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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

Opinion No. 2020-UP-031

THE STATE,

RESPONDENT,

V.

ALQI DHIMO,

APPELLANT.

APPELLATE CASE NO. 2018-000110

PETITION FOR REHEARING

On February 5, 2020, this Court affirmed Appellant's conviction in an unpublished opinion. *State v. Dhimo*, 2020-UP-031 (S.C. Ct. App. filed February 5, 2020). Pursuant to Rule 221(a), SCACR, counsel for Appellant respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court.

On appeal, Appellant argued that 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. This Court affirmed Appellant's conviction.

There was no direct evidence of Appellant's guilt. The complainant did not testify; no eyewitnesses saw an attempted sexual assault; and Appellant did not confess to a crime. In order for the case to be properly submitted to the jury, the State was therefore required to show substantial circumstantial evidence that Appellant committed an overt act in an attempt to commit the crime. No such evidence was presented.

While this Court's opinion notes that submission to the jury is only proper in a case where there is any direct or substantial circumstantial evidence of guilt, counsel respectfully submits that the Court misapprehended the nature of the evidence offered by the State here. Because Appellant and the complainant were voluntarily engaged in foreplay prior to the complainant becoming unconscious, none of the circumstantial evidence offered by the State (the complainant's swimsuit being pulled to the side; Appellant's partial nudity; the presence of Appellant's DNA underneath the complainant's fingernails; and the alleged bite marks on Appellant's arm) established that Appellant attempted to commit a sexual battery once she became mentally deficient, mentally incapacitated, or physically helpless. Appellant may well have stopped engaging in foreplay with the complainant once she became incapacitated, and nothing offered by the State established otherwise.

Counsel also respectfully submits the Court misapprehended the fact that, contrary to the State's claim, the videotape did not show Appellant taking the complainant out of the car after she became unconscious. Instead, it showed the complainant conscious when she exited.

Therefore, the fact that the complainant got out of the car to go to the beach was not an overt act to commit a sexual battery on Appellant's part.

The State alleged that Appellant tried to sexually batter the twenty-two-year-old complainant, J.K., while he had reason to know she was mentally defective, mentally incapacitated, or physically helpless. R. 522 – 523. The circumstances that gave rise to the case were that security guards in Myrtle Beach saw a man with his pants down at the beach and called police officers. R. 211, ll. 6-11; R. 213, ll. 5-7. Appellant was clothed by the time police officers arrived, but the complainant was unconscious due to intoxication. Her swimsuit bottom was pulled to the side, which exposed her private parts. R. 165, l. 3 – 166, l. 8.

Appellant, a taxi cab driver, whose cab had been parked haphazardly by the beach, had a video and audio recorder in his taxi cab. Video from the taxi cab introduced at trial showed the complaint willingly kissing, licking, and groping Appellant on numerous occasions. State's Exhibit #16. A bartender recalled seeing the pair that night, said they appeared to be on a date, and said he served them several shots of Crown Royal Apple. R. 231, ll. 7-10; R. 234, l. 23 – 235, l. 18; R. 238, ll. 6-8.

The complainant passed away six months prior to Appellant's trial, and the state relied entirely on circumstantial evidence to prove its case. R. 157, l. 13 – 158, l. 1. It relied upon the following circumstances: Appellant was videotaped in the taxi cab saying he wanted to "love" the complainant; Appellant was partially nude when seen by security guards on the beach near the complainant; Appellant's DNA was under the complainant's fingernails and Appellant had scratches and bite marks on his arm; and the complaint's swimsuit was pulled to the side. *See* Final Brief of Respondent at 12.

Trial counsel moved the court direct a verdict of acquittal, and he argued the State failed to present any direct or "substantial circumstantial evidence proving that there was any type of touching or attempted touching on the beach . . ." R. 433, 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." R. 433, ll. 21-25. However, the trial court denied the motion. R. 438, ll. 10-18.

"[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). 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.

Here, the trial court should have granted a directed verdict because the evidence was not substantial circumstantial evidence of guilt—it 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.*

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.*

Appellant was tried for attempted third degree criminal sexual conduct. "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. *See 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. 256, 19 S.E.2d 101, 102-03 (1942) (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).

The facts of the case at hand, however, show Appellant and the complainant were voluntarily engaged in sexual foreplay. Therefore, none of the circumstances pointed to by the

State added up to substantial evidence of an overt act. Although the State argued that Appellant's statement to the complainant that he wanted to "love" her was substantial circumstantial evidence of an overt act, a statement is not an overt act. Also, the complainant was videotaped repeatedly telling Appellant, "I love you." State's Exhibit #16.

Likewise, Appellant's nudity and the complainant's exposed privates were not proof that he attempted to do anything to her after she became incapacitated, since they had been engaged in foreplay and went to the beach together. It was also undisputed that the complainant had gotten out of the cab to urinate by the roadside shortly before they got to the beach, so her swimsuit might have been askew from that. State's Exhibit #16.

Counsel also respectfully submits the Court overlooked the fact that while complainant had Appellant's DNA under her fingernails, this was not substantial circumstantial evidence of guilt, since the complainant was videotaped touching Appellant in a "loving manner." R. 272, l. 9 – 273, l. 7.

Moreover, the State inconsistently took the position that the marks on Appellant's arm were defensive bite marks made by the complainant after the pair exited the cab—at which point the State conversely argued the complainant had already passed out. Final Brief of Respondent at 12. However, there was no testimony at trial that it is medically possible to bite someone while unconscious. Therefore, the theory that the alleged bitemarks show an overt act is irrational. If the complainant was unconscious as the State alleged, she could not have bitten Appellant.

The State also incorrectly argued the video showed the complainant passing out and being removed from the taxi cab. Final Brief of Respondent at 12. However, that is untrue. *See* State's Exhibit #16. In the light most favorable to the State, the videotape does <u>not</u> show Appellant taking the complainant out of the car after she became unconscious. While the

complainant's head hung down at one point, the video unambiguously shows that her head came back up and both her head and her arm were up before the lights in the car came on (when the door was opened). State's Exhibit #16. The complainant had even driven the pair to the beach herself. Therefore, the fact that the complainant exited the car to go to the beach was not an overt act to commit a sexual battery on Appellant's part.

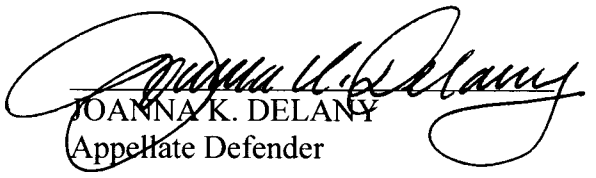
While appellant was undoubtedly at the scene when the complainant was found unconscious, there was no evidence appellant attempted to sexually batter the complainant once she had become that way.

Here, Appellant's actions may merely be characterized as suspicious, since nothing offered by the State showed that Appellant attempted to have sex with the complainant after she was unconscious. Therefore, counsel respectfully submits this Court misapprehended the evidence offered by the State. *See State v. Odems*, 395 S.C. 582, 590, 720 S.E.2d 48, 52 (2011) ("Petitioner's overall actions may appear suspicious, but mere suspicion is insufficient to support a guilty verdict."); *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000) (trial court should not refuse to grant the motion for a directed verdict "where the evidence merely raises a suspicion that the accused is guilty.") 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).

The trial court erred by refusing to direct a verdict of acquittal on the charge of third degree attempted criminal sexual conduct, given the lack of substantial circumstantial evidence. Based on the above arguments, counsel for Appellant respectfully seeks rehearing pursuant to

Rule 221(a), SCACR, due to the significant points overlooked and/or misapprehended by the Court in affirming Appellant's conviction.

Respectfully Submitted,



JOANNA K. DELANY
Appellate Defender

This 7th day of February, 2020.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Alqi Dhimo, at 605 37th Ave North #D, Myrtle Beach, SC, 29577, this 7th day of February, 2020.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 7th day of February, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029.