

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

**ORIGINAL  
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OCT 03 2019

**SC Court of Appeals**

THE STATE,

RESPONDENT,

V.

LANCE R. ELAM,

APPELLANT

APPELLATE CASE NO 2018-002256

ANDERS BRIEF OF APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Whether the court erred in refusing to direct a verdict of acquittal for CSC in the first degree and burglary in the first degree, where the complainant did not testify at trial, and where appellant testified the incident was consensual, since absent the complainant's testimony the state failed to prove that appellant entered the home without consent and with intent to commit a crime, and it failed to prove appellant used aggravated force to accomplish a sexual battery?

## STATEMENT OF THE CASE

On June 22, 2017, a Beaufort County Grand Jury indicted appellant for the offenses of criminal sexual conduct (CSC) in the first degree and burglary in the first degree. R. 324 – 327. Appellant was tried before the Honorable Carmen T. Mullen and a jury, from December 10 – 12, 2018. R. 1. Eric Staggs and Courtney Gibbes represented appellant. R. 2. Hunter Swanson and Kimberly Smith represented the state. R. 2.

Appellant was convicted as indicted and he was sentenced to concurrent terms of thirty years and life, respectively. R. 312, ll. 13-18; R. 320, ll. 8-15.

This appeal follows.

## STANDARD OF REVIEW

“A case should be submitted to the jury when the evidence is circumstantial ‘if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.’” *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). “Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt.” *Id.* “Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error.” *Id.* at 139, 708 S.E.2d at 776-777. “On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state.” *Id.* at 139, 708 S.E.2d at 777; *see also State v. Hepburn*, 406 S.C. 416, 429 753 S.E.2d 402, 409 (2013). 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. *Hepburn*, 406 S.C. at 416, 429 S.E.2d at 409.

## ARGUMENT

The court erred in refusing to direct a verdict of acquittal for CSC in the first degree and burglary in the first degree where the complainant did not testify at trial, and where appellant testified the incident was consensual, since absent the complainant's testimony the state failed to prove that appellant entered the home without consent and with intent to commit a crime, and it failed to prove appellant used aggravated force to accomplish a sexual battery.

Appellant explained that his entry into the home and sexual relations with the complainant were consensual. The complainant did not testify, and there were no eyewitnesses. Without the complainant's testimony, under these circumstances, the state was unable to prove material elements of burglary—that appellant's entry of the dwelling was without consent and that he had the intent to commit a crime therein. The state was also unable to prove a material element of first degree criminal sexual conduct—it could not prove that a sexual battery was accomplished with aggravated force.

### ***Relevant facts***

Police officers were called when the complainant appeared at the home of her daughter, Chynna Lopez, distraught and crying. R. 96, ll. 1-7. Lopez accompanied the complainant back to the complainant's house, where her bedroom was in disarray. R. 97, ll. 13-19. There were no sheets on the complainant's bed, and her cellular telephone and jewelry box were missing. R. 97, l. 16 – 98, l. 2. Lopez activated the complainant's "find my phone" function and the family alerted police officers the telephone was nearby—close to the post office. R. 98, ll. 4-17; R. 109, l. 3 – 110, l. 12.

Appellant was found at the post office next to his work truck, which contained the complainant's telephone and jewelry box. R. 144, ll. 18 – 145, l. 22. Appellant also had the

complainant's bedsheets. R. 139, l. 3 – 143, l. 23. His truck had a flat tire. R. 175, ll. 9-12. Appellant was quickly detained. R. 124, ll. 7-8.

The complainant had to be coaxed to cooperate with the investigation, and she did not testify at trial. The complainant was "resistant" to speaking with police officers and did not want to be medically evaluated, according to Officer Laura Rutland. R. 128, ll. 7-22. Lopez, the complainant's daughter, confirmed that the complainant "just didn't want to talk about it at all." R. 100, ll. 16-17. Jennifer Stokes, a sexual assault nurse examiner, stated that she spent a "significant amount of time" "trying to convince [the complainant] to allow me to perform [an] exam." R. 152, l. 25 – 153, l. 1. Upon performing the exam, Stokes found the complainant had swelling and micro tearing to the perineal area and bruising in the vaginal wall and cervix. R. 159, ll. 3-20.

Lopez consented to a search of the complainant's home on the complainant's behalf. R. 129, ll. 6-12. Officers checked the windows and saw that several window screens had been removed or damaged. R. 129, ll. 15-22. DNA analysis showed that appellant's DNA was present in the complainant's vagina, and that the complainant was a contributor to DNA scraped from beneath appellant's fingernails. R. 220, l. 20 – 223, l. 25.

The complainant did not testify, so the jury did not hear her account of how a sexual battery allegedly occurred and did not hear her account of the circumstances surrounding appellant's entry into her home. There were no eyewitnesses to the alleged offenses.

Appellant, who was married, testified in his own defense and he explained that he had a "discrete" relationship with the complainant, but she eventually "got mad at me because I didn't want to leave my family." R. 234, ll. 12-13; R. 238, l. 20 – 239, l. 4. Appellant denied entering through a window and said he had walked into the house through the door and had consensual

sex with the complainant. R. 236, l. 12 – 238, l. 7. “[W]hat we had was consensual.”<sup>1</sup> R. 238, l. 20. Appellant explained that on the night in question, he hoped to persuade the complainant to give him eight hundred dollars to keep his car from being auctioned off, but that the complainant felt betrayed by this request. Appellant said the complainant asked, “Well, is this all about money?” R. 236, l. 22 – 237, l. 24.

Appellant explained that, nevertheless, the two eventually kissed and had sex. R. 238, ll. 6-7. However, appellant revealed that “after we had sex, I, again, asked her for the money . . .” R. 238, ll. 7-8. “And she basically got aggressive. She got mad.” R. 238, ll. 12-13. Appellant offered that the reason the complainant was not present in court was because “she knows as well as I do . . . that this is not a rape case. I didn’t rape anyone, nor did I burglarize a house. R. 243, ll. 16-19.

At the close of the state’s case, defense counsel moved that the court direct verdicts of acquittal. R. 227, ll. 24-25. Defense counsel observed that appellant had been unable to confront his accuser, and argued, “There has been no testimony from the witness stand indicating that this was anything other than a consensual act, and we don’t believe that this is a jury question at all based on the absence of direct accusation.” R. 228, ll. 5-9.

The solicitor responded that there was “substantial” circumstantial evidence including the complainant’s demeanor afterwards, physical evidence of her injury, signs of forced entry, and that there was also appellant’s confession to police officers and his inculpatory telephone call to his wife. R. 228, l. 15 – 229, l. 10. The court ruled that “taking all of the evidence in the light

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<sup>1</sup> When questioned by police officers, appellant denied any wrongdoing. R. 180, ll. 6-8. However, in a subsequent interview, appellant confessed to burglarizing the complainant’s home and to sexually assaulting her. R. 251, l. 14 – 255, l. 24. This interview was entered into evidence as State’s Exhibit #3 and is on file with this Court. Appellant was also recorded making inculpatory remarks during a telephone call that he made to his wife from the detention center. R. 258, ll. 4-23; R. 203, ll. 1-16.

most favorable to the non-moving party, there is adequate evidence and circumstance for the jury to determine that [appellant] is guilty of the burglary and the criminal sexual conduct in the first degree.” R. 229, ll. 18-23.

The jury deliberated for three and a half hours before finding appellant guilty as indicted. R. 307, l. 15; R. 312, ll. 5-18. The court sentenced appellant to life in prison for first degree burglary and thirty years for first degree criminal sexual conduct. R. 320, ll. 8-15.

### ***Discussion***

The court erred when it refused to direct a verdict of acquittal on both charges, since the state failed to present evidence on a material element of first degree burglary and on a material element of first degree CSC. An accused “is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged.” *State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004) (citing *State v. McHoney*, 344 S.C. 85, 544 S.E.2d 30 (2001); *State v. Brown*, 103 S.C. 437, 88 S.E. 21 (1916); *State v. Gore*, 318 S.C. 157, 456 S.E.2d 419 (Ct. App. 1995)). *Accord State v. Heath*, 370 S.C. 326, 330, 635 S.E.2d 18, 19 (2006) (we “reverse Appellant’s conviction because the State failed to establish an essential element of the crime charged”).

“[W]hen 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). 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. Hepburn*, 406 S.C. 416, 429 753 S.E.2d 402, 409 (2013). Here, the only direct evidence was appellant’s confession, the force of which was cancelled out by his in-court testimony to a different set of events. Nor was the circumstantial evidence substantial.

Without the victim present to give her version of events, and considering appellant's explanation, the evidence presented at trial merely raised a suspicion of guilt.

The court erred in failing to direct a verdict of acquittal on the first degree burglary charge since the state did not prove all material elements of the offense. S.C. Code Ann. § 16-11-311 provides that

**A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either: (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime: (a) is armed with a deadly weapon or explosive; or (b) causes physical injury to a person who is not a participant in the crime; or (c) uses or threatens the use of a dangerous instrument; or (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or (3) the entering or remaining occurs in the nighttime.**

Here, the state alleged that entry into the home was made at nighttime, a fact that was not in dispute. R. 327. However, absent the testimony of the complainant, the state was unable to prove the essential elements that appellant entered the complainant's home without consent and that he entered with the intent to commit a crime therein. Instead, appellant testified that his entry into the complainant's home was with consent and that the sexual relations were also consensual. The complainant did not testify at trial, so there was no direct evidence in the form of testimony to the contrary.

Similarly, the court erred when it failed to direct a verdict of acquittal on the first degree CSC charge. S.C. Code Ann. § 16-3-652(1) provides that a person is guilty of CSC in the first degree if he engages in sexual battery with the victim and if any one or more of the following circumstances are proven:

(a) **The actor uses aggravated force to accomplish sexual battery.** (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 similar offense or act. (c) The actor causes the victim, without the victim's consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance.

(emphasis added). Here, the state proceeded under subsection (a) according to the indictment, which charged that appellant “did engage in sexual battery with the use of aggravated force upon [C.B.] . . .” R. 325.

S.C. Code Ann. § 16-3-652(1)(a) requires proof that an accused used aggravated force to accomplish sexual battery. Here, there was no testimony that aggravated force was used—and aggravated force was an essential element of the offense. According to S.C. Code Ann. § 16-3-651(c), “‘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.” Appellant testified the sexual activity was consensual. The state did not allege that appellant had a weapon, and the complainant did not provide any testimony that the sexual relations were not, in fact, consensual.

In *State v. Lindsey*, 355 S.C. 15, 21, 583 S.E.2d 740, 743 (2003), it was argued that the court should have directed a verdict in the defendant's favor based on lack of evidence of aggravated force. However, the South Carolina Supreme Court found the charge of CSC in the first degree was properly submitted to the jury where the “victim testified that [the defendant] would not get off of her, and that she was kicking, pushing, fighting and hitting to get him off of

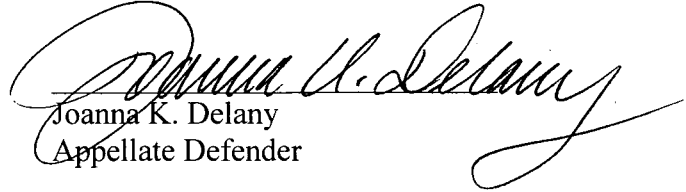
her.” *Id.* at 21-22, 583 S.E.2d at 743. “We find this evidence sufficient to create a jury issue as to whether Lindsey used aggravated force in attacking the victim.” *Id.* at 21, 583 S.E.2d at 743.

Here, there was no testimony by the victim that appellant used aggravated force. Therefore, the charge of first degree CSC should not have been submitted to the jury. *See State v. Green*, 327 S.C. 581, 588, 491 S.E.2d 263, 266 (Ct. App. 1997) (where there was no evidence the defendant used any force, much less aggravated force, when committing the sexual batteries, the trial court should have granted motion for directed verdict on the first degree CSC charges).

If the state’s evidence “merely raises a suspicion that the accused is guilty,” the court must direct a verdict in his favor. *State v. Schrock*, 238 S.C. 129, 132, 322 S.E.2d 450, 452 (1984). Here, the evidence only raised a suspicion of guilt. Without the complainant’s testimony, the state was unable here to prove material elements of burglary, and it was unable to prove a material element of first degree criminal sexual conduct. The court therefore erred when it failed to direct a verdict of acquittal on both charges. *State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004).

**CONCLUSION**

Based on the foregoing argument, appellant's convictions and sentences should be reversed and the case remanded for entry of a directed verdict of acquittal.



Handwritten signature of Joanna K. Delany in cursive script.

Joanna K. Delany  
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of October, 2019.

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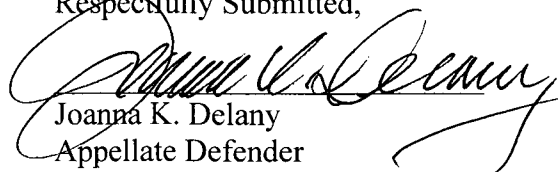
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Lance R. Elam states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Carmen T. Mullen, which was held on December 10 - 12, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, She asks the Court to relieve her as counsel for Lance R. Elam.

Respectfully Submitted,

  
Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 3rd day of October, 2019.

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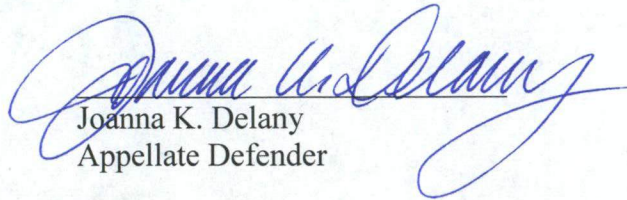
OCT 03 2019

SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

October 3, 2019.



Joanna K. Delany  
Appellate Defender

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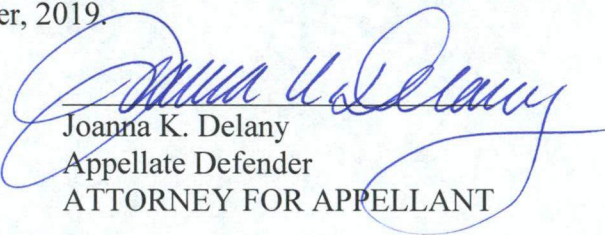
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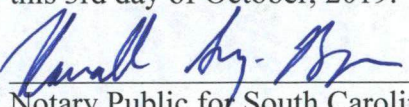
APPELLANT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blicht, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Lance R. Elam, 378473, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 3rd day of October, 2019.

  
\_\_\_\_\_  
Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 3rd day of October, 2019.

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