STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to the Court of Appeals
Appeal from Horry County
Honorable Steven H. John, Circuit Court Judge

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Opinion No. 2020-UP-031 (S.C. Ct. App. Filed February 5, 2020, Withdrawn, Substituted, and Refiled April 29, 2020)

2015-GS-26-04000

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THE STATE,

RESPONDENT,

V.

ALQI DHIMO,

PETITIONER

APPELLATE CASE NO. 2018-000110

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# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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## CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies the petition for rehearing was made and finally ruled upon by the Court of Appeals on April 29, 2020.

## QUESTION PRESENTED

Whether the Court of Appeals erred in finding there was substantial circumstantial evidence to support the trial court's refusal to grant Petitioner a directed verdict on the charge of attempted third degree criminal sexual conduct, where the Court of Appeals did not identify such evidence, and where it was undisputed the complainant voluntarily engaged in foreplay with Petitioner prior to being found unconscious on the beach, since there was no direct evidence and no substantial circumstantial evidence that Petitioner attempted to commit an overt sex act on a physically helpless, mentally defective, or mentally incapacitated person?

## STATEMENT OF THE CASE

Petitioner was indicted by an Horry County Grand Jury on September 17, 2015, for attempted third degree criminal sexual conduct. R. 522 – 523. The indictment alleged that on June 22, 2015, petitioner attempted to engage in a sexual battery with J.K., when he knew or had reason to know she was mentally defective, mentally incapacitated or physically helpless. R. 523. Petitioner was also indicted for indecent exposure.

Petitioner proceeded to trial before the Honorable Steven H. John and a jury January 8 – 10, 2018. R. 99. Petitioner was represented by John Reuben Long, II, and the State was represented by Mary Ellen Walter and C. Leigh Andrew. R. 99. Petitioner was found not guilty of indecent exposure, but was found guilty of attempted third degree criminal sexual conduct and was sentenced to incarceration for eight years and ordered to register as a sex offender. R. 501, ll. 10-13; R. 524.

On January 17, 2018, Petitioner served his notice of appeal. Undersigned counsel represented Petitioner before the Court of Appeals. Petitioner challenged the trial judge's failure to direct a verdict of acquittal. On February 5, 2020, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. *State v. Dhimo*, Op. No. 2020-UP-031 (S.C. Ct. App. filed February 5, 2020). Thereafter, Petitioner filed a petition for rehearing, which was denied on April 29, 2020. However, Opinion No. 2020-UP-031 was withdrawn, substituted, and refiled on April 29, 2020, in an unpublished opinion. *State v. Dhimo*, Op. No. 2020-UP-031 (S.C. Ct. App. filed February 5, 2020, Withdrawn, Substituted, and Refiled April 29, 2020). Petitioner now files this petition for writ of certiorari.

## ARGUMENT

The Court of Appeals erred in finding there was substantial circumstantial evidence to support the trial court's refusal to grant Petitioner a directed verdict on the charge of attempted third degree criminal sexual conduct, where the Court of Appeals did not identify such evidence, and where it was undisputed the complainant voluntarily engaged in foreplay with Petitioner prior to being found unconscious on the beach, since there was no direct evidence and no substantial circumstantial evidence that Petitioner attempted to commit an overt sex act on a physically helpless, mentally defective, or mentally incapacitated person.

**Reasons to grant certiorari**

This Court should grant the petition for writ of certiorari because the decision of the Court of Appeals is in conflict with prior decisions of this Court. *See* Rule 242(b)(3), SCACR.

Petitioner submits the State did not present substantial circumstantial evidence of guilt. Nothing offered by the State showed that Petitioner attempted to have sex with the complainant after she became physically helpless, mentally defective, or mentally incapactitated. The Court of Appeals' decision is therefore in conflict with prior decisions of this Court which require the trial judge to direct a verdict of acquittal where the State presents no direct or substantial circumstantial evidence of guilt, and the evidence instead merely raises a suspicion of guilt. *See State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000); *State v. Reid*, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011); *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004).

Although the Court of Appeals cited prior decisions of this Court in its opinion, the Court of Appeals failed to apply those decisions to these facts. Therefore, this Court should grant the petition for writ of certiorari.

**Relevant facts**

J.K., the complainant, passed away from a heart attack in November 2015, prior to appellant's trial. R. 157, l. 13 – 158, l. 1.

On June 21, 2015, the twenty-two-year-old complainant was drinking alcohol at a barbeque in Myrtle Beach while only dressed in a bathing suit and tank top, which is the way she remained dressed throughout the evening. R. 153, l. 24 – 154, l. 3; R. 154, l. 24 – 155, l. 3; R. 154, ll. 8-9. The complainant left the party with her boyfriend around 10:00 p.m. but the couple got in an argument. R. 155, ll. 6-7. The complainant hit her boyfriend while he was driving, so he became upset and pulled over. R. 155, ll. 9-10. The complainant got out of the car and her boyfriend followed her, but she kicked the car and he eventually drove away. R. 155, l. 10 – 156, l. 1.

Alqi Dhimo, Petitioner, had been a taxicab driver for about fifteen years. State's exhibit #3.[1] The complainant flagged down Petitioner's taxi. Video footage of much of the interaction between Petitioner and the complainant was captured on the dashboard camera (dash-cam) of Petitioner's taxicab and comprises State's exhibit #16, which is on file with this Court.[2]

The dash-cam footage shows that the complainant got in the back seat of Petitioner's cab, said she was going to 77th Avenue, and offered that she had a fight with her boyfriend. State's exhibit #16. The recording stopped but resumed thirty minutes later. State's exhibit #16. The State believed the two went to a bar in the intervening minutes, and presented the testimony of a

[1] State's exhibit #3 is a CD of Petitioner's interview with law enforcement and is on file with this Court.

[2] The dash-cam was installed in Petitioner's cab as a condition of bond when he was charged with first degree criminal sexual conduct in 2014. R. 20, ll. 19-23. Petitioner had no prior criminal record. R. 441, ll. 1-3.

bartender at Jimmagan's Pub who said he remembered serving Petitioner and the complainant three or four shots of Crown Royal Apple that night, and said that it looked like they were on a date. R. 231, ll. 7-10; R. 234, l. 23 – 235, l. 18; R. 238, ll. 6-8

The dash-cam footage showed that upon reentering the taxicab after leaving Jimmagan's Pub, the complainant sat in the front seat beside Petitioner. State's exhibit #16. The video showed the two driving around for about twenty minutes and engaging in foreplay. State's exhibit #16.

The footage showed the complainant repeatedly telling Petitioner, "I love you," Petitioner saying, "I love you," in response, and the two kissing. State's exhibit #16. Officer Williamson agreed the video reflected the complainant scratching Petitioner with her fingernails in a "loving manner," caressing his body, licking his face, and rubbing his crotch. R. 272, l. 9 – 273, l. 7. Petitioner suggested the two go to the beach and said, "Let me love you." State's exhibit #16.

The video reflected that the complainant told Petitioner he was a "good kisser" and she said he was "fucking hot." State's exhibit #16. At times, the complainant said "stop" or "not now," but she continued to reinitiate foreplay with Petitioner afterwards. State's exhibit #16. This went on for about twenty minutes, until the complainant exited the taxicab to urinate, and then reentered the cab on the driver's side, whereupon she briefly drove the cab and stopped at the beach. State's exhibit #16.

The State argued the complainant appeared to pass out after she parked the cab, when her head hung down. R. 462, ll. 13-16. However, the video showed the complainant conscious when she exited. State's exhibit #16.

Subsequently, security guards reported a man lying on his side on the beach wearing only a shirt, and they said he might have someone with him. R. 213, ll. 5-6. R. 215, ll. 4-25.

According to security guards, the man said to stop and not come any closer. R. 212, ll. 2-3. None of the security guards reported seeing physical contact between Petitioner and the complainant. R. 221, ll. 13-15; R. 230, ll. 2-4. One of the security guards said Petitioner was "leaning over" the complainant when he stood up. R. 224, ll. 8-11; R. 225, ll. 10-11.

Detective Daniel Eddy went to the beach in response to the call from the security guards—Eddy turned on his body-worn camera to record the incident.[3] R. 164, ll. 7-25. Detective Eddy could not tell if Petitioner was intoxicated due to his Albanian-American accent, and Petitioner was clothed by the time Eddy arrived. R. 168, ll. 5-7; State's exhibit #36.

The complainant was unconscious on the beach, lying on her side with her bikini bottom pulled to the side and her privates exposed. R. 165, l. 7-18. The complainant's swimsuit was not ripped or torn. R. 202, ll. 13-19. The defense argued her bikini bottom could have been pulled to the side by the complainant when she earlier urinated off-camera. R. 274, ll. 12-20. According to Detective Eddy, the complainant smelled of alcohol. R. 166, l. 2. Officers awakened her with smelling salts, and she refused to go to the hospital. R. 166, ll. 3-4; R. 203, ll. 1-6.

The complainant was briefly recorded by an officer's body camera in an ambulance, and she repeatedly said, "This is embarrassing." State's exhibit #36. Officers arrested the complainant for public drunk and they also arrested Petitioner for indecent exposure. R. 175, ll. 14-18; R. 58, ll. 11-14. According to a forensic toxicologist, the complainant's blood alcohol concentration was 0.169 percent and using retrograde extrapolation, would have been about 0.334 eleven hours earlier (when officers saw her on the beach). R. 312, ll. 10-16; R. 315, l. 23 – 316, l. 10.

[3] The footage from officers' body-worn cameras comprises State's exhibit #36 and is on file with this Court. R. 106, l. 24.

Petitioner cooperated with police officers. State's exhibit #36. Petitioner gave a somewhat unintelligible statement to law enforcement, due to his accent and possibly due to intoxication.[4] State's exhibit #3. The State argued Petitioner's statement was suspicious, because he "didn't mention any of the physical contact" with the complainant in the taxi and said he had turned on the fare meter but had not. R. 467, ll. 2-3; R. 467, ll. 19-20.

Detective Hugh Jones, who was assigned the next day to follow up on the case, met with the complainant and he incorrectly told her that Petitioner was seen naked on top of her. R. 47, ll. 11-16; R. 48, ll. 2-6; R. 59, ll. 15-18. After speaking with Jones, the complainant agreed to go to the hospital for a sexual assault exam. R. 421, ll. 1-8.

Medical personnel performed a rape kit on the complainant. R. 296, ll. 4-11. Hospital staff called the complainant's mother, and her mother was present during the exam. R. 303, ll. 18-23. Petitioner had what appeared to be scratches and bite marks on his arms, and his DNA was found in fingernail scrapings from the complainant's right hand. R. 166, ll. 22-25; R. 345, ll. 1-9. However, a forensic serologist from SLED testified the complainant's rape kit was negative for sperm or semen. R. 320, ll. 6-9; R. 332, ll. 16-23.

Defense counsel moved for a directed verdict at the close of the State's case, and argued the State failed to present "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. Defense counsel correctly noted, "The State has failed to give any direct or substantial

[4] The poor quality of the recording and the noise from the complainant, who was in jail at the time and was yelling in the background, contribute to the confusion. State's exhibit #3.

circumstantial evidence proving that there was any type of touching or attempted touching on the beach . . .” R. 433, ll. 13-16.

The State argued that the video showed the complainant “passed out,” in the cab when the video ended, and that Petitioner was seen nude lying on the beach beside her. R. 435, ll. 19-25. Defense counsel said, “That’s a misrepresentation of the facts, Your Honor.” R. 436, ll. 1-2.

The solicitor argued the complainant’s bathing suit bottom was pulled to the side revealing her privates, and the solicitor incorrectly told the trial judge that Detective Eddy had testified the complainant “had red marks on her inner thighs.” R. 436, ll. 12-14. Although Hugh Jones said during pretrial motions that he thought Detective Eddy had seen marks around the complainant’s genitalia, the State did not present any evidence of this at trial.[5] R. 61, ll. 6-11. Nevertheless, the solicitors argued to the jury in opening statement and in closing argument that the complainant had red marks and abrasions near her genitals, despite no evidence of this being presented at trial. R. 132, ll. 23-25; R. 460, ll. 13-15.

The State also argued the marks on Petitioner’s arms and his DNA under her fingernails contributed to “enough” evidence. R. 436, l. 22 – 437, l. 9. The court denied defense counsel’s directed verdict motion and stated there was “some direct evidence and clearly enough circumstantial evidence.” R. 438, ll. 10-18.

Defense counsel argued in closing that just because the complainant had gotten drunk and lost her inhibitions in the taxicab did not mean that Petitioner later attempted to commit a sexual battery upon her. R. 472, l. 24 – 473, l. 8; R. 475, l. 25 – 476, l. 1.

[5] During pretrial, Hugh Jones also claimed that according to Detective Eddy, the complainant’s bikini bottom was on backwards. R. 61, ll. 12-16. No evidence of this was presented at trial, and Detective Eddy testified at trial. R. 100, l. 11.

Petitioner was found guilty of attempted third degree criminal sexual conduct and he was sentenced to eight years' incarceration and ordered to register as a sex offender for life. R. 524. The jury found Petitioner not guilty of indecent exposure. R. 501, ll. 10-13.

**Discussion**

The trial court should have granted Petitioner a directed verdict because the evidence only raised a suspicion Petitioner 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*.

"[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). 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*.

In *State v. Rogers*, 405 S.C. 554, 564, 748 S.E.2d 265, 270 (Ct. App. 2013), this Court explained, "[D]irect evidence is that which requires only the factfinder's determination that the evidence is credible before it may find the existence of a disputed fact." "Direct evidence is based on personal knowledge or observation and, *if true*, proves a fact without inference or presumption." *Id*. at 563, 748 S.E.2d at 270 (internal alterations and quotations omitted) (emphasis in original).

If, for example, the State had presented eyewitness testimony or testimony from the complainant that Petitioner pulled the complainant's bikini bottom to the side and attempted to

sexually assault her, this would be direct evidence, since the jury would only have to determine the testimony was credible in order to conclude that a fact in issue had been proven. However, no direct evidence was presented here.

Instead, the State relied on circumstantial evidence. "Circumstantial evidence, on the other hand, requires the factfinder not only to determine that it believes the evidence, but also to make at least one additional inference from the evidence before concluding the fact has been proven." *Id*. at 564, 748 S.E.2d at 270. Evidence is circumstantial, rather than direct, where "[a]t least one additional inference is necessary before any of the evidence proves [the offense]." *Id*.

Petitioner was tried for attempted third degree criminal sexual conduct, an attempt crime which required proof of an overt act. "The law does not concern itself with mere guilty intention, unconnected with any overt act." *State v. Quick*, 199 S.C. 256, 19 S.E.2d 101, 102 (1942). "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 the Court of Appeals 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. at 256, 19 S.E.2d at 102-03 (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); *State v. Buckmon,* 347 S.C. 316, 322, 555 S.E.2d 402, 405 (2001) (evidence merely suspicious in trial for murder and attempted armed robbery where accused was near the crime scene, was with two others where three people were seen running towards the crime scene, and accused's codefendants had earlier talked about doing a "lick".)

Here, the failure to show evidence of an overt act warranted a directed verdict of acquittal. The State did not present direct evidence or substantial circumstantial evidence that Petitioner committed an overt act once the complainant became physically helpless, mentally defective, or mentally incapacitated. The evidence presented by the State proves only that: (1) while the complainant was awake and conscious, Petitioner said he wanted to "love" her on the beach; (2) Petitioner was partially nude near the complainant; (3) the complainant's swimsuit was pulled to the side after she had urinated; and (4) at some point the complainant became unconscious.

While Petitioner was undoubtedly at the scene when the complainant was found unconscious, there was no evidence Petitioner tried to or even wanted to have sex with her while she was in that state. The circumstantial evidence offered here did not reasonably tend to prove Petitioner's guilt, nor could his guilt be fairly and logically deduced from the evidence. *Mitchell,* 341 S.C. at 409, 535 S.E.2d at 127.

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.

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).

Petitioner submits the trial court erred in submitting the case to the jury, since there was no direct evidence and no **substantial** circumstantial evidence that Petitioner committed an overt act in an attempt to commit criminal sexual conduct against a physically helpless, mentally defective, or mentally incapacitated person. Instead, the evidence was only sufficient to raise a suspicion of guilt.

The Court of Appeals' opinion is largely parenthetical and does not cite to any evidence in the case, making it difficult for Petitioner to determine what reasoning was employed and what facts were relied upon by the Court of Appeals. The opinion did not identify the substantial circumstantial evidence of guilt or the overt act. The refiled, substituted opinion did include the following parenthetical: "*State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016) ('[A]lthough the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt.')" (emphasis in original). However, any suspicious circumstances here were not substantial, and no overt act was proven.

"The trial court should grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty, as 'suspicion' implies a belief or opinion as to guilt based

upon facts or circumstances which do not amount to proof." *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013) (internal quotations and alterations omitted). "The 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).

Because the State relied on circumstantial evidence here, that evidence had to be substantial, and it was not. *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000). Here, the circumstances were only suspicious, and so the trial court's failure to direct a verdict of acquittal was error. *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475 (2004).

## CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented.

s/ Joanna K. Delany
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of May, 2020.