of aggravation, against the victim or any other person.

S.C. Code §16-3-651(b).

“Aggravated force” means that the actor uses physical force or physical violence of a high and aggravated nature to overcome the victim or includes the threat of the use of a deadly weapon.

S.C. Code §16-3-651(c).

Unlike subsection (b), subsection (a) of §16-3-654 requires an “actor use force or coercion to accomplish the sexual battery in the absence of aggravating circumstances.” The Supreme Court found that in the absence of a statutory definition of force or coercion, the common, ordinary meaning of the term should apply. State v. Hamilton, 276 S.C. 173, 178, 276 S.E.2d 784, 787 (1981). The Supreme Court found as follows: “Force and coercion as used in the statute, have basically the same meaning. They mean to make a person follow a prescribed and dictated course; to inflict or impose[; to] force one’s will on someone.” Id., (citations and quotations omitted).

Accordingly, force or coercion is not aggravated if it is not accompanied by violence or threats of violence. The essence of Twyman’s largely conclusory argument is that the trial court should have equated “forcibly” with “aggravated force”. Twyman does not refer to actual evidence of aggravated force or coercion. However, to constitute aggravated force or

coercion, the force or coercion used must be of a high and aggravated nature. In the instant case, no evidence of coercion or force of a high and aggravated nature was presented to the jury; therefore, the trial court did not err in denying the motion for directed verdict. See also, State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000) (finding criminal sexual conduct in the third degree is not a lesser included offense of criminal sexual conduct in the first degree) *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). Further, Twyman's argument fails because an indictment is not evidence. State v. Sims, 377 S.C. 598, 609, 661 S.E.2d 122, 128 (Ct. App. 2008) (quoting State v. Gilcrest, 342 S.C. 369, 372, 536 S.E.2d 868, 869 (2000)).

II.

Evidence supports that the victim was mentally incapacitated or mentally defective and therefore, the trial court did not err in denying the motion for directed verdict.

Twyman argues the trial court erred in denying the motion for directed verdict on the grounds that evidence failed to show that Victim met the definition of mentally incapacitated or mentally defective. In contrast, several witnesses provided testimony that supports the verdict, especially taken in the light most favorable to the State.

It is axiomatic, that in ruling on a motion for a directed verdict, the trial court is concerned only with the existence of evidence, not its weight. State v. Spann, 279 S.C. 399, 308 S.E.2d 518 (1983). The trial court must submit the case for the jury's consideration if any evidence, direct or circumstantial, tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978). Only when there is a complete lack of competent evidence should the trial court refuse a motion for directed verdict. State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984). Upon a motion for directed verdict, the evidence is viewed in the light most favorable to the State. State v. Creech, 314 S.C. 76, 441 S.E.2d 635, 638 (Ct. App. 1994).

Under S.C. Code §16-3-651(e):

“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.

Under §16-3-651(f):

“Mentally incapacitated” means that a person is rendered temporarily incapable of appraising or controlling his or her

conduct whether this condition is produced by illness, defect, the influence of a substance or from some other cause.

Evidence was presented to the jury that despite Victim being eighteen years of age, her mother would not let her leave the house without permission and that when she visited Gooding's residence, she was always accompanied by someone. ROA. pp. 85-86; p. 89. Officer Craven testified he quickly determined, upon meeting Victim for the first time, that she was mentally handicapped. ROA. p. 92. Lohr, Victim's language pathologist, testified Victim was on a child-like level. ROA. p. 111, lines 14-16. Victim's special education teacher, Marks, testified Victim's I.Q. is 55 and she is mildly mentally disabled. Marks testified Victim reads at a third grade level and her emotional needs are at the level of a six or seven year old. Marks testified that to a certain degree, she cannot appraise the nature of her actions. ROA. pp. 119-122. Victim will always need someone to take care of her. ROA. p. 123. Schein-Pearson testified that Victim does not think fast on her feet and will always need someone to assist her in understanding her world. Victim often times does not appreciate the outcome of her actions and Victim will not be able to appreciate right from wrong when confronted with something she has not previously experienced. ROA. pp. 133-134; p. 137.

Accordingly, ample evidence was presented that Victim met the statutory definition of mentally defective as well as the definition of mentally incapacitated. Accordingly, the trial court did not err in denying the motion for directed verdict.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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vs.

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Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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THE STATE,

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LESLIE TWYMAN,

Appellant.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

This 14th day of August, 2012



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