IN THE CIRCUIT COURT, SEVENTH

JUDICIAL CIRCUIT, IN AND FOR

VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA CASE NO.: 15-101845CFDL

VS.

JASON N. MINTON

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**Motion for Judgment of Acquittal**

Pursuant to Rule 3.380(c), Fla. R. Crim. P., defendant, Jason N. Minton, moves this Court to enter a Judgment of Acquittal as to the charges of:

1. Sexual Battery by a person 18 Years or Older on a Person 18 Years or Older (Specified Circumstances)
2. Kidnapping

Because the evidence offered by the State “is such that no view which the jury may lawfully take of it favorable to the [State] can be sustained under the law,” judgment of acquittal must be entered. *Lynch v. State*, 293 So.2d 44 (Fla. 1974). In support of this motion Defendant would show the following:

1. **Sexual Battery by Person 18 Years or Older on Person 18 Years or Older (Specified Circumstance)**
   1. The State Has Failed to Offer Any Evidence Regarding the use of the Defendant’s Penis to Commit Sexual Battery, Therefore They Cannot Prove the Crime as Charged

The State has chosen to allege that the Defendant penetrated the “mouth, anus and vagina of the victim *with [his] penis* . . .” (emphasis added). However, the State neglected to provide any evidence that the Defendant used his penis to commit sexual battery. 42 C.J.S., Indictments and Informations § 262 says that: “Where an offense may be committed in various ways, the evidence must establish it to have been committed in the mode charged in the indictment.” *Florida Statute* 794.011(1)(h), which is what the State has cited to in its charging document, gives two separate and distinct ways that sexual battery can occur: “. . . oral, anal, or vaginal penetration by, or union with, the sexual organ of another *or* the anal or vaginal penetration of another by any other object . . .” (emphasis added).

It should be noted first that Ms. Peppers makes clear that no oral penetration ever took place:

Q: So at the house, you don’t remember having oral sex with him?

A: I don’t remember. No.

Peppers Trial Testimony, Page 77, Lines 13-15.

Q: Okay. Now, but you do – you still do not recall having performed oral sex on Mr. Minton at the house.

A: No.

Q: Did you ever perform oral sex, or did he just ask you to?

A: I don’t recall. No.

Q: So the answer is as far as you know, you’ve never performed oral sex on Mr. Minton.

A: Correct.

Peppers Trial Testimony, Page 79, Lines 8-17.

As to anal and vaginal penile penetration, no evidence of the Defendant’s semen was ever introduced into evidence. Additionally, during direct examination, Ms. Peppers testified that she could not feel whether or not the Defendant used a condom:

Q: Okay. Do you know whether or not he used a condom or anything?

A: Not that I’m aware of. No, I don’t know.

Peppers Trial Testimony, Page 23, Lines 17-19.

During cross-examination, Ms. Peppers states that she never saw the Defendant’s penis:

Q: Okay. And did you have an actual – do you have an actual memory of him – of ever seeing his penis?

A: I don’t remember actually seeing his penis, no.

Peppers Trial Testimony, Page 74, Lines 13-17.

How, if she could neither feel nor see it, could Ms. Peppers claim to know that the Defendant used his penis to penetrate her either vaginally or anally? She could not, and the State did not produce any evidence to the contrary. Taken in the light most favorable to the State, they have proven that *something* penetrated Ms. Peppers. But, the evidence presented is not sufficient to allow a jury to determine whether the Defendant used his penis to sexually batter Ms. Peppers, and therefore this Court must grant this Motion for Judgment of Acquittal.

WHEREFORE: The Defendant asks this Court to grant this Motion for Judgment of Acquittal as to sexual battery.

* 1. The State Has Failed to Offer Any Evidence Regarding Specified Circumstances
     1. (1): Physically Helpless to Resist

The term “physically helpless to resist,” as used in Fla. Stat. 794.011, has “an unusual and very limited definition.” *Coley v. State*, 616 So.2d 1017, 1020 (Fla. 3d DCA 1993). A reflection on the phrase based on common use and interpretation would lead to a different meaning than statutorily imparted; it is a true “misnomer.” *Id*. The statute defines the condition as one in which “a person is unconscious, asleep, or for any other reason physically unable to communicate unwillingness to an act.” *Fla. Stat.* 794.011(1)(e). A victim is not considered physically helpless to resist who is physically tied up and who is under the influence of illegal narcotics at the time of the alleged sexual battery. *Coley* at 1020-21. A victim is not physically helpless when afflicted with partial paralysis, as whether the victim is able to “jump up and escape her attacker” is not the standard. *Davis v. State*, 538 So.2d 515, 516 (Fla. 2nd DCA 1989). Any attempt to communicate to the alleged attacker the victim’s unwillingness to engage in the sexual act vitiates this aggravating factor. Important to remember is that whether the manifestation of the victim’s lack of consent was effective is not the standard – the attempt to communicate the unwillingness is all that matters. *Id*.

* + 1. The State Has Failed to Offer Any Evidence Regarding Specified Circumstance (4): Defendant Administered, Without the Consent of the Victim, a Narcotic, Anesthetic, or Intoxicating Substance

Based on the testimony elicited during the presentations of its case, the State may be alluding to either alcohol or an unidentified narcotic. Both are addressed, *infra*.

* + - 1. Alcohol as an Intoxicating Substance

The uncontroverted testimony by Ms. Peppers shows that she drank alcohol of her own volition on the night in question:

Q: Okay, so you ultimately agreed to drink the alcohol; right?

A: Yes.

Q: Okay, I mean there’s no question that you willingly drank?

A: Yes.

Peppers Trial Testimony, Page 55, Lines 16-21.

* + - 1. An Unnamed Pill as Narcotic

Q: Did he cover your mouth or do anything to force you to swallow the pill?

A: I think he just put it in, I don’t think it was forceful.

Q: Ok, so would it be fair to say that you swallowed the pill yourself?

A: Yes.

Q: Would it be fair to say you voluntarily swallowed the pill?

A: In my state of mind, yes.

Peppers Trial Testimony, Page 70, Lines 23-25 to Page 71, Lines 1-7.

* + 1. The State Has Failed to Offer Any Evidence Regarding Specified Circumstance (6): The Victim was Physically Incapacitated

This specified circumstance is not applicable to the facts of this case. The State never attempted to prove that Ms. Peppers suffers from any physical handicap, which is the only type of physical incapacitation considered by this portion of the statute. To wit:

The fourth element which the state had the burden of proving is the physical incapacitation of the victim. Section 794.011(4)(f), Florida Statutes, was specifically drafted to protect those who are physically handicapped, *see Davis v. State,* 567 So.2d 25 n. 1 (Fla. 2d DCA 1990), *quashed on other grounds,* 581 So.2d 586 (Fla.1991), and as such this element has not been proven because there was no evidence indicating she was physically handicapped. The young woman's drunken state does not rise to the level of incapacitation contemplated by section 794.011(4)(f).

*Soukup v. State*, 760 So. 2d 1072, 1074 (Fla. 5th DCA 2000).

The State has failed to introduce any evidence of the three specified circumstances that serve to enhance the crime of sexual battery.

WHEREFORE: The Defendant asks this Court to grant this Motion for Judgment of Acquittal as to the charge of sexual battery under specified circumstances.

1. **Kidnapping**

As cited in the Florida Standard Jury Instructions, *Faison v. State* is the seminal case on kidnapping during the commission of another crime. In revisiting its earlier decision in *Faison*, the Florida supreme court noted that it is not the intention of the statute to turn every forcible felony into a de facto kidnapping:

Because a literal construction of the kidnapping statute would convert almost every forcible felony into kidnapping, this Court has adopted a three-prong test to determine whether movement or confinement during the commission of another felony is sufficient to justify an additional conviction for kidnapping. *Faison v. State,* 426 So.2d 963, 965–66 (Fla.1983). According to *Faison,* for a kidnapping conviction to stand, the resulting movement or confinement (a) must not be slight, inconsequential, and merely incidental to the other offense; (b) must not be of the kind inherent in the nature of the other offense; and (c) must have some significance independent of the other offense in that it makes the other offense substantially easier to commit or substantially lessens the risk of detection.

*Walker v. State*, 604 So. 2d 475, 477 (Fla. 1992).

Surely that an alleged victim is held down during the forcible felony of sexual battery is merely incidental to the sexual battery. And, in fact, that is exactly what other Florida courts have found:

First, the evidence established that the movement was merely incidental to the crime because it occurred during a struggle to restrain the victim by getting her to the ground. *See Stanley v. State,* 112 So.3d 718, 719–20 (Fla. 2d DCA 2013) (holding that confinement by throwing the victim onto her bed, holding her down, and taping her mouth and hands was merely incidental to the sex crimes); *Simpkins v. State,* 395 So.2d 625, 626 (Fla. 1st DCA 1981) (holding that pulling a victim from a bedroom to a living room was not materially different from the restraint involved in committing the sexual battery).

Second, the confinement was inherent in the nature of the crime in that Wilson could not have committed the sexual battery without restraining the victim. *See Stanley,* 112 So.3d at 720. And third, the movement did not have independent significance because it did not make the crime easier or substantially lessen the risk of detection. Simply put, there was no evidence of any reason for the victim's movement aside from the victim's testimony that it was part of the struggle that occurred when he attempted to restrain her.

*Wilson v. State*, 159 So. 3d 316, 318 (Fla. Dist. Ct. App. 2015).

Additionally, Ms. Peppers made clear that the Defendant never impeded her alleged escape from his home and never forced her to return to his vehicle:

Q: Okay. And he didn’t run after you or try to grab you or anything like that.

A: I don’t remember.

Q: It’s a pretty small house.

A: Yes. I don’t remember struggling with him or anything. I just remember running out and seeing headlights.

Q: So at no point do you recall you having to struggle to get free to escape the house?

A: No. There was no biting or fighting or struggling or anything. He was off of me at the time, so I ran out.

Peppers Trial Testimony, Page 84, Lines 7-18.

Although Ms. Peppers admits that no sexual contact took place in the Defendant’s vehicle after she left his house, therefore clearly the Defendant could not have committed kidnapping during the commission of a felony based on any of his actions in the vehicle, Ms. Peppers testimony on whether she was confined during her time in the Defendant’s vehicle is still illuminating as to the Defendant’s actions that evening:

Q: You don’t recall the conversation, any conversation about how you got back in the car?

A: No.

Q: Okay. And when you went to get out of the car, did Mr. Minton try to grab you?

A: Not that I remember. I just saw the door handle, and I opened it and woke up in my bathroom.

Q: Okay. So, to your knowledge, he didn’t do anything to force you to get in the car?

A: Not that I’m aware of. No.

Q: And he didn’t do anything to force you to stay in the car.

A: Not that I’m aware of. No.

Q: Okay. And when you opened the car, you’re not aware of any – he didn’t chase you or come after you with the car.

A: Not that I know of. No. I have no memory of that, whatsoever.

Q: So it would be fair to say you have no memory of any difficulty with Mr. Minton preventing you from leaving his house, leaving the car, anything.

A: After he got off of me, no.

Peppers Trial Testimony, Page 87, Lines 10-25; Page 88, Lines 1-6.

WHEREFORE: The Defendant asks this Court to grant this Motion for Judgment of Acquittal as to the charge of kidnapping.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service via the Florida Courts E-Filing Portal, in accordance with Administrative Order No. AOSC13-49, to the Office of the State Attorney, at [eservicevolusia@sao7.org](mailto:eservicevolusia@sao7.org) this 3rd day of May, 2017.

DAMORE, DELGADO & ROMANIK

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