STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

Opinion No. 2020-UP-271 (S.C. Ct. App. Filed September 30, 2020)

THE STATE,

RESPONDENT,

V.

STEWART JEROME MIDDLETON,

PETITIONER

APPELLATE CASE NO. 2017-002478

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on November 24, 2020.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by finding the trial court properly refused to direct a verdict where there was no direct or substantial circumstantial evidence that the complainant was mentally incapacitated or physically helpless when she had sex with petitioner after the Christmas party or that petitioner knew or had reason to know of such alleged incapacity, since being "intoxicated" does not satisfy this standard and particularly where the complainant was conscious and jumped up out of bed naked not long before the sexual intercourse occurred?

2.

Whether the Court of Appeals erred by finding no abuse of discretion in the trial court allowing Detective Bailey to testify that petitioner did not show up for two appointments with her, and that it allegedly took him seventeen to twenty days to meet with the detective as she requested, since this testimony was not relevant to the issue of petitioner's guilt or innocence?

STATEMENT OF THE CASE

Petitioner was indicted at the May, 2014 term of the Charleston County Grand Jury for the offense of criminal sexual conduct in the third degree. R. 348 – 349. Petitioner's case came on for trial on October 23, 2017, before the Honorable J.C. Nicholson, Jr., and a jury. James Smiley and Laree Hensley represented petitioner. The assistant solicitors were Andrew Evans and Jessica Baldwin. R. 1.

On October 26, 2017, the jury found petitioner guilty. R. 337, ll. 17-23. Judge Nicholson sentenced petitioner to six years' imprisonment, suspended upon the service of six months, and five years probation. R. 344, l. 19 – 25.

The Court of Appeals (Huff, Thomas, and McDonald, JJ.) affirmed petitioner's conviction in State v. Stewart Jerome Middleton, 2020-UP-271 (September 30, 2020). App. 1-4. Petitioner sought rehearing. App. 5-8. Rehearing was denied. App. 9.

This petition for a writ of certiorari follows.

ARGUMENT

1.

The Court of Appeals erred by finding the trial court properly refused to direct a verdict where there was no direct or substantial circumstantial evidence that the complainant was mentally incapacitated or physically helpless when she had sex with petitioner after the Christmas party or that petitioner knew or had reason to know of such alleged incapacity, since being "intoxicated" does not satisfy this standard and particularly where the complainant was conscious and jumped up out of bed naked not long before the sexual intercourse occurred

Relevant facts

Kayla I., helped plan the SKF company's Christmas party on December 14, 2013, at the Embassy Suites Hotel in Charleston. R. 33, ll. 2-22. Kayla I. was five-foot-four, and she weighed 115 pounds. She told the solicitor at trial that she was not "[a] big drinker back then." R. 36, ll. 9-23.

She remembered she got to the Embassy Suites at about one o'clock that afternoon. She went to eat at Jim and Nick's at the Tanger Outlet. She thought she also had dinner about three or four o'clock. R. 35, ll. 7-24. She then went back to her hotel room where she maintained she had "[t]wo of the small plastic cups that come in the hotel room, half sprite and half Ciroq [vodka]." R. 36, ll. 3-13. Kayla I. then went with her friend Yolanda Alston to the ballroom on the second floor for the Christmas party. There were about thirty or forty people at the party. They were expecting about seventy-five people. R. 37, ll. 2-23.

Petitioner was a coworker with Kayla I., but he was not at the party at the time. R. 37, l. 24 – 38, l. 8. After about an hour-and-a-half, Kayla I., remembered, "[I] was really intoxicated

as well as sick, and that was pretty much it. That's when I decided it was time for me to leave." R. 38, ll. 9-21.

Kayla I. (hereinafter the "complainant") said she asked another coworker, Jimmie Filbeck, to escort her back to her room. Although Filbeck's wife was not at the party at the time, the complainant maintained: "I asked him and his wife to come back and check on me when they were leaving the party, just to make sure I was okay." She gave Jimmie Filbeck her room key so he could "get back into the room." R. 38, l. 22 – 39, l. 15.

She testified the "next thing she remembered" was "Jimmy and his wife coming in the courtroom (sic) [her room], startled, kind of jumped up [on the bed] and I remember him saying, 'we just came to check on you' and that was it." The complainant said that was the last thing she remembered happening at the hotel, and that she did not recall interacting with petitioner or consenting to have sex with him or anyone else that evening. R. 40, ll. 2-20. She said she next remembered "waking up in the hospital at Roper St. Francis." R. 40, ll. 21-23. The complainant remembered a nurse or nurses "told me that I was there because I had gotten raped. Again, I didn't know what was going on . . ." R. 41, ll. 13-21.

The next day she spoke with Jimmie Filbeck, Yolanda Alston, and petitioner. R. 42, ll. 3-13. She said she got petitioner's phone number from Filbeck. Her first conversation with petitioner was very short, apparently because he was around other people. "When he called back, he told me he wasn't able to talk. The first time I called, he was around some people, and he proceeded to tell me what happened. He told me I was drunk. He kept going back and forth with what happened. I was ready to get off the phone, and he made the statement, you really don't remember, do you? And I told him, no. Like, tell me, stop playing, you know, with me. Just tell me what happened, and he said yes. You know, we had sex." R. 42, l. 21 – 43, l. 16.

She said later that day that she was texting petitioner, at the suggestion of her police officer friend, to get petitioner's position in writing, and petitioner wrote back: "I'm so sorry. I guess you was drunk. I was drunk, and it should never have happened." R. 45, l. 16 – 46, l. 6. The complainant asked petitioner if he had worn a condom, and he responded: "Yes." R. 347.

The complainant remembered she saw petitioner at work on Monday after the party which was not unusual since they worked together. "He came in and made eye contact with me and then kind of left out." R. 46, ll. 19-22. The complainant said she talked to other people at work including her general manager and her HR manager at SKF. She later filed a complaint with the police department. R. 51, ll. 12-16. She sued the Embassy Suites hotel because a desk clerk gave petitioner a key to her room. As will be seen infra, and which is included in state's exhibit 6 which is before this Court for review, petitioner told Detective Bailey that he returned to the complainant's room with Jimmie Filbeck and his wife to check on Kayla. Filbeck would testify that Kayla jumped out of bed naked in front of the three of them. Petitioner told the police that Kayla thereafter came into the hall near the elevator with a towel wrapped around her, and she locked herself out of her room when the door closed behind her.

Petitioner then went to the front desk to get a key to the room to let her back inside. Petitioner said when he opened the door to the hotel room with the new key that they had consensual sex in her hotel room on the carpeted floor. See State's exhibit 6, the DVD of the interview with Detective Bailey which was on file with the Court of Appeals.

The complainant acknowledged she received a "six figures" or more settlement from the Embassy Suites. After petitioner was fired from the corporation where they both worked, she said she took six months of paid leave, and she filed an EEOC claim. She lived in California while she was on disability. R. 68, l. 1 – 69, l. 19. The complainant acknowledged that she had

been given a "bad conduct" discharge for fraud from the Air Force before she went to work for SKF. R. 32, ll. 20-21; r. 49, l. 14 – 50, l. 20.

The complainant told defense counsel Smiley on cross-examination that she did not remember locking herself out of the room that night. She claimed she did not recall seeing petitioner or seeing petitioner come into her room that night. She denied that she smoked marijuana, but she admitted marijuana was found in her hotel room the next day. R. 58, l. 2 – 59, l. 20.

The complainant also said she did not remember how she got from her hotel room down to the service elevator area where she was found that evening. R. 60, l. 11 – 61, l. 15. Mitchell Rumsey was a manager working at the hotel on the night of December 14, 2013. He remembered seeing the complainant crouched down by a service elevator crying. Rumsey said this service area where he found the complainant was "an employee area." Guests should not have been in this area of the hotel. The complainant was intoxicated, and she was "belligerent." She could walk, but he helped "steady her." R. 24, l. 24 – 25, l. 16.

Rumsey thought, "Something not positive had occurred." The complainant then said she had "been raped," according to Rumsey. Rumsey took her into his office and called 911. R. 8, l. 15 – 14, l. 24. The complainant further testified she did not remember telling a detective or police officer that she had *not* been sexually assaulted that evening. "I remember waking up that night. I don't remember being at the hospital. . . At that point, I woke up in the hospital. I was scared. They said I had gotten raped." She turned down any sexual assault protocol because she testified that she wanted to leave the hospital and go home. R. 62, l. 15 – 65, l. 4.

On cross-examination, the complainant said that petitioner was "short" with her when she called him the next day. "I was just going to, like, chalk it up to nothing happened; like, maybe I

was just too intoxicated at that point until he called me back." R. 66, ll. 13-17. She repeated that petitioner told her during their second phone conversation that "we had sex." R. 67, ll. 3-16. Her friend, Deputy Green, told her to have petitioner admit to having sex with her in writing, which she did by way of a text message. R. 67, ll. 3-25; r. 346. The following occurred on cross-examination of the complainant:

> Q: And he [petitioner] was very, at that point, straightforward, correct?
>
> A: Correct.
>
> Q: He told you he was sorry, right?
>
> A: He did.
>
> Q: Okay. *And he didn't realize you were that drunk.*
>
> *A: Not that drunk. He said, I guess you were drunk.*

R. 67, l. 21 – 68, l. 2. (emphasis added).

In petitioner's interview with Detective Bailey, which again, is before this Court as State's Exhibit 6, petitioner said he went to the complainant's room with Jimmie Filbeck to check on her. She came into the hall with a towel wrapped around her, after she had jumped out of the bed naked. She got locked out of her room in the process.

Petitioner therefore went to the front desk and obtained another key to her hotel room. Rumsey, the manager, said the man who asked him for another key to the complainant's room said the complainant was his "friend" or "girlfriend." Rumsey acknowledged he earlier said in a deposition that he was told she was "his girlfriend versus a friend." R. 10, l. 9 – 13, l. 6.

As to his knowledge of the complainant prior to the Christmas party, petitioner said he knew she liked to "party a lot." Petitioner said he based that belief on her conduct at prior Christmas parties that he apparently heard about at work. Petitioner remembered that people at

the party that night were talking about the complainant "embarrassing herself." She was "hammered." Petitioner remembered speculation at the party about "how was she going to go back to work?" As stated, petitioner said he obtained another key to the complainant's hotel room after she locked herself out. He let her back into the hotel room with the new key. The complainant and petitioner then had sex on the carpet inside her hotel room.

Petitioner said the complainant called him the next day. Strangely, she claimed she had been hit by a car. Petitioner talked with her about them having sex the night before, and he asked her if she did not even remember them having sex. The complainant apparently maintained she was just "trying to figure out what happened."

Yolanda Alston remembered getting to the Christmas party at about 8:00 that night. She saw the complainant, and they hugged. "When I saw her, I could tell she was intoxicated." Yolanda remembered going to the complainant's room and seeing her drink "clear liquor." R. 80, l. 24 – 81, l. 25.

Alston estimated on a scale of 1 to 10 of intoxication, "I would give her [an] 8." Alston said she and other coworkers decided the complainant needed to "be taken away from the party" because she was embarrassing herself. R. 81, l. 11 – 82, l. 22. Alston saw petitioner at the party, and she spoke to him when she was getting ready to leave. She could not tell if petitioner was also intoxicated. R. 83, ll. 2-19. Alston remembered that the complainant and petitioner continued to work at SKF for about another month after the Christmas party. R. 87, l. 16 – 24.

Jimmie Filbeck testified that the complainant was "actually coherent and she was just intoxicated." R. 94, ll. 16-25. Filbeck said he planned for his wife to come to the Christmas party, but she had not arrived yet. The complainant "[a]sked me to take her to her room because she didn't want to embarrass herself." R. 95, ll. 11-14. Filbeck escorted her to her hotel room.

She was stumbling and hanging on to him inside the elevator. He claimed at one point she fell on the elevator floor. Filbeck now reasoned: "[S]he was just drunk . . . she was basically incoherent, and I just couldn't -- was basically hanging off of me and falling down."

Filbeck admitted that the complainant "put her key in the door, opened her door, and went to lay down." However, she also got another drink. He claimed that she sat on the bed, fell off of the bed, and that he picked her up and put her back in bed. R. 96, ll. 2-25.

Filbeck admitted the complainant "wanted me to stay with her because -- I have no idea, and I told her I could not, and I have to go back to the party. And after two or three minutes of that, she basically just fell backwards onto the bed, and I took -- well before that, she actually wanted me to come back and check on her. So she had two keys in her hand, and I took one of them, and then she basically fell back and I put a cover on top of her and went back to the party." Filbeck maintained the complainant "was fully clothed" at this time. R. 97, ll. 14-21.

Filbeck remembered that an hour and a half to two hours later, after his wife arrived at the party, that his wife wanted to leave the Christmas party. Filbeck said he told her he had to check on the complainant. "Everybody" was leaving the party around this time. R. 98, l. 13 – 99, l. 14.

Petitioner and Filbeck were also coworkers. Filbeck testified that he and his wife were walking toward the elevator to check on the complainant when he noticed petitioner "kind of following us, and I didn't think anything of it at the time. . . ." Filbeck reasoned a lot of people were spending the night at the Embassy Suites because of the party. Filbeck recalled petitioner got on the elevator with them. They went up to the complainant's hotel room, and he opened the door. Filbeck remembered that the "[n]ext thing I know, Kayla, jumps out of bed, and she's completely nude. And as soon as I see her, I turned around and everybody gets out of the room."

Filbeck said petitioner was either in the room with them or standing right outside the hotel room door when this happened. R. 100, ll. 5-23.

Filbeck threw down the hotel key he had for her room on the counter, and he closed the door. Filbeck said that the three of them then got on the elevator, and pushed to go downstairs. Filbeck did not remember petitioner saying: "Kayla is locked out of her room." R. 102, ll. 1-16. Filbeck recalled that petitioner got off the elevator at some point, and he maintained petitioner did not say anything else to them. R. 103, ll. 4-15.

On cross-examination, Filbeck acknowledged he did not knock on the complainant's door before they entered because "[I] thought she would be passed out." Petitioner entered the hotel room with him and his wife. "Kayla jumped up out" of the bed naked. "It was a shock." "I don't think anybody said any words, actually, it was just everybody left." Filbeck claimed that he did not remember if his wife said anything to him about the incident at the time. R. 115, l. 6 – 116, l. 21; R. 117, l. 5 – 118, l. 17. Filbeck finally admitted he had previously been friends with petitioner, and that they had gone on a company camping trip prior to this incident. R. 118, l. 21 – 119, l. 10.

Britton Delis was an assistant general manager of the "Rooms Division" at the Embassy Suites on the night of the Christmas party. R. 121, l. 7 – 123, l. 13. The hotel had a very archaic surveillance system, but Delis reviewed footage of a gentleman getting another key made that evening for Room 403." It was difficult to view. R. 123, l. 14 – 124, l. 17. A review of his records showed that the new key was used to unlock the door to Room 403, the complainant's room, at 10:25 pm that evening. R. 127, ll. 2-25. Another key was later used at 11:52 that evening. R. 128, ll. 1-2. Delis said he did not remember if he talked to the police that day, but he knew that Room 403 was later locked down "for investigative purposes." R. 130, ll. 20-24.

Delis also testified that the service elevator was not meant to be used by guests, and it was not open to the public. R. 141, l. 17 – 143, l. 22. Delis admitted there was no security at the Embassy Suites in 2013, and he admitted at times a guest could get into the area of the service elevator if proper procedures were not followed. R. 144, l. 23 – 146, l. 9.

Joye McElroy was a nurse at St. Francis hospital where the complainant was transported that evening. R. 147, l. 4 – 148, l. 7. McElroy said she could *not* point to anywhere in the nurses' or physicians' notes where it said the complainant complained of a sexual assault. R. 178, l. 1 – 179, l. 4. McElroy admitted that the complainant declined a sexual assault exam. R. 179, ll. 5-23. McElroy acknowledged that on the Glasgow Coma Scale, Kayla was given a rating of 15. This was a "good number," meaning that the complainant was *conscious, interacting, and making eye contact*. R. 180, ll. 3-24.

McElroy was aware that the complainant took Ativan daily, and that she had a medical history of anxiety. She denied using alcohol on a social basis. However, the complainant admitted to "recent binge" drinking, using street drugs and marijuana. R. 180, l. 10 – 183, l. 9.

The police interview

Detective Rebecca Bailey interviewed petitioner. She testified over objection that she first made contact with petitioner on February 3, 2014, and that it took petitioner seventeen to twenty days for him to come and see her. She testified petitioner did not show up for two interviews and he called her later stating he could not come in. She said she "finally got to interview him" on February 20, 2014. This issue is discussed in Issue 2, infra. R. 191, l. 20 – 192, l. 23.

Bailey testified that petitioner told her that others at the party said that the complainant had been "drinking all day and was 'wasted' and 'hammered.' She had to be carried back to her

hotel room by some guy named Jimmie [Filbeck], who you all [the jurors] met the other day." Petitioner told Bailey that he went with Filbeck and his wife to the complainant's room. When Jimmie opened the door with his key, "Kayla was completely nude. So the defendant said he was kind of shocked, ran out of the room. Jimmie and his wife ran out of the room, and they all got back on the elevator." Bailey said:

> [H]e made a comment about -- they got back on the elevator, but the victim was coming up right behind him, saying, Oh, Jimmie. I'm so sorry. I'm so sorry you saw me like that, and while they're on the elevator, he says -- he explains -- the elevator, it's partially glass and that he can see Kayla outside of her room, and he says to Jimmie -- pardon my language, I'm quoting here -- Oh, shit, Jimmie, she's outside.
>
> So he then says he gets off the elevator, but Jimmie and his wife do not. Of course I asked him why would Jimmie not get off the elevator? Jimmie is the one that was going to make sure she was okay to begin with, and he said his wife was -- again, I believe the word he used was shitting and was mad that he wanted to go check on her, so Jimmie left.
>
> He gets off the elevator. He goes back to the victim, who he says is in the hallway. Are you locked out of your room? She says, Yeah, I am. He says, I'm going to go get you a key. He goes down to the front desk where he met up with Mr. Rumsey again and says -- tells him, I'm Kayla's boyfriend, which he wasn't and never was. She's locked out of her room. I need a key to help her back in.

R. 193, l. 15 – 195, l. 24.

Bailey said the complainant told her that she essentially did not remember the events of that evening. She remembered waking up in the hospital. R. 206, ll. 1-18. Bailey reluctantly agreed that a police officer's report made at the time said the complainant denied being sexually assaulted. R. 209, l. 11 – 210, l. 2.

Directed verdict motion

Defense counsel made an extensive directed verdict motion in which defense counsel, the judge, and the solicitor talked about the elements of criminal sexual conduct in the third degree. The elements were that the alleged victim had to be mentally incapacitated or physically helpless. Further, petitioner had to know or have reason to know of the disability if one, in fact, existed. R. 256, l. 7 – 275, l. 7. At the end of the extensive directed verdict motion, the judge took the motion under advisement. R. 275, ll. 6-7.

The solicitor argued petitioner admitted having "intercourse on the floor of the hotel room." There was also evidence that the alleged victim had fallen down. The judge responded, "Maybe I missed the point, but to me it's not a question of whether she had sex or didn't have sex. Okay? It's a question of whether or not the actor, who in this case would be the defendant, knows or should have known if the victim was mentally incapacitated." The judge then asked to know what evidence, circumstantial or otherwise, there was that she was mentally incapacitated. R. 260, l. 5 – 261, l. 4. The judge noted there was no evidence that the alleged victim was helpless, and he wondered what evidence there was that she was mentally incapacitated. R. 263, ll. 15-18.

The solicitor responded that the alleged victim had a limited recollection because of drinking, and that she had been falling down. The judge responded, "That was two and a half, three hours before the alleged rape." R. 263, l. 15 – 264, l. 14. The solicitor argued petitioner had heard that the alleged victim was "hammered," petitioner had seen her in her room naked, and he knew that she had been drinking. The solicitor said the complainant had a drug alcohol reading of .264, and he argued she was "extremely intoxicated." R. 264, l. 2 – 266, l. 13.

The judge asked the solicitor where there was evidence beyond mere suspicion to prove the elements of the crime. The solicitor claimed there was circumstantial evidence from which the jury could "draw an inference" that "the victim was mentally incapacitated and/or physically helpless. R. 266, ll. 10 – 267, l. 15.

The judge responded that the evidence showed that the alleged victim went to the hospital, gave coherent details including her name, address, and all of the information. The judge added, "If somebody is incapacitated, you don't wake up when you walk in the room, jump up, go to the foot of the bed buck, naked put a towel on, and have the presence of mind to put a towel on and go outside." The judge asked the solicitor again to show him any evidence that the alleged victim was incompetent. R. 267, l. 8 – 269, l. 8. (emphasis added).

The judge also noted the state *did not call a toxicologist* to provide any expert testimony on the effects of alcohol and mental capacity and "that's where the gap is." R. 267, l. 17 – 271, l. 5. Defense counsel Smiley then reminded the judge that the Glasgow coma test showed the alleged victim was normal, and that that there was no evidence the alleged victim was mentally incapacitated or helpless. R. 271, l. 4 – 272, l. 7.

In addition, the judge also observed that the complainant apparently smoked marijuana after having sexual relations as well. Defense counsel Smiley added that the complainant herself testified she only had two or three drinks. If the complainant was technically intoxicated, "[s]he certainly had the mental capacity to manipulate a lock that I have trouble with all the time, but to get in (the hotel room door). She walked to the elevator. Yes, she allegedly fell down in the elevator when Mr. Filbeck and her were alone. She knew her room number. She also had enough presence of mind, Your Honor, to say, I want to go back to my room. I might be embarrassing myself, so she had some self-awareness at that time. . . ." R. 271, l. 6 – 273, l. 5.

In addition, it appeared the complainant slept in her room while the others returned to the party before she had sex with petitioner. The complainant also told the nurse at the hospital that she was on Ativan, told her about her social history of binge drinking, and using drugs. She had a Glasgow score showing she was alert at the time. Defense counsel repeated that there was no evidence to show the alleged victim in this case was mentally incapacitated or physically helpless. R. 272, l. 10 – 275, l. 5. As stated, the judge took the directed verdict motion under advisement.

Defense case

The defense then presented the testimony of former North Charleston police officer Darnell Johnson. R. 276, l. 3 – 278, l. 23. Johnson remembered being dispatched to the Embassy Suites on the night of the December 14, 2013, Christmas party. R. 278, l. 1 – 279, l. 24. Johnson remembered talking to the complainant. She was able to talk to him, and to answer the majority, if not all, of his questions. R. 279, l. 16 – 281, l. 2.

Johnson said while the complainant had a "negative attitude," *she was alert*. R. 280, l. 22 – 286, l. 17. She did have a "strong odor of alcohol" but that did *"not indicate intoxication*" alone. Johnson recalled the complainant was slurring her words, but he refused to classify her as "confused." R. 286, l. 10 – 289, l. 8. Officer Johnson concluded that he asked the complainant a lot of questions and she denied she had been sexually assaulted. The case was nonetheless "coded" as a rape call. R. 288, l. 1 – 289, l. 16.

Motion renewed

At the conclusion of Johnson's testimony, defense counsel renewed his motion for a directed verdict. He specifically incorporated Johnson's testimony to the previous lengthy directed verdict motion. The judge again took the matter under advisement: "I'll rule when I'm

ready to rule." R. 295, ll. 7-15. The following day at the beginning of court, the judge denied the directed verdict motion. R. 296, ll. 6-18.

Court of Appeals

The Court of Appeals, in a summary two-page opinion, affirmed. It stated in one page that the complainant smelled of alcohol, was slurring her words, and was stumbling. Her blood alcohol reading was .264, which some nurse considered "toxic." App. 2-3.

Discussion

South Carolina Code § 16-3-654 defines the crime of criminal sexual conduct in the third degree. To be guilty, a defendant must know 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 the sexual battery." See S.C. Code § 16-3-654(1)(b). As seen above, it appeared in this case that the judge correctly was strongly leaning towards directing a verdict at the end of the state's case, since there was no direct or substantial circumstantial evidence that the complainant in this case was mentally incapacitated or physically helpless. Moreover, there was no direct or substantial circumstantial evidence that petitioner knew or had reason to know that the alleged victim was mentally incapacitated or physically helpless. Certainly nothing in the defense case aided the state on the complainant being mentally incapacitated, or physically helpless and petitioner having reason to know of that disability. Yet the judge strangely denied the motion for a directed verdict after correctly and strongly leaning in that direction as this record reveals.

It appears that the alleged victim may have drunk too much for her size and weight, while also taking Ativan. However, as argued during the lengthy directed verdict motion, the complainant jumped out of bed naked when Filbeck, Filbeck's wife, and petitioner entered her

hotel room. Her Glasgow coma score showed that she was alert and making eye contact. Officer Johnson also testified that she was alert, and even though she had a "negative attitude," she was able to answer his questions that evening.

This was simply not a case where the alleged victim was unconscious or drugged to be unconscious, so a perpetrator could have sex with her. Although the alleged victim may have become intoxicated during a Christmas party, hardly a rare event, she was aware of her surroundings. It is common knowledge that people have sex after drinking "too much" quite regularly. Respectfully, that does not translate into the defendant being guilty of criminal sexual conduct in the third degree. In the final analysis, there was no substantial circumstantial evidence that the alleged victim was physically helpless or mentally incapacitated as required by the statute. Further, there was no direct or substantial circumstantial evidence that *even if* the state had substantial circumstantial evidence that the alleged victim was mentally incapacitated, that petitioner knew or had reason to know of that mental incapacitation. In fact, it appeared undisputed that during their phone conversation the following day, petitioner seemed to recognize for the first time that the complainant did not remember, or claimed she could not remember, that they had had sex the night before after the Christmas party. Petitioner later texted the complainant that they were both intoxicated, and he apologized. However, that was not an admission that the complainant was mentally incapacitated or physically helpless or that petitioner knew she was mentally incapacitated. It was quite the opposite. It was simply a recognition that the complainant apparently had little recognition of the events of the prior evening, and that petitioner was sorry if she now regretted having sex.

If the state fails to produce substantial circumstantial evidence the defendant committed the particular crime, the defendant is entitled to a directed verdict. State v. Rothschild, 351 S.C.

238, 569 S.E.2d 346 (2002); State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002). "Mere speculation" of guilt is insufficient to take the case to the jury, and beyond a directed verdict motion. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001).

In State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000), this Court held the state's circumstantial evidence against Martin was insufficient to take the murder charge to the jury. In Martin, the defendant borrowed his girlfriend's car which was later placed at the scene of the murder. On the morning after the murder, the manager of a restaurant found several bags of garbage near the bar where Martin and co-defendant Wilson picked up Martin's girlfriend late the prior night. Inside the trash bags were items belonging to the victim. Also found inside were latex gloves similar to those Martin's girlfriend used to clean her dogs. When Martin's girlfriend asked Martin why he and co-defendant were so late in picking her up that evening, defendant Martin replied, "some shit happened" and co-defendant Wilson added, "someone may have died tonight." Despite this strong circumstantial evidence, this Court in Martin held it was not the substantial circumstantial evidence necessary to take the case to the jury. This Court in Martin cited State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984), which was another very strong case of suspicion of the defendant's guilt in a murder case. Schrock is another case of very strong suspicion where the Court ruled a directed verdict should have been granted. In addition, State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) is also instructive where this Court ordered a directed verdict of acquittal where there was very strong suspicion of the defendant guilt, yet this Court still held it fell short of *substantial* circumstantial evidence. See, also, State v. Arnold, 361 S.C. 368, 605 S.E.2d 529 (2004) on this subject.

Further, criminal statutes are construed strictly against the state and in favor of the defendant. See Hair v. State, 305 S.C. 77, 406 S.E.2d 332 (1991). Petitioner submits that the

legislature did not intend for the facts of this case to constitute criminal sexual conduct in the third degree where a defendant knowingly, or having reason to know, has sexual intercourse with a mentally incapacitated or physically helpless person. Further, there was nothing cognitively wrong with the alleged victim in this case. She was a gainfully employed conscious woman who worked with petitioner, and who allegedly drank too much at an office Christmas party at the Embassy Suites. She jumped out of her bed naked when Filbeck, his wife, and petitioner went to her room. She was not unconscious, and at times denied being sexually assaulted.

While she may have been confused or hardly recalled events, that did not make petitioner guilty of having sex with a mentally incapacitated or physically helpless person, where he knew, or should have known, the alleged victim was mentally incapacitated or physically helpless. Again, the legislature could not have intended that the facts of this case would subject an otherwise productive citizen to a conviction for criminal sexual conduct in the third degree subjecting him to a lifetime of registering as a sex offender, which respectfully, effectively ruins the life of that citizen. Because the state failed to provide direct or substantial circumstantial evidence that the alleged victim was mentally incapacitated or physically helpless **and** that petitioner knew or should have known she was mentally incapacitated or physically helpless, the judge erred by refusing to direct a verdict of acquittal. See State v. Martin, State v. Schrock, State v. Arnold, supra. This Court should respectfully grant certiorari on this important issue.

2.

The Court of Appeals erred by finding no abuse of discretion in the trial court allowing Detective Bailey to testify that petitioner did not show up for two appointments with her, and that it allegedly took him seventeen to twenty days to meet with the detective as she requested, since this testimony was not relevant to the issue of petitioner's guilt or innocence

Relevant facts

As seen, Detective Rebecca Bailey investigated the Christmas party incident in this case. On direct examination, Detective Bailey was asked how many times she scheduled an interview with petitioner. Defense counsel Smiley objected on the basis of relevance. The judge overruled that objection. R. 191, l. 23 – 192, l. 4. Detective Bailey then answered:

> First time I made contact with the defendant, I want to say it was February 3rd. Don't quote me, around there, the 3rd, 4th. *I know it took about 17 to 20 days for him to come in. He didn't show for the first two. He would call after the fact, or , like 24 hours later. Then -- because we were having such a difficult time getting him to actually stick to an appointment* and come in, I told him, Go home. Look at your schedule. Find a day that suits you and your place of employment, and then call me and you tell me what day you want to come in, and I'll accommodate – whatever day, whatever time, I'll accommodate you.
>
> So he left city hall, and he never called me back. So I had to reach out to him again. *It was 12 or 13 days after not hearing from him, and then we finally met on February 20th.*
>
> Q: So it was February 20 when you finally got to interview him?
>
> A: Yes.
>
> Q: Was he in custody at the time you interviewed him?
>
> A: He was not.

R. 192, ll. 5-25. (emphasis added).

Defense counsel Smiley would later, as he had every right to do, attempt to minimize the damage of this testimony on cross-examination. Bailey said it "took some time" for petitioner to talk to her, but she admitted on cross-examination that petitioner was under no obligation to talk to her at all. R. 212, ll. 9-20. Defense counsel Smiley asked Detective Bailey to admit there were some delays with interviewing others in this case. Detective Bailey would not budge: "*No delays other than with Mr. Middleton.*" As to Mr. Rumsey, Bailey said Rumsey was hesitant to come in, but his manager told her that he would have Rumsey come in right away and bring the tapes with him. Bailey said that she also "played phone tag" with Mr. Green, a friend of the alleged victim. However, Detective Bailey then proclaimed, "Your client is the only one who was *ducking and dodging me*. Everybody else -- except for maybe Rumsey who didn't want to come in that day, but his manager made him. Everybody else, it was just a scheduling issue." Bailey said petitioner "just didn't show, and he'd come in later or wouldn't call, and he didn't call back, and it took 13 days, and it just -- I was trying to get him to come in." R. 212, l. 9 – 214, l. 19. (emphasis added). Bailey was doing everything she could to hurt petitioner in the eyes of the jury.

Court of Appeals

The Court of Appeals, in its summary opinion, held the trial judge did not err by admitting this evidence petitioner failed to show up for two appointments for an interview and delayed giving a statement because it was evasive conduct relevant to show consciousness of guilt. App. 3.

Discussion

Defense counsel correctly objected that Detective Bailey's testimony about petitioner missing appointments, or not "showing up" until later was not relevant. It did not make it more

or less probable that he was guilty in this case for any legitimate reason. See Rule 401, SCRE. As Detective Bailey would later acknowledge, petitioner was under no obligation to talk to her at all. What happened here was as prejudicial as a comment on a defendant's right to silence, which obviously is totally improper. Cf. State v. McIntosh, 368 S.C. 432, 595 S.E.2d 484 (2004), *citing* Doyle v. Ohio, 426 U.S. 610 (1976). See, also, State v. Gray, 304 S.C. 482, 405 S.E.2d 420 (1991). Further, as petitioner argued in his rehearing petition:

> This Court cited State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976), in support of this proposition of law. In McDowell, the court found that evidence the defendant was affirmatively seeking evidence about how to "beat" the polygraph examination was admissible to show his consciousness of guilt. However, the court was careful to point out that evidence the defendant refused to take an offered polygraph examination would have been inadmissible. Here, appellant not showing up for two appointments with the police was more in line with a refusal to take a polygraph than it was with the admission of any other evidence of evasion. Detective Bailey clearly wanted to interrogate appellant, and evidence appellant did not want to be interrogated by the police was impermissibly used as evidence of his guilt in the same manner as if appellant had been read his Miranda warnings and then refused to talk with the police. That would clearly have been a Doyle violation.[1] Appellant was under no obligation to talk to Detective Bailey, and evidence appellant initially chose to remain silent by not meeting Detective Bailey to be interrogated was unfairly used against him as evidence of his guilt.

App. 5-6.

This testimony was not relevant, and this is not a case of an evidentiary error without prejudice. The prejudice of deliberately making petitioner seem evasive from which the jury would infer he had guilty knowledge was extremely prejudicial particularly where in this case it was unclear just what petitioner morally or legally may have been guilty of doing. The import of Detective Bailey's testimony was clear: She thought petitioner was avoiding her because he was

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[1] Miranda v. Arizona, 384 U.S. 436 (1966); Doyle v. Ohio, 426 U.S. 610 (1976).

guilty of an illegal sexual assault. The solicitor wanted to jury to draw that impermissible spurious conclusion from Detective's Bailey's irrelevant testimony.

This was not evidence of flight in any manner, and it was only meant to impermissibly cast undue suspicion upon petitioner for irrelevant reasons. See State v. Pagan, 369 S.C. 201, 331 S.E.2d 262 (2006) (impermissible evidence of flight or guilty knowledge).

The error was not harmless because it is not too much to say that petitioner was convicted of criminal sexual conduct in the third degree in this highly unusual case based on suspicion. The evidence, most respectfully, cannot seriously be argued to have been overwhelming in this case where petitioner very strongly submits that a directed verdict should have been issued. This admission of this very prejudicial irrelevant testimony was not harmless beyond a reasonable doubt. See State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006); State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41 (2007). Certiorari should respectfully be granted.

CONCLUSION

By reason of the foregoing arguments, certiorari should respectfully be granted to allow full briefing on both legal issues.

Respectfully Submitted,

s/ Robert M. Dudek
Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of January, 2021.

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Jan 15 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

Opinion No. 2020-UP-271 (S.C. Ct. App. filed 11/24/2020)

THE STATE,

RESPONDENT,

V.

STEWART JEROME MIDDLETON,

PETITIONER

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above-referenced case has been served upon William M. Blitch, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201 this 15th day of January, 2021.

s/ Robert M. Dudek
Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER