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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
J.C. "Buddy" Nicholson, Circuit Court Judge

Appellate Case No. 2017-002478

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SC Court of Appeals

THE STATE, ...RESPONDENT

v.

STEWART JEROME MIDDLETON, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

William M. Blitch, Jr.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
Charleston, South Carolina 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly denied Appellant's motion for a directed verdict where the State presented direct and substantial circumstantial evidence from which the jury could fairly and logically find Appellant guilty of third-degree criminal sexual conduct?

2. Whether the trial court properly overruled Appellant's objection to testimony elicited from Detective Bailey that Appellant was being evasive and avoiding an interview with the police on grounds of relevance, where that testimony was relevant as tending to show Appellant's guilty knowledge, intent, and that he sought to avoid arrest

STATEMENT OF THE CASE

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). He was represented by James Smiley, Esquire, and Laree Hensley, Esquire, of the Charleston County Bar. Respondent (the State) was represented by Assistant Solicitors Andrew Evans and Jessica Baldwin of the Ninth Circuit Solicitor's Office. (Tr.p.1, R.p.1). On October 23-26, 2017, Appellant proceeded to trial by jury pursuant to which he was found guilty as charged. 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 his conviction and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

In his opening statement, the solicitor summarized the December 14, 2013, incident at the Embassy Suites hotel in North Charleston which led to the criminal sexual conduct charge against Appellant. Victim and Appellant both worked for a company called SKF and Victim planned their office Christmas party at the Embassy Suites. She spent most of the day setting up, and had booked a room for that night because she knew she would be drinking at the party. Later, during the party, Victim's friend, Yolanda Alston, thought Victim was too intoxicated to stay at the party and asked a mutual friend and coworker, Jimmie Filbeck, to take her up to her room. Filbeck walked Victim up to Room 403 and put her to bed. Before he left, she gave him a room key and asked if he and his wife would come back later to check on her. A couple of hours later, when they left the party to check on Victim, Appellant followed along. As they entered Victim's room with the key, Victim startled awake and got out of bed naked. Seeing Victim

appeared to be alright, Filbeck put the key down on a counter and closed the door as they left. After Filbeck, his wife, and Appellant got on the elevator to go back downstairs, Appellant jumped off the elevator. Shortly thereafter, Appellant went to the front desk, claimed he was Victim's boyfriend, and asked for a key to her room. The desk manager, Mitchell Rumsey, gave Appellant a key and not long afterwards he discovered Victim, distraught, upset, and intoxicated in the service hallway of the hotel. Although incoherent and upset at first, she told Rumsey she had been raped. (Tr.p.44-p.48, R.p.2-6). In response, Appellant asked the jury to listen to his story and judge his credibility and motivations. He argued he committed adultery by having sex with Victim, but that he was not guilty of the charged crime because Victim was not mentally incapacitated at the time they had intercourse. (Tr.p.48-p.50, R.p.6-8).

The State then began calling witnesses to testify about the case. First, Mitchell Rumsey, the front desk clerk and guest services manager at the Embassy Suites on the night of December 14, 2013, took the stand. He described giving Appellant a key to room 403 after Appellant claimed to be Victim's boyfriend and was able to confirm her name and room number. He further described subsequently discovering Victim as he finished his shift and was exiting the building through the employee exit to his car. Rumsey said Victim was crouched down by the service elevator, crying, distraught, scared, in a fetal position, as if something "not positive" had occurred. The first thing she said was that she had been raped. Rumsey helped her get up and took her to his office where he called 911. Rumsey said he talked to 911 operator because Victim was unable to speak. The 911 call was then played for the jury. (Tr.p.50-p.58, R.p.8-16).

Next, the Victim testified. She explained she was employed by SKF Aerial Engineering and was hosting the annual Christmas party at the Embassy Suites on December 14, 2013. 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. 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. That was when her friend and coworker, Jimmie Filbeck, took her back to her room. She said she asked Filbeck to come back and check on her and gave him a room key. 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. The next thing she remembered was Filbeck and his wife coming into the room and startling her. Victim jumped up and heard them say they were just checking on her. She said she 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. . (Tr.p.74-p.82, R.p.32-40).

Victim testified she did not remember going to the hospital, but once she was there, she called her friend, Deputy Green of the Charleston Police Department, because the nurse told her she was there because she had been raped. Green picked her up from the hospital. Victim then began making phone calls to piece together what had happened. She first called and talked to Filbeck. After obtained Appellant's phone number, she called Appellant. Appellant was first

very short with her and acted like nothing happened, but he called back later explaining he was not able to talk the first time she called because he was with people. Victim said Appellant questioned how she could not remember the previous night and told her they had sex. Victim later exchanged text messages with Appellant wherein he said that he was sorry, that he guessed she was drunk, that he was drunk, and that it should never have happened. He also said he used a condom. Victim reported the incident to her employer and then filed charges with the police. They took her to MUSC where a rape kit was performed. Victim emphasized she did not consent to sexual intercourse with Appellant. (Tr.p.83-p.91, R.p.41-49).

The State then called Yolanda Alston to the stand. Alston explained her relationship to Victim and Appellant and then described attending the 2013 SKF Christmas party. She said she met up with Victim at the party and could tell she was already intoxicated. They then went up to Victim's room where Victim had a drink before they headed back down to the party. Alston testified Victim was acting very feely and touchy and was intoxicated, saying she would rate Victim an "8" on an intoxication scale of one to ten. Alston said she and Filbeck decided Victim needed to be taken away from the party because she was embarrassing herself, so Filbeck took her upstairs. She saw Appellant at the party but said he arrived after Victim was gone. Alston testified that the morning after the party, Victim told her she had been sexually assaulted at the hotel sometime after Appellant left. (Tr.p.121-p.126, R.p.79-84).

Next, the State called Jimmie Filbeck to the stand. Filbeck, who was still employed at SKF at the time of trial, explained Victim was a friend and former coworker. He described the SKF Christmas party on December 14, 2013, and how Victim was already intoxicated when he arrived but not incoherent. Filbeck said about an hour later Victim approached him and asked him to take her to her room. He did, and described how she was stumbling and hanging off of

him on the way, falling down once in the elevator and a second time when they got to the door of her room. Filbeck said when they entered her room, Victim poured and took a shot of liquor. She then tried to sit on the bed and fell onto the floor. Filbeck picked her up and got her into bed and said he had to go back to the party to meet his wife. Vicim game him a key and asked him to come back and check on her. Filbeck them put a cover over her and went back to the party. He said Victim was fully clothed. (Tr.p.134-p.139, R.p.92-97).

Filbeck went down and met his wife and when the party was winding down, they went back up to check on Victim. As they walked to the elevator, Filbeck noticed Appellant following them and getting on the elevator. They all got off the elevator and went to Victim's room. As soon as Filbeck opened the door, Victim jumped out of bed completely nude. He said they immediately turned around to leave. He threw the key on the counter, and pulled the door shut behind them as they left. The three got on the elevator to go back down, but before the door closed, Appellant jumped out. Filbeck testified he never saw Victim come out of her room, never heard a door open, and never heard Appellant say anything about Victim being locked out of her room. He said that was the last time he saw either Victim or Appellant that night. Filbeck testified Victim was extremely intoxicated and although she was conscious when he entered the room, he did not believe she knew what she was talking about. (Tr.p.140-p.146, R.p.98-104).

The State then called Britton Delis, Embassy Suites' Assistant General Manager of Rooms at the time of the incident. He was able to give the standard layout of the rooms in the hotel. Delis worked with the police to facilitate their collection of evidence after the incident. He provided security footage from cameras overlooking the front desk which was not terribly clear, but showed an image of a gentleman getting a key made at the time in question. He also provided a "guest room lock interrogation report" which logged each time room 403 was opened

with a key that night and which key was used. Finally, Delis described the glass and paper cups that would have been provided by the hotel in Victim's two double-bed suite. (Tr.p.163-p.170, R.p.121-128). On redirect, Delis testified that although the service area of the hotel is behind locked doors which should only be accessible by employees, they had challenges with doors sticking on the bottom so that they did not latch properly. (Tr.p.186-p.188, R.p.144-146).

Next, the State called Joye McElroy, the emergency room nurse at St. Francis Hospital to the stand. She was involved in Victim's treatment the morning after the incident, reporting to work at 7 a.m. on December 15, 2013, and issuing discharge instructions to Victim. McElroy reviewed Victim's charts and noted she had been treated for alcohol intoxication and a reported assault. After an objection and some discussion, the parties agreed to admit some medical records consisting of three pages of doctor's notes, three pages of nurse's notes, and one page chemistry report, into evidence. The chemistry report showed Victim had a blood alcohol content of .264 milligrams per deciliter, where a toxic range would be approximately .3. Victim arrived at the hospital at 12:35 a.m. and the blood was not drawn until 3:38 a.m., three hours later. McElroy testified that in her experience, a healthy adult's blood alcohol decreases over time when they are not consuming more alcohol. She also noted that intoxicated people often have symptoms ranging from slurred speech, unsteady movement, unsteady gait, nausea, vomiting, dizziness, all the way to loss of consciousness. (Tr.p.195-p.200; p.211-p.216, R.p.153-158; 169-174).

The State then called Detective Rebecca Bailey of the North Charleston Police Department to the stand. She explained she was assigned to investigate Victim's case several days after the incident, and describe steps she took during that investigation. She noted she talked to Victim, Rumsey, Delis, Fdilbeck, Deputy Alphonso Green of the Charleston County

Police Department, and Appellant. Detective Bailey also viewed the VHS tape of the video surveillance from the hotel and the key card transaction report from Victim's hotel room. (Tr.p.241-p.246, R.p.186-191). The solicitor then 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:

> ò 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). Next, Bailey gave a summary of Appellant's video recorded statement and then the video was admitted into evidence and played for the jury. (Tr.p.247-p.253, R.p.192-198).

In his statement, Appellant 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).

On cross-examination, Appellant questioned Detective Bailey about the various things the police failed to do during their investigation, like taking photos of the room, talking to people from the party, collecting the cups and liquor bottle from the hotel room, or collecting DNA or fingerprint evidence. (Tr.p.253-p.267, R.p.198-212). 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).

Finally, the State called Doctor Katherine Gill-Hopple, the forensic nurse examiner at the Medical University of South Carolina to the stand. She was admitted as an expert in forensic nursing, sexual assault nurse examination, and sexual assault dynamics, without objection. Dr. Gill-Hopple explained the purpose of a sexual assault exam and testified she conducted a case review of the sexual assault exam performed on Victim by Nurse Stephanie Green on December 16, 2013, two days after the incident. She explained the typical steps taken during an exam and explained that Nurse Green noted several abrasions and contusions discovered on Victim's back and thighs, but none on her genital exam. Dr. Gill-Hopple testified it was not unusual in her experience not to find genital injuries and described various reasons this was the case. She said it was also not unusual for sexual assault victims to delay reporting an assault or to recant or partially recant an incident. (Tr.p.282-294, R.p.227-239). Following extensive cross-examination about Victim's physical injuries and brief redirect, the State rested. (Tr.p.294-p.309, R.p.239-254).

After the State rested, Appellant made a motion for a directed verdict, first arguing the State had failed to prove the corpus delicti aliunde because, without his extrajudicial statements, there was no evidence of a sexual battery, and thus, no evidence of a crime. The State responded by pointing out the evidence corroborating Appellant's admission of sexual intercourse, at which point the trial judge asked the State what evidence existed that Victim was mentally incapacitated. After a lengthy discussion and arguments from the parties, the trial judge took the motion under advisement. (Tr.p.310-p.330, R.p.255-275).

Appellant proceeded to present evidence in his defense, calling former North Charleston police officer Darnell Johnson to the stand. Johnson explained he was the officer who first responded to the hotel after the reported sexual assault on the night of December 14, 2013. He talked to Victim, who repeatedly denied that she had been sexually assaulted and seemed to get a little "attitude-ish" because he kept asking the same question. Johnson said he then backed off and waited for EMS to arrive, noting they almost had to "coerce" her to go with them to the hospital. He described Victim as over-friendly and touchy-feely, noting she almost had to be peeled off of Mr. Rumsey, the hotel employee who found her after the assault. (Tr.p.331-p.340, R.p.276-285). On cross-examination Johnson acknowledged Victim had a strong odor of alcohol, was slurring her words, and was stumbling when he talked to her. (Tr.p.341-p.349, R.p.286-294).

When Johnson finished testifying, the defense rested. (Tr.p.349, R.p.294). Appellant renewed his motion for a directed verdict of acquittal and the judge advised the parties he would make a ruling the following morning. Following a brief charge conference, the trial broke for the day. (Tr.p.349-p.351, R.p.294-296). The next morning, the trial judge ruled: "All right. Taking the evidence in the light most favorable to the non-moving party at the directed verdict stage, the directed verdict is denied." (Tr.p.351, R.p.296). The parties proceeded to make closing arguments. During his closing argument, the solicitor noted Appellant was not interviewed by the police until two months after the incident, which meant he had plenty of time to come up with his version of what happened that night. (Tr.p.357-p.358, R.p.302-303). Notably, the solicitor did not comment on Appellant's evasiveness in delaying his interview with the police and did not argue it was evidence of a guilty conscience. Appellant's closing

argument focused on the lack of evidence that Victim was incapacitated and the weaknesses in the police investigation. (Tr.p.352-p.378, R.p.297-323).

The trial judge then charged the jury on Appellant's right not to testify, the State's burden of proof, the presumption of innocence, reasonable doubt, the roles of the judge and jury, prior statements of witnesses, direct evidence, circumstantial evidence, credibility of witnesses, expert witnesses, and the elements of the crimes. Neither party took exception to the jury charge or verdict form. (Tr.p.378-p.390, R.p.323-335). The jury deliberated for a little over two hours before finding Appellant guilty of third-degree criminal sexual conduct, as indicted. Appellant renewed his directed verdict motion and the trial court denied the motion. (Tr.p.393-p.394, R.p.338-339). Judge Nicholson sentenced Appellant to six (6) years' imprisonment suspended upon the service of six (6) months' imprisonment and five (5) years' probation. (Sentencing Sheet; R.p.348-350).

ARGUMENT

I.

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 third-degree criminal sexual conduct.

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 State submits these arguments are without merit. 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. An appeal to legislative intent does not dictate otherwise. The Legislature established the elements of the offense and the jury exercised its duty to determine whether the facts of Appellant's case satisfied those elements so as to constitute 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. Appellant's conviction should be affirmed.

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.").

Discussion / 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 that 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). Victim testified she weighed only 115 pounds and drank three mixed drinks that were half vodka and half Sprite prior to the incident. She said *she did not recall having any interaction with Appellant that night* but knows she did not consent to sexual intercourse with him, and *was not in a state of mind to consent.* (Tr.p.74-p.82, R.p.32-40). She repeated *she did not consent to sexual intercourse with Appellant.* (Tr.p.83-p.91, R.p.41-49). 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). ER 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). 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, although not as extensive, there was nevertheless sufficient evidence to show Appellant had a reason to know Victim was mentally incapacitated or physically helpless when they had sex. First, as Victim's coworker, Appellant knew *she was petit,* which would reduce her capacity for handling alcohol consumption. Second, Rumsey testified that immediately after the incident, *Victim was unable to speak.* (Tr.p.50-p.58, R.p.8-

16). If anything, this level of incapacity would have been worse at the time of the incident because, as noted by ER Nurse McElvoy, BAC decreases over time. (Tr.p.211-p.216, R.p.169-174). Consequently, the jury could conclude Appellant could discern Victim's inability to speak at the time he was having intercourse with her on the floor. This would constitute physical inability of the Victim to communicate unwillingness to an act and/or inability of the Victim to appraise or control her conduct. Third, 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. All of these admissions support the conclusion Appellant knew or had reason to know Victim was temporarily incapable of appraising or controlling his or her conduct, and therefore mentally incapacitated at the time they had sex. Fourth, 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. Fifth, Filbeck, who saw Victim in her hotel room mere minutes before the incident, 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 conclude they were equally obvious to Appellant and therefore gave him knowledge of her mental incapacity. Finally, Johnson, who encountered Victim after Rumsey and after the

incident, acknowledged *Victim had a strong odor of alcohol, was slurring her words, and was stumbling*. Again, these physical observation 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, this testimony and Appellant's own statement to police provided sufficient evidence that Appellant had knowledge of Victim's mental incapacity or physical helplessness at the time they had sex; therefore, the issue was properly sent to the jury.

In conclusion, viewing the evidence in the light most favorable to the State, a jury could reasonably deduce Appellant engaged in sexual battery with the Victim, while she was mentally incapacitated or physically helpless, and that Appellant knew or had reason to know of her incapacity at the time of the sexual battery. Accordingly, the trial court properly refused to direct a verdict in Appellant's favor. Appellant's conviction and sentence should be affirmed.

II.

The trial court properly overruled Appellant's objection to testimony elicited from Detective Bailey that Appellant was being evasive and avoiding an interview with the police on grounds of relevance, because that testimony was relevant as tending to show Appellant's guilty knowledge, intent, and that he sought to avoid arrest.

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. He contends testimony about his missing appointments or not showing up until later did not make it more or less probable that he was guilty for "any legitimate reason," and that he was not overstating the prejudice from this evidentiary error by analogizing it to an improper comment on a defendant's right to silence. Appellant claims the solicitor "wanted the

jury to draw th[e] impermissible spurious conclusion" that he was avoiding Detective Bailey because he was guilty, and that the testimony "was only meant to impermissibly cast undue suspicion on [him] for irrelevant reasons." (Brief of Appellant, p.22-p.23). The State disagrees and submits Appellant's argument is without merit. 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, intent, 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.

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.*

Discussion / 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 this Court 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. This 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 our supreme 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. Rule 402, SCRE.

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 from Appellant on cross-examination (Tr.p.267-p.269, R.p.212-214), and was insignificant in the context of the remaining evidence supporting Appellant's convictions. 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, Appellant's convictions and sentences should be affirmed Appellant's convictions should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: _____
William M. Blitch, Jr.
S.C. Bar No. 15608

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
June 7, 2019

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
J.C. "Buddy" Nicholson, Circuit Court Judge

Appellate Case No. 2017-002478

THE STATE,.....RESPONDENT

v.

STEWART JEROME MIDDLETON,.....APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: _____
William M. Blitch, Jr.
S.C. Bar No. 15608

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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