STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Jan 15 2021
SC Court of Appeals

Certiorari to Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEWART JEROME MIDDLETON,

APPELLANT

APPELLATE CASE NO. 2017-002478

APPENDIX

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Stewart Jerome Middleton, Appellant.

Appellate Case No. 2017-002478

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Unpublished Opinion No. 2020-UP-271
Submitted June 1, 2020 – Filed September 30, 2020

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

PER CURIAM: Stewart Jerome Middleton appeals his conviction for third-degree criminal sexual conduct (CSC), arguing the trial court erred in (1) denying his motion for a directed verdict and (2) admitting Detective Rebecca

Bailey's testimony indicating Middleton failed to show up for two appointments and delayed giving a statement to the police. We affirm.[1]

1. We hold the trial court did not err in denying Middleton's motion for a directed verdict. At trial, an Embassy Suites employee testified that when he found the victim shortly after the alleged assault occurred, she was "definitely not sober," was unable to walk to his office without assistance, was unable to speak to the 911 operator, and had difficulty holding a conversation. The victim's coworker testified that at approximately 9:00 p.m. on the night of the alleged assault, the victim was stumbling and repeatedly fell onto the floor as he helped her back to her hotel room. The coworker also testified that Middleton followed him uninvited into the victim's hotel room when he returned to check on the victim. Another hotel employee testified that at 10:25 p.m., he issued a key for the victim's hotel room to a man who claimed to be the victim's boyfriend. The police officer who responded to the 911 call testified that when he arrived at the hotel at approximately 11:38 p.m., the victim smelled of alcohol, was slurring her speech, and was stumbling. An emergency room nurse testified the victim arrived at the hospital at 12:35 a.m. and the victim's blood alcohol content at 3:38 a.m. was .264, or nearly "toxic." Finally, Middleton asserted that shortly before the alleged assault, the victim locked herself out of her hotel room while wearing only a towel and she was crying and fell onto the floor immediately before Middleton claimed he and the victim had sex. When viewed in the light most favorable to the State, we find the evidence presented was substantial circumstantial evidence reasonably tending to prove Middleton was guilty of third-degree CSC. Accordingly, the trial court did not err in denying Middleton's motion for a directed verdict. *See State v. Harry*, 420 S.C. 290, 298, 803 S.E.2d 272, 276 (2017) ("In reviewing the denial of a motion for a directed verdict, [the appellate court] must view the evidence in a light most favorable to the State."); *State v. Cherry*, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004) ("If there is . . . substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury."); S.C. Code Ann. § 16-3-654(1)(b) (2015) ("A person is guilty of [third-degree CSC] if the actor engages in sexual battery with the victim and . . . [t]he actor knows or has reason to know that the victim is . . . mentally incapacitated[] or physically helpless . . . ."); S.C. Code Ann. § 16-3-651(h) (2015) (stating "sexual battery" is "sexual intercourse or . . . any intrusion . . . of any part of a person's body or of any object into the genital or anal openings of another person's body"); S.C. Code Ann. § 16-3-651(f) (2015) (stating a person is "mentally incapacitated" if the person is "temporarily incapable of

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

appraising or controlling his or her conduct"); S.C. Code Ann. § 16-3-651(g) (2015) (stating a person is "physically helpless" if the person is "unconscious, asleep, or for any reason physically unable to communicate unwillingness to an act").

2. We hold the trial court did not err in admitting Detective Rebecca Bailey's testimony that Middleton failed to show up for two appointments for an interview and delayed giving a statement to the police because the testimony was evidence of evasive conduct that was relevant to show Middleton's consciousness of guilt. *See State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. . . . An abuse of discretion occurs when the conclusions of the trial court either lack[ed] evidentiary support or [were] controlled by an error of law."); Rule 401, SCRE (stating evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence"); *State v. Martin*, 403 S.C. 19, 26, 742 S.E.2d 42, 46 (Ct. App. 2013) ("As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of [the accused's] consciousness of guilt." (quoting *State v. McDowell*, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976))); *id.* at 28, 742 S.E.2d at 47 (recognizing evidence of evasive conduct may be admissible to show a defendant's consciousness of guilt). Additionally, we find the evidence presented at trial justified an inference of a nexus between the evasive conduct and the charge, including (1) Detective Bailey telling Middleton that "she wanted him to come in to take [his] statement," (2) Detective Bailey offering to accommodate Middleton's schedule by meeting "whatever day, whatever time" was best for him, (3) Middleton missing two appointments without explanation and failing to reschedule, and (4) Middleton stating at the beginning of his interview with Detective Bailey that he "kn[e]w what [the meeting] was about" and asking if the the victim had filed a police report. Accordingly, the trial court did not err in admitting Detective Bailey's testimony. *See Martin*, 403 S.C. at 27, 742 S.E.2d at 46 (stating evidence of evasive conduct is admissible if the "circumstances justify an inference that the accused's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose" (quoting *State v. Orozco*, 392 S.C. 212, 220, 708 S.E.2d 227, 231 (Ct. App. 2011), *overruled on other grounds by State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016), *abrogated on other grounds by State v. Cartwright*, 425 S.C. 81, 819 S.E.2d 756 (2018))); *id.* (providing there must be a nexus between the evasive conduct in question and the offense charged).

AFFIRMED.

HUFF, THOMAS, and MCDONALD, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

STEWART JEROME MIDDLETON,

APPELLANT.

APPELLATE CASE NO. 2017-002478

Appeal from Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

Opinion No. 2020-UP-271

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, petitioner seeks rehearing because this Court may have overlooked the fact that Detective Rebecca Bailey's testimony that appellant failed to show up for two police interviews and delayed giving a statement to the police was admissible to show appellant's consciousness of guilt as to the crime ultimately charged. 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. This Court should respectfully reconsider its holding that evidence appellant failed to show up to be interrogated by Detective Bailey on two different occasions was properly admitted against him.

In State v. Sloan, 278 S.C. 435, 439, 298 S.E.2d 92, 94 (1976), the Supreme Court held the trial court erred by admitting evidence that Sloan made no attempt to talk to the police prior to being served with the arrest warrant. The Court noted that "the prosecution may not use at trial the fact that a defendant stood mute in the face of accusation, except for impeachment purposes. Jenkins v. Anderson, 447 U.S. 231 (1980); Miranda v. Arizona, 384 U.S. 436 (1966). Here, the defendant did not testify and thus did not cast aside his right to remain silent." Appellant Middleton likewise did not testify, and the trial court here erred by admitting evidence appellant did not show up to be interrogated by Detective Bailey when he had every right to avoid interrogation and answering the questions of the police. The state impermissibly persuaded the trial court to allow the jury to use these refusals to initially meet with Detective Bailey on two occasions as evidence of his guilt.

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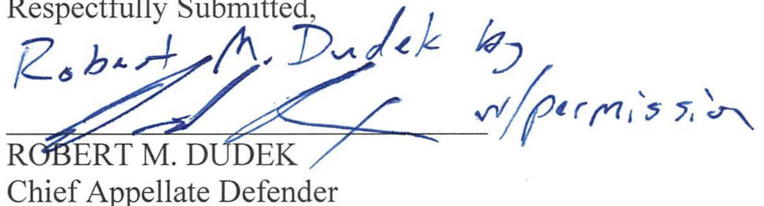
[1] Miranda v. Arizona, 384 U.S. 436 (1966); Doyle v. Ohio, 426 U.S. 610 (1976).

Directed Verdict

This Court should also reconsider its holding that there was substantial circumstantial evidence that appellant was guilty of criminal sexual conduct in the third degree. There was not substantial circumstantial evidence that appellant knew or had reason to know that the victim was mentally incapacitated or physically helpless. There was evidence that the alleged victim was moving throughout the hotel that night. There was no substantial circumstantial evidence that the alleged victim was "temporarily incapable of appraising or controlling his or her conduct" or, even if she was, that appellant knew or had reason to know of that fact. While the alleged victim may have had "too much" to drink, she was not "physically helpless," meaning "unconscious, asleep, or for any reason physically unable to communicate unwillingness to an act [sex]." <u>See</u> S.C. Code § 16-3-651 and S.C. Code § 16-3-654. Since there was no substantial circumstantial evidence appellant knew or had reason to know the alleged victim was "mentally incapacitated" or "physically helpless," as those terms are defined, this Court should reconsider its ruling that a directed verdict was properly denied on the charge of third-degree criminal sexual conduct and rehearing should be granted.

Respectfully Submitted,



ROBERT M. DUDEK
Chief Appellate Defender

This 15th day of October, 2020.

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STATE OF SOUTH CAROLINA

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Appeal from Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

THE STATE,

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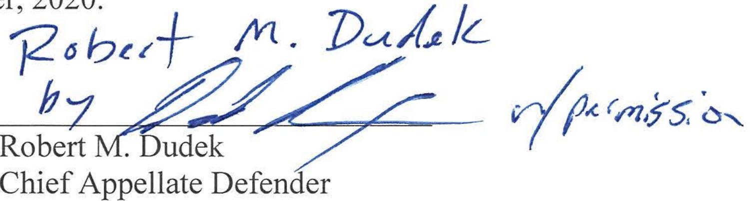
V.

STEWART JEROME MIDDLETON,

APPELLANT.

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 Rehearing in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 15th day of October, 2020; and Stewart J. Middleton at 203 Market Hall Street, Moncks Corner, SC 29461, this 15th day of October, 2020.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

v.

Stewart Jerome Middleton, Appellant.

Appellate Case No. 2017-002478

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff J.

Paula H. Thomas J.

Stephanie P. McDonald J.

Columbia, South Carolina

cc:
Robert Michael Dudek, Esquire
Alan McCrory Wilson, Esquire
William M. Blitch, Jr., Esquire
Scarlett Anne Wilson, Esquire
The Honorable J. C. Nicholson, Jr.

FILED
November 24, 2020