STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Charleston County
Hon. J.C. Buddy Nicholson, Circuit Court Judge
Appellate Case Tracking No. 2020-001665

The State, Respondent,

v.

Stewart Jerome Middleton, Petitioner.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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STATEMENT OF THE CASE

Procedural History

Stewart Jerome Middleton (Appellant) was indicted at the May 2014 term of the grand jury for Charleston County for third-degree criminal sexual conduct (2014-GS-10-02602). (Indictment; R. 348). On October 23-26, 2017, Appellant proceeded to trial by jury pursuant to which he was found guilty as charged. (Tr.p.1, R.p.1). He was sentenced by the Honorable J.C. Nicholson, Jr., to six (6) years' imprisonment suspended upon the service of six (6) months' imprisonment and five (5) years' probation. (Indictment & Sentencing Sheet; R.p.348-350). Appellant timely filed a notice of intent to appeal.

After briefing and without oral argument, the Court of Appeals affirmed Petitioner's conviction and sentence. State v. Middleton, 2020-UP-271 (S.C. Ct. App. Filed September 30, 2020). Petitioner served and filed a Petition for Rehearing which was denied. (App.5-9).

Factual Background

Victim explained she was employed by SKF Aerial Engineering and was hosting the annual Christmas party at the Embassy Suites on December 14, 2013. (R.33). Victim testified she booked a hotel room for the night because she knew she would be drinking, and planned on sharing her room with her friend, Labelia Nelson. (R.33-34). Victim indicated she did not ask anyone else to stay with her that night. She said she checked into her room at 1 p.m. and then went shopping and ate an early dinner around 3 or 4. Victim returned to her room and began drinking peach Ciroq vodka and Sprite. She said she drank two small plastic cups of half Sprite and half Ciroq, and explained she weighed 115 pounds and was five-four. Victim said her friend and coworker, Yolanda Alston, then came to her room to visit, and she had a third mixed-drink before they went down to the party. She said she expected 75 people, but only about 30 or 40

were there yet. Victim said she knows Appellant as a coworker, but they never hung-out together outside of work, and he was not at the party when she and Alston arrived. She said she stayed at the party for about an hour and a half, but started feeling sick and drunk and decided it was time to leave. Yolanda Alston, Victim's friend and coworker, indicated Victim needed to be taken from the party because she was already intoxicated. Alston indicated she could tell "very quickly" that Victim had been drinking. (R.81). She said she was an eight on a scale of one to ten for intoxication. (R.82).

Her friend and coworker, Jimmie Filbeck, indicated Victim was intoxicated but not incoherent when he first saw her at the party. He indicated later in the evening she was "pretty much out and out drunk." (R.95). Filbeck took her back to her room. As they walked to the elevator, Victim was "stumbling" and "hanging off of" Filbeck. Once in the elevator, Victim fell down onto the floor. (R.95). When they arrived at her room, Victim was "just drunk" and "basically incoherent." (R.96).

Victim asked Filbeck to come back and check on her and gave him a room key. When Filbeck left, Victim was clothed. (R.97). Victim said she was wearing her bra and underwear when she went to bed, but that it was not unusual for her to sleep in the nude.

Filbeck and his wife headed back to Victim's room to check on her. Appellant followed them onto the elevator. Filbeck waited for Appellant to push a button on the elevator, but when he just stood there, Filbeck pushed the button for Victim's floor. (R.100). Victim woke up to Filbeck and his wife coming into the room and startling her. Victim jumped up and heard them say they were just checking on her. According to Filbeck, Victim was nude when she jumped up. He, his wife, and Appellant all left the room. (R.100-101).

Victim did not recall having any interaction with Appellant that night at all, but knows she did not consent to sexual intercourse with anybody, and was not in a state of mind to consent. The next thing she remembered was waking up in the hospital at Roper St. Francis.

Mitchell Rumsey, the guest services manager at the Embassy Suites, testified a gentleman came to the front desk about 10:25 that night seeking a key for his "girlfriend's room" and gave the number of the room where Victim was staying. (R.10-11; 24). Rumsey finished his shift and, as he exited, he came across Victim. She was "crying visibly" and "very distraught." He explained she was "crouched over in the fetal position, scared. Something not positive had occurred." (R.13). The first words from Victim were that "she had been raped." (R.14). Rumsey testified she had to lean on him because she could not walk easily on her own. He explained she could not talk to the 911 operator so he made the call. (R.14-15). Rumsey indicated Victim was intoxicated and "definitely not sober" when he found her. (R.25). He indicated it was "difficult for her to put words together and form a conversation." (R.28). He was asked to place her intoxication on a scale of one to ten where one is "dead sober" and ten is "unconscious" and Rumsey indicated Victim was a seven. (R.28-29).

Joye McElroy, the emergency room nurse who treated Victim the next morning, indicated she was treated for alcohol intoxication and a reported assault. (R.155). Victim arrived at the hospital at 12:35 a.m. and had her blood drawn at 3:38 a.m., roughly five hours after the sexual assault. At the time of her blood draw, her blood alcohol level was still .264, with McElroy explaining that .3 is considered toxic and that the alcohol concentration decreases over time when not consuming alcohol. (R.171-172).

Appellant gave a statement in which he said he knew Victim from work and although she is nice, she drinks a lot. He said he knows she always gets "hammered" at the annual office

Christmas parties. He noted he saw Victim drink a lot at the Christmas party the year before the incident, and heard she drank a lot again on the night of December 14, 2013. Appellant said that when he arrived at the party around 9 p.m., everyone was talking about Victim and how she was so "wasted" by 7 p.m. that someone had to help her to her room. He specifically mentioned someone named Sandra telling him Victim was very drunk. Appellant said it appeared Victim was drinking Ciroq peach vodka because he saw the nearly empty bottle in her room. He said it was a pretty big bottle and he thinks she may have drunk it all. Appellant acknowledged encountering Victim coming towards the door naked when he, Filbeck, and Filbeck's wife went to check on her around 10 p.m. He said that immediately after they left, she came out of the room wearing nothing but a towel and managed to lock herself out. Appellant said that after getting a key from the front desk to let Victim back into her room, she was crying and upset about the party being a bust, her having to leave the party drunk, and Filbeck seeing her nude. He said Victim then fell to the floor where they started kissing and then had sex. Appellant repeated his belief that Victim drank the whole bottle of vodka and admitted she was a "tiny girl" who had been drinking all day before they had sex on the floor of her hotel room. He said he knew she was drunk based on what he was told by other people at the party. (State's Exhibit #6 – DVD of interview).

ARGUMENT

I. The Court of Appeals properly affirmed the trial court's denial of Petitioner's motion for a directed verdict because the State presented sufficient evidence to support the jury's determination Petitioner was guilty of third-degree criminal sexual conduct.

The Court of Appeals correctly found the trial court properly denied Appellant's motion for a directed verdict. Appellant argues the trial court erred in failing to grant a directed verdict because there was no direct or substantial circumstantial evidence that Victim was mentally incapacitated or physically helpless when he had sex with her, or that he knew or had reason to know of her incapacity. He contends the evidence presented by the State established only a mere speculation or mere suspicion of guilt, which was insufficient to take the case to the jury. Appellant further argues he was entitled to a directed verdict because, where criminal statutes must be strictly construed against the State and in favor of the defendant, the legislature did not intend for the facts of his case to constitute criminal sexual conduct in the third degree. The trial court properly denied Appellant's motion for a directed verdict because the State presented direct and substantial circumstantial evidence from which the jury could fairly and logically find Appellant guilty of each element of third-degree criminal sexual conduct.

The evidence, viewed in a light most favorable to the State, showed that Appellant engaged in sexual battery with Victim when he knew or had reason to know she was mentally incapacitated or physically helpless. Taken together, the evidence presented at trial supports the jury's conclusion that Appellant was guilty of committing third-degree criminal sexual conduct. Thus, the State presented evidence from which the jury could fairly and logically find Appellant satisfied all the elements of the crime beyond a reasonable doubt, and the Court of Appeals properly affirmed the trial court's decision.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Phillips, 416 S.C. 184, 192, 785 S.E.2d 448, 452 (2016); State v. Curtis, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004); State v. Condrey, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002). When the evidence presented merely raises a suspicion of the accused's guilt, the trial court should not refuse to grant the directed verdict motion. Phillips, 416 S.C. at 192, 785 S.E.2d at 452; State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). However, the trial court must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." Phillips, 416 S.C. at 192-93, 785 S.E.2d at 452 (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). Indeed, "the lens through which a court considers circumstantial evidence when ruling on a directed verdict motion is distinct from the analysis performed by the jury." State v. Bennett, 415 S.C. 232, 236, 781 S.E.2d 352, 354 (2016). The jury's focus is on determining whether every circumstance relied on by the State is proven beyond a reasonable doubt, and that all of the circumstances be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. Phillips, 416 S.C. at 193, 785 S.E.2d at 452; State v. Littlejohn, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955). The trial court must view the evidence in the light most favorable to the State when ruling on a motion for directed verdict, and must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." Phillips, 416 S.C. at 193, 785 S.E.2d at 452;

Littlejohn, 228 S.C. at 329, 89 S.E.2d at 926. While "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." Bennett, 415 S.C. at 237, 781 S.E.2d at 354. The reviewing court should affirm if in viewing the evidence in the light most favorable to the State, "the evidence could induce a reasonable juror to find [the defendant] guilty." See State v. Pearson, 415 S.C. 463, 474, 783 S.E.2d 802, 808 (2016); see also, State v. Richburg, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968) ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury.").

Analysis

In South Carolina:

> (1) A person is guilty of criminal sexual conduct in the third degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:
>
> (a) The actor uses force or coercion to accomplish the sexual battery in the absence of aggravating circumstances.
>
> (b) The actor knows 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 sexual battery.

S.C. Code Ann. § 16-3-654 (2015). Therefore, to withstand Appellant's directed verdict motion in the trial of this case, the State was required to produce evidence that: (1) Appellant engaged in a sexual battery with Victim; (2) Victim was mentally incapacitated or physically helpless; and (3) Appellant knew or had reason to know of Victim's mental incapacity or physical helplessness. As to the first element, it is undisputed that on the night of December 14, 2013, Appellant engaged in a sexual battery with Victim on the floor of her hotel room.

In regard to the second element, the South Carolina Code provides that:

> For purposes of Sections 16-3-651 to 16-3-659.1
>
> . . . .
>
> (f) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct whether this condition is produced by illness, defect, the influence of a substance or for some other cause.
>
> (g) "Physically helpless" means that a person is unconscious, asleep, or for any other reason physically unable to communicate unwillingness to an act.

S.C. Code Ann. § 16-3-651 (2015). Here, there was extensive evidence of Victim's mental incapacity or physical helplessness due to the influence of alcohol. Rumsey testified when he discovered Victim immediately after the incident she was crouched down by the service elevator, crying, distraught, scared, in a fetal position, as if something "not positive" had occurred. He then had to talk to the 911 operator on her behalf because Victim was unable to speak. (Tr.p.50-p.58, R.p.8-16). He indicated when he found her, roughly an hour after Appellant obtained the key to her room, that she was a seven out of ten in terms of her intoxication.

Victim testified she weighed only 115 pounds and drank three mixed drinks that were half vodka and half Sprite prior to the incident. Filbeck testified Victim was already drunk when he arrived at the party and that she was stumbling and hanging off of him when he took her to her room. He described how she fell down twice on the way, took a shot of liquor when they got to the room, and fell down again trying to sit on the bed. Filbeck testified Victim was extremely intoxicated when he returned to the room to check on her, and although she was conscious, he did not believe she knew what she was talking about. (Tr.p.134-p.146, R.p.92-104).

Significantly, Nurse McElroy testified Victim has a BAC of .264 three hours after arriving at the hospital and that a healthy adult's BAC decreases over time when they are not consuming more alcohol. (Tr.p.195-p.200; p.211-p.216, R.p.153-158; 169-174). Most

importantly, Appellant even admitted he learned from people at the party how drunk Victim was and labeled her "wasted." Viewed in the light most favorable to the State, this testimony provided ample evidence of Victim's mental incapacity or physical helplessness to send the case to the jury.

As to the third element, there was sufficient evidence to show Appellant had a reason to know Victim was mentally incapacitated or physically helpless when they had sex. Appellant admitted in his statement to Detective Bailey that: (1) he knew Victim drinks a lot and always gets "hammered" at the annual office Christmas parties, (2) he heard Victim drank a lot on the night of the incident and that everyone was talking about Victim and how she was so "wasted" by 7 p.m. that someone had to help her to her room, (3) he remembered Sandra telling him Victim was very drunk at the party, (4) he believed Victim drank almost an entire bottle of vodka, (5) Victim came to the door naked and then exited the room wearing only a towel, forgetting her room key and getting locked out, (6) Victim was crying and upset and then fell to the floor just before they had sex, and (7) Victim was a "tiny girl" who had been drinking all day before the incident. Additionally, Appellant texted Victim that he guessed she was drunk when they had sex since she did not remember, thereby acknowledging his own awareness of her possible incapacity. Appellant's own admissions and actions support the conclusion Appellant knew or had reason to know Victim was temporarily incapable of appraising or controlling her conduct, and therefore mentally incapacitated at the time they had sex.

Other testimony and evidence also indicated Appellant should have known Victim was incapacitated at the time he had sex with her. Prior to the incident, Victim was described as "just drunk" and "basically incoherent by Filbeck, who also indicated she fell on the floor and was stumbling as he assisted her to her room. Alston indicated she was an eight on a scale of one to

ten for intoxication. Filbeck, who saw Victim in her hotel room mere minutes before the sexual assault, testified Victim was extremely intoxicated and although she was conscious, he did not believe she knew what she was talking about. If these observations were obvious to Filbeck, the jury could certainly conclude they were equally obvious to Appellant and, therefore, gave him knowledge of her mental incapacity. See State v. Sterling, 396 S.C. 599, 617, 723 S.E.2d 176, 186 (2012) ("one cannot escape liability by shutting one's eyes to what would otherwise be obvious.").

After the sexual assault took place, Victim was described by Rumsey as unable to walk on her own had difficulty putting words together to form a conversation. He indicated she was "definitely not sober" and a seven on a scale of one to ten for intoxication. According to McElroy, Victim's blood alcohol level was .264 roughly five hours after the sexual assault, and she explained the level decreases as time goes by without the consumption of more alcohol. The physical observations by those confronting Victim after the assault, especially when considered in light of the testimony by McElroy about her alcohol level, should have been obvious to Appellant and were likely worse at the time of the incident. Viewed in the light most favorable to the State, the testimony and Appellant's own statement to police provided sufficient evidence Appellant knew or had reason to know of Victim's mental incapacity or physical helplessness at the time they had sex; therefore, the issue was properly sent to the jury.

Accordingly, the trial court properly refused to direct a verdict in Appellant's favor and the Court of Appeals properly affirmed his conviction and sentence. As a result, this Court should deny the Petition for Writ of Certiorari as to Petitioner's Question 1.

II. The Court of Appeals properly affirmed the trial court's admission of Detective Bailey's testimony regarding Petitioner's failure to show up for appointments and delaying his statement because it was relevant evidence demonstrating consciousness of guilt.

The Court of Appeals correctly found the testimony by Detective Bailey regarding Appellant's avoidance of appointments with her was admissible as evidence of consciousness of guilt. Appellant argues the trial court erred by allowing Detective Bailey to testify that Appellant did not show up for two appointments with her and that it took him seventeen to twenty days to meet with her as requested, because this testimony was not relevant to the issue of his guilt or innocence. Evidence that Appellant was avoiding an interview or being evasive in speaking to detectives who he knew were actively investigating him for an allegation of third-degree criminal sexual conduct is relevant because it tends to show Appellant's guilty knowledge and that he sought to avoid arrest. Furthermore, even if this Court determines admission of the testimony was error, it was harmless because it could not reasonably have affected the outcome of the trial.

Relevant Facts

The solicitor questioned Detective Bailey about her interview of Appellant during the investigation. He asked how many times Detective Bailey scheduled an interview with Appellant, which prompted an objection from Appellant. The Court asked for the legal objection, and Appellant responded: "Relevance." The trial court overruled the objection and told the witness to go ahead. (Tr.p.246-p.247, R.p.191-192). Detective Bailey then testified:

> 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 like 12 or 13 days after not hearing from him, and then we finally met on February 20th.

(Tr.p.247, lines 5-20, R.p.192).

On cross-examination, Appellant questioned Detective Bailey in regard to Appellant's interview. Detective Bailey acknowledged Appellant was under no obligation to talk to her at all. Appellant then probed further and asked if Detective Bailey had problems talking to any other witnesses during her investigation. She responded: "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." (Tr.p.267-p.269, R.p.212-214). Appellant did not object or otherwise move to strike this response, and instead returned to his task of trying to discredit the police investigation. (Tr.p.269-p.278, R.p.214-223).

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41,48, 625 S.E.2d. 216, 220 (2006). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. Indeed, the admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of

discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

Analysis

As a general rule, all relevant evidence is admissible. State v. Aleksey, 343 S.C. 20, 34, 538 S.E.2d 248, 255 (2000); Rule 402, SCRE. Evidence that assists the jury in arriving at the truth of an issue is relevant and admissible unless otherwise incompetent. State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004). Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In the Matter of Care and Treament of Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003); State v. King, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct. App. 2002); Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). It is not required that the inference sought should necessarily follow from the fact proved. See Sweat, 362 S.C. at 127, 606 S.E.2d at 513. Indeed, evidence is relevant if "logically relevant" to establish a material fact or element of the crime; it need not be "necessary" to the State's case in order to be admitted. Id. (citing State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990)).

"As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt." State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976). This general rule applies to evidence of particular acts, including flight. State v. Martin, 403 S.C. 19, 26, 742 S.E.2d 42, 46 (Ct. App. 2013). Indeed, false and conflicting statements and attempts to run away are considered evidence of guilty knowledge and

intent. State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982). As explained by the Court of Appeals in Martin:

> Our supreme court has identified the "critical factor to the admissibility of evidence of flight" as "whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities ... [and his] actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose." State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006). In addition, this court has held evidence of "unexplained" flight is admissible as indicating consciousness of guilt, for it is not to be supposed that one who is innocent and conscious of that fact would flee. However, we have further noted that [t]he critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities. Flight evidence is relevant when there is a nexus between the flight and the offense charged. It is sufficient that 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. Where the circumstances fail to show the necessary nexus between a defendant's flight and the current offense for which he is on trial, the flight evidence is not relevant and should not be admitted.

Martin, 403 S.C. at 26-28, 742 S.E.2d at 46. The Court found the test for determining the admissibility of evidence concerning flight also applies to evidence of evasive conduct. Martin, 403 S.C. at 30, 742 S.E.2d at 47 (emphasis added).

As far back as 1976 this Court recognized that evasive conduct, regardless of actual flight, was properly admitted at trial. McDowell, 266 S.C. at 515, 224 S.E.2d at 892 ("The statement of appellant was not that he had refused the offer of a polygraph test, but, rather, whether he could 'beat the test' and, inferentially at least, use the results to hide his guilt. The statement allegedly made was to avoid detection of guilty and, as such, was properly admitted into evidence."). This recognition is consistent with the law in many jurisdictions. See Currier v. Commonwealth, 779 S.E.2d 834, 838 (Va. 2015) (noting that evidence appellant was seeking

to avoid contact with law enforcement officers after commission of the crime is probative evidence of guilt of that crime); Medina v. State, 254 So.3d 1148, 1152 (Fla. Dist. Ct. App. 2018) ("Evidence of a defendant's acts or statements calculated to defeat or avoid his prosecution is admissible against him as showing consciousness of guilty."); People v. Cunny, 80 N.Y.S.3d 457, 460-61 (N.Y. App. Div. 2018) ("While consciousness of guilt evidence has consistently been viewed as weak because the connection between the conduct and a guilty mind often is tenuous, even equivocal consciousness of guilt evidence may be admissible if 'it has a tendency to establish the fact sought to be proved—that defendant was aware of guilt."); State v. Austin, 97 N.E.3d 12166, 1273-74 (Ct. App. Ohio 9th Dist. 2017) ("An accused's flight, escape from custody, resistance to arrest, concealment, assumption of false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself.'"); State v. Edwards, 156 A.3d 506-532-33 (Conn. 2017) ("It is well established that '[i]n a criminal trial, it is relevant to show the conduct of an accused, as well as any statement made by him subsequent to the alleged criminal act, which may fairly be inferred to have been influenced by the criminal act. . . . The state of mind which is characterized as guilty consciousness or consciousness of guilt is strong evidence that the person is indeed guilty . . . .'").

Here, the testimony elicited from Detective Bailey about the difficulty she had in getting Appellant to stick to an appointment time and come for an interview, and the fact that it ultimately took him 17 to 20 days to finally come in and talk after her first contact, was of consequence to the jury's determination of Appellant's guilt or innocence at trial. The testimony had a greater tendency, even if only slight, to allow the jurors to determine Appellant suffered from a guilty conscience and therefore was guilty, than they would have been without such testimony. It also helped explain the logical chain of events in the overall police investigation as

the police worked to gather evidence and talk to the relevant witnesses. For these reasons, the testimony was relevant and admissible.

Relying in part on State v. Pagan, 369 S.C. 201, 331 S.E.2d 262 (2006), Appellant argues the testimony elicited from Detective Bailey "was not evidence of flight in any manner, and it was only meant to impermissibly cast undue suspicion upon appellant for irrelevant reasons." However, this reliance on Pagan is misplaced. In Pagan, this Court held that evidence of Pagan's alleged failure to stop for a blue light was inadmissible as evidence of flight or guilty knowledge; however, this was because there was no nexus between the flight and the charged offense of murder. Id. at 209, 631 S.E.2d at 266. The Court noted the critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities. Id. No such inference was created in Pagan. Id.

By comparison, there is no question Appellant had knowledge that Detective Bailey wanted to interview him about his, at the time, alleged sexual assault of the Victim. Thus, there was a clear nexus between Appellant's evasive conduct and offense that was charged. The State was entitled to introduce evidence to demonstrate Appellant's guilty conscience, as well as to explain the steps of the police investigation to the jury, particularly where Appellant's theory of defense was, in part, to attack that police investigation. The testimony was relevant and properly admitted over Appellant's Rule 402 objection.

Harmless Error

Errors are considered to be harmless when they could not reasonably have affected the result of the trial. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003). "It is a rule of practically universal application in appellate procedure that an accused cannot avail

himself of error as a ground for reversal where the error has not been prejudicial to him." State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947). Here, even if this Court determines the trial court erred in allowing the challenged testimony from Detective Bailey, Appellant was not prejudiced by the error where it was cumulative to more damaging testimony elicited by Appellant on cross-examination. Specifically, in response to Appellant's question, and without any objection from Appellant, Detective Bailey indicated Appellant was "the only one who was **ducking and dodging** me." (Tr.p.267-p.269, R.p.212-214) (emphasis added). The admission of Detective Bailey's testimony on direct could not be prejudicial in light of this testimony elicited by Appellant and admitted without any objection. See State v. Price, 368 S.C. 494, 499-500, 629 S.E.2d 363, 366 (2006) (noting any error in admission of improper evidence is harmless when such is cumulative to other unobjected-to evidence admitted at trial); State v. Kirton, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122 (Ct. App. 2008) (finding, while an objection to the testimony presented by the victim was preserved, appellant failed to timely object to the similar testimony by two other witnesses and, therefore, the admission of the victim's testimony would have been harmless error as it was merely cumulative to the other that was entered into evidence without objection).

Any minor undue suspicion cast upon Appellant by the reference to his evasive conduct pales in comparison to the suspicion Appellant cast upon himself by way of the statement he gave to Detective Bailey, which was inconsistent with the credible testimony offered by Rumesy, Filbeck, Alston, and other witnesses for the State. Thus, any possible error in allowing the testimony from Detective Bailey was entirely harmless because it could not reasonably have affected the result of the trial. See State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is

harmless where it could not reasonably have changed the outcome of the trial). For all of these reasons, the Court of Appeals properly affirmed Appellant's convictions and sentences, and this Court should deny the Petition for Writ of Certiorari as to Petitioner's Question 2.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

March 4, 2021

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Charleston County
Hon. J.C. Buddy Nicholson, Circuit Court Judge
Appellate Case Tracking No. 2020-001665

The State, Respondent,

v.

Stewart Jerome Middleton, Petitioner.

PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by email to Petitioner's counsel of record, Robert M. Dudek, at the primary email address listed in the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.
This 4th day of March, 2021.

CAROLINE COLLINS
Administrative Coordinator
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
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Caroline Collins

From: Caroline Collins
Sent: Thursday, March 4, 2021 10:28 AM
To: rdudek@sccid.sc.gov
Cc: Kellner, Haley; William Blitch
Subject: The State v. Stewart Jerome Middleton (2020-001665)
Attachments: MIDDLETON Stewart - Return to Petition for Writ of Certiorari - 2020-001665 (02504957xD2C78).PDF

Good Morning Mr. Dudek,

Attached please find a copy of the Return to Petition for Writ of Certiorari to the Court of Appeals in The State v. Stewart Jerome Middleton (2020-001665). This return will be submitted to the South Carolina Supreme Court today via the AIS One Drive System.

If you will, please reply to this email to confirm receipt.

Thank you!

Caroline Collins
Administrative Coordinator
South Carolina Attorney General's Office
P: (803) 734-3723