STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Clarendon County
R. Ferrell Cothran, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

vs.

LUCRETIA CONYERS,

Appellant.

Appellate Case No. 2021-000615

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

The trial court correctly denied the motion for directed verdict for resisting arrest because the arresting officer had probable cause to arrest Appellant for breach of peace and obstruction of justice after Appellant interfered with law enforcement's investigation of a fresh neighborhood burglary by physically pushing her way between the officer and a cooperating citizen parked in Appellant's driveway; Appellant became loud and boisterous, would not let the officer interview the cooperating citizen, and attracted attention in the neighborhood. Then she resisted the lawful arrest.

STATEMENT OF THE CASE

Appellant was tried and convicted by a jury for resisting arrest during trial on June 1-2, 2021. The presiding judge, the Honorable R. Ferrell Cothran, Jr., sentenced Appellant to forty-five days' imprisonment, but at Appellant's insistence, granted an appeal bond.

STATEMENT OF FACTS

Lieutenant Joshua Jackson of the Clarendon County Sheriff's Office testified the department received a call on November 19, 2016, for a suspected break-in at a location on Brown Road where a white van was parked and in which items were being removed from a house of a deceased person. Tr. p. 50. Responding to the call, Lieutenant Jackson and Sergeant Hickman saw a white van further down Brown Road, parked in a yard – Appellant's yard – and the officers stopped and made contact with the driver, Sherry McFaddin, who sat in the van. Lieutenant Jackson testified he was in uniform and driving a fully marked vehicle when stopped in front of Appellant Conyers' house. Tr. pp. 50-51.

McFaddin was cooperative and calm while Lieutenant Jackson gathered information from her. On the other hand, Appellant came out of the house yelling and cursing, complaining she did not like policemen on her property. Tr. pp. 51-52.

Lieutenant Jackson explained:

> [Appellant] was cussing and carrying on and saying that she hates the police, to get off her property. At that point I tried to explain to Ms. Conyers the reason why I was on her property was to identify, you know, talk to Ms. Sherry because we had a possible break in in the area and we just wanted to make sure it wasn't the van that we were looking for.
>
> **Ms. Conyers proceeded to basically forcibly move me out of the way.** I was right here at the mirror of her van, Ms. Sherry was still sitting inside of the van. Ms. Conyers came and wedged herself in between us two to basically move me out of the way. At that time I tried to explain to Ms. Conyers, look, I'll be glad to get off your property. Just let me gather this information so I can just document and make sure this ain't the person we're looking for.
>
> Ms. Conyers then stated that she was there first and I was gonna have to wait. Again, I tried to talk to Ms. Conyers, you know, look, we're trying to get this information to make sure this is not the van that's breaking into houses. Ms. Conyers turned around and

> started cursing and carrying on. At that point I felt that she breached the tranquility of the neighbors. I placed her under arrest for breach of peace.

Tr. p. 53, lines 1-22. Appellant left many of these facts out of her summation of the evidence in her brief. See Br. of App. p. 5.

Lieutenant Jackson explained Appellant was yelling, expounding: "it was constant cursing and yelling and carrying on. I even asked Lieutenant Hickman to see if he could calm her down and she just wasn't having it." Tr. p. 54, lines 1-11. Lieutenant Jackson testified he asked four or five times for Appellant to not interfere and stand down. Tr. p. 55, lines 11-15. Lieutenant Jackson testified the arrest was for profanity and yelling, not her expression of disdain for the police. Tr. p. 55, lines 19-23.

Lieutenant Jackson attempted to place Appellant under arrest for breach of peace, asking her to put her hands behind her back. Appellant replied he was going to have to fight her. Lieutenant Jackson started using the straight-arm bar technique that is taught at the academy, and as he locked Appellant's elbow, she fell down. Lieutenant Jackson asked for help from Sergeant Hickman as Appellant refused to get off the ground. Appellant told Lieutenant Jackson not to touch her. Sergeant Hickman managed to place handcuffs on Appellant. Tr. pp. 56-57.

For the defense, the lone witness was Sean McDuffy, who testified that at the time of the arrest, Appellant was "my lady," and he lived with Appellant. Tr. pp. 108-09. He verified the officers asked Appellant "to lower her voice." Tr. p. 109, lines 17-18. McDuffy explained: "Uhm, she's yelling and the officer was like, calm down, and when he said calm down so many times, he said if she didn't calm down, he was gonna arrest her. . . . she did not calm down." Tr. p. 111, lines 16-19.

McDuffy claimed Appellant could not have disturbed the neighbors, but admitted there was a woman present who lived thirty yards away and when asked if the woman was being disturbed, McDuffy answered, "No. **Everybody** was more like why is this happening, you know?" Tr. p. 115, lines 9-22. McDuffy testified "It was just the people who lived in the home which was myself and Lucretia and her cousin that stay farther down the road and the neighbor lady that was there that's now deceased and the officers." Tr. p. 115, line 25 – p. 116, line 4. Also, he added, the driver of the van. Tr. p. 116, line 6. McDuffy advised he did not recognize the van the police were investigating. McDuffy admitted he also asked Appellant to calm down several times. Tr. p. 118.

ARGUMENT

The trial court correctly denied the motion for directed verdict for resisting arrest because the arresting officer had probable cause to arrest Appellant for breach of peace and obstruction of justice after Appellant interfered with law enforcement's investigation of a fresh neighborhood burglary by physically pushing her way between the officer and a cooperating citizen parked in Appellant's driveway; Appellant became loud and boisterous, would not let the officer interview the cooperating citizen, and attracted attention in the neighborhood. Then she resisted the lawful arrest.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. Id. Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)).

"Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776-77 (2011). "When evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury." State v. Richburg, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968). Once a defendant comes forward with proof, the propriety of a directed verdict is judged on all the evidence. State v. Hepburn, 406 S.C. 416, 432, 753 S.E.2d 402, 410 (2013).

Appellant claims directed verdict should have been granted because Appellant was resisting an unlawful arrest. It is unlawful "to resist **an** arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, ..." S.C. Code § 16-9-320 (Supp. 2015) (emphasis added). Accordingly, the statute clearly proscribes resisting "an arrest," not resisting a lawful arrest. As originally enacted in 1980, § 16-9-320 proscribed resisting a "lawful arrest" and also the assaulting, beating, or wounding an officer while resisting a "lawful arrest". 1980 Act No. 511, § 3. Then in 1990, the term "lawful" was removed from the language of the statute. 1990 Act No. 598 § 2.[1]

Our courts "have long acknowledged the presumption that in adopting an amendment to a statute, the Legislature intended to change the existing law." Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 60, 644 S.E.2d 675, 678 (2007). "Because the amendment materially changed the terminology of the statute, a departure from existing law clearly was intended, rather than a clarification of original intent." Id. at 61, 644 S.E.2d at 678. The words of a statute will be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Sys. Corp., v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992).

The change is consistent with the trend away from an antiquated self-help remedy towards a law more consistent with the needs of modern urbanized society:

> Under common law, a citizen generally is permitted to use reasonable

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[1] Appellant cites State v. Poinsett, 250 S.C. 293, 157 S.E.2d 570 (1967), which is a case decided long before the 1990 statutory amendment. Also see generally State v. Williams, 367 S.C. 192, 624 S.E.2d 443 (Ct. App. 2005) (finding a defendant has a right to resist a lawful arrest made with excessive or unlawful force, and that this should have been charged to the jury).

> force to resist an illegal arrest. However many states have abrogated the common law by statute, or through court holdings, reasoning the common-law rule is no longer consistent with the needs of modern society. . . .

5 Am. Jur. 2d Arrest § 89.

The policy behind such a change is well articulated by the Alaskan Supreme Court in Miller v. State, 462 P.2d 421 (Alaska 1969) as follows:

> The weight of authoritative precedent supports a right to repel an unlawful arrest with force. . . . this was the rule at common law. It was based upon the proposition that everyone should be privileged to use reasonable force to prevent an unlawful invasion of his physical integrity and personal liberty.
>
> But certain imperfections in the functioning of the rule have brought about changes in some jurisdictions. A new principle of right conduct has been espoused. It is argued that if a peace officer is making an illegal arrest but is not using force, the remedy of the citizen should be that of suing the officer for false arrest, not resistance with force. The legality of a peaceful arrest may frequently be a close question. It is a question more properly determined by courts than by the participants in what may be a highly emotional situation. Because officers will normally overcome resistance with necessary force, the danger of escalating violence between the officer and the arrestee is great. What begins as an illegal misdemeanor arrest may culminate in serious bodily harm or death.
>
> The control of man's destructive and aggressive impulses is one of the great unsolved problems of our society. Our rules of law should discourage the unnecessary use of physical force between man and man. Any rule which promotes rather than inhibits violence should be re-examined. Along with increased sensitivity to the rights of the criminally accused there should be a corresponding awareness of our need to develop rules which facilitate decent and peaceful behavior by all.

Miller, at 426.

In the instant case, Appellant violated the statute even assuming an unlawful arrest.

Breach of Peace

Appellant claims the trial court should have granted directed verdict because Appellant was not committing a breach of the peace and so in actuality Lieutenant Jackson was trying to effect an illegal arrest. The question is whether Lieutenant Jackson had probable cause to believe Appellant was committing a crime. The United Supreme Court observed the following regarding probable cause:

> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same – and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

Texas v. Brown, 460 U.S. 730, 742 (1983) (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." Id. Probable cause does not require absolute certainty, it is concerned "with probabilities and not certainties." State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003).

Breach of the peace "is a common law offense defined in our precedents in broad terms." State v. Simms, 412 S.C. 590, 596, 774 S.E.2d 445, 448 (2015). Breach of the peace embraces a wide variety of conduct "destroying or menacing public order and tranquility." Id. at 594-95, 74 S.E.2d at 447 (quoting State v. Poinsett, 250 S.C. 293, 297, 157 S.E.2d 570, 571 (1967)). The Supreme Court quoted favorably an opinion from this Court:

> Throughout the various definitions appearing in the cases there runs the proposition that a breach of the peace may be generally defined as such a violation of the public order as amounts to a disturbance of the

> public tranquility, by act or conduct either directly having this effect, or by inciting or tending to incite such a disturbance of the public tranquility. Under this general definition, therefore, in laying the foundation for a prosecution for the offense of breach of the peace it is not necessary that the peace actually be broken; commission of an unlawful and unjustifiable act, tending with sufficient directness to breach the peace is sufficient.

Id. at 595, 74 S.E.2d at 447 (quoting State v. Peer, 320 S.C. 546, 552, 466 S.E.2d 375, 379 (Ct. App. 1996)). "Whether conduct constitutes a breach of the peace depends on the time, place, and nearness of other persons." Id. (quoting Peer). Although breach of peace includes acts likely to produce violence in others, violence is not an element of breach of the peace. Id.

In the instant case, Appellant was loud and profane, and refused requests by both law enforcement and Appellant's boyfriend, McDuffy, to calm down and lower her voice. She physically pushed her way between Lieutenant Jackson and the driver, who was engaged in a voluntary conversation with Lieutenant Jackson and obstructed the orderly conversation. The neighbor, the cooperative van driver, and a cousin living down the road were all present for the melee in the residential neighborhood – so the peace was broken. So evidence exists that Lieutenant Jackson had probable cause to believe the peace and tranquility of the neighborhood was broken by Appellant's outrageous conduct.

Appellant argues her conduct does not constitute a breach of peace because she did not use "fighting words." "The United States Supreme Court has consistently recognized that 'the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.'" In re Jeremiah W., 353 S.C. 90, 95-96, 576 S.E.2d 185, 188 (Ct. App. 2003) *rev'd on other grounds by* 361 S.C. 620, 606 S.E.2d 766 (2004) (quoting city of Houston v. Hill, 482 U.S. 451, 461 (1987)). "The State may not punish a person for voicing an objection to a police officer

where no fighting words are used." Id. at 96, 576 S.E.2d at 188 (quoting State v. Pittman, 342 S.C. 545, 548, 537 S.E.2d 563, 565 (Ct. App. 2000)). In Jeremiah W., an officer attempted to address Jeremiah at an apartment complex where he had been given a trespass warning. Jeremiah retorted with obscenities. When the officer caught up to Jeremiah, Jeremiah turned around, pulled his hands out of his pants, and yelled "what?" with his arms bowed out. A crowd was present for the encounter. Jeremiah W., 353 S.C. at 92, 537 S.E.2d at 187. This Court found the evidence of guilt was insufficient, finding "Officer Cooke's own testimony indicates that his decision to arrest Jeremiah was based on his language and the fact that he was being loud and boisterous." Id. at 96, 537 S.E.2d at 189.

Unlike Jeremiah W., upon which Appellant relies, Appellant did more than merely use loud and boisterous language and profanity. In addition to those actions, Appellant "forcibly" moved the officer out of the way, wedging herself between the van and the officer.[2] She then kept the officer from interviewing the driver of the van, telling the officer she was there first and he would have to wait. When the officer attempted again to explain he merely wanted to gather information from the driver, Appellant "turned around and started cursing and carrying on." Tr. p. 53, lines 1-22. Besides, the State was not required to prove Appellant was guilty of breach of peace beyond a reasonable doubt – the State just needed to prove (at most) that Lieutenant Jackson had probable cause to believe Appellant breached the peace. Texas v. Brown, 460 U.S. 730, 742 (1983) (Probable cause "does not demand any showing that such a belief be correct or more likely true than false.").

In State v. Williams, 534 A.2d 230, 232 (Conn. 1987), an officer attempted to detain the

[2] The Use of Force report indicates Appellant stood 5'11" and weighed 250 lbs. Defense Exhibit #1.

defendant because he matched the description of a burglary suspect. He asked the defendant to wait in the police car until another officer arrived for further identification. The defendant would not comply with the request and became increasingly "out of control," the defendant started to swear at the officers and in a crescendo, protested his detention. Observing that noise attracted onlookers, the officers decided to arrest the defendant for breach of peace. The defendant resisted and was subsequently convicted at a bench trial of interfering with an officer by resisting arrest under the Connecticut statute. Id.

The Connecticut Supreme Court addressed the defendant's claim that the arrest for breach of peace was illegal. The court explained, "The legality of the defendant's arrest depends upon whether the police had probable cause to believe that the crime of breach of the peace had been committed and that the defendant had committed it." Id. at 239. The Court found sufficient evidence because the defendant "was 'getting loud' and 'swearing' at the police officers; it was four o'clock in the morning; people were watching the incident from across the street; and the defendant was 'creating a disturbance.'" Id. at 240. The court then observed, "The defendant's argument of insufficiency of the evidence would have greater persuasiveness if the issue were his guilt or innocence of the crime of breach of the peace. The standard for sufficiency of the evidence to convict is higher than the standard that governs a police officer's determination of probable cause." Id.

As in Williams, law enforcement had probable cause to believe Appellant breached the peace. Appellant was not arrested merely for words of protest or using profanity, but was arrested for forcibly pushing her way in between the officer and the cooperative citizen, blocking the officer from conducting his investigation, and attracting onlookers. Further, the officer was clear his decision to arrest was not based on Appellant's expressed viewpoint about law enforcement. This is

sufficient to establish probable cause for a breach of the peace as Appellant was arrested for more than mere words of protest or profanity.

Obstruction of justice/hindering a police officer.

Further, Appellant's conduct clearly establishes obstruction of justice at common law. Common law obstruction of justice is defined as, "an offense to do any act which prevents, obstructs, impedes, or hinders the administration of justice." State v. Cogdell, 273 S.C. 563, 567, 257 S.E.2d 748, 750 (1979). Appellant also committed the related common law offense of the interference of a police officer in performance of his duty. State v. Kirven, 279 S.C. 541, 309 S.E.2d 749 (1983) (finding when defendant stepped in between officer and defendant's son as the officer was arresting the son, the facts failed to meet the charged statutory offense of hindering a police officer because the officer was not executing a warrant or other process as required by statute: "This requirement distinguishes the statutory crime from common law interference with a police officer in the performance of his duty, with which Appellant might have been charged.").

"[P]robable cause for a warrantless arrest generally exists 'where the facts and circumstances within the arresting officer's knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested.'" State v. Moultrie, 316 S.C. 547, 552, 451 S.E.2d 34, 37 (Ct. App. 1994) (quoting United States v. Miller, 925 F.2d 695, 698 (4th Cir. 1991)).

As observed by the United States Supreme Court, the touchstone of the Fourth Amendment is reasonableness and "[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them fair leeway for enforcing the law in the community's protection." Heien v. North Carolina, 574 U.S. 54, 60-61 (2014) (citation and

internal quotation marks omitted).

"Probable cause is determined as of the time of the arrest, based on facts and circumstances – objectively measured – known to the arresting officer. The determination of probable cause is not an academic exercise in hindsight." Jackson v. City of Abbeville, 366 S.C. 662, 667, 623 S.E.2d 656, 659 (Ct. App. 2005).

In Abbeville, a civil action, the officer arrived at a convenience store where the store clerk had asked Jackson to leave after Jackson became enraged over not being allowed to put up a flyer in the store for his club. Jackson interrupted the clerk while the officer attempted to interview the clerk and refused the officer's request to be quiet. The officer put Jackson on trespass notice, but Jackson refused to leave. Jackson resisted when the officer attempted to arrest him. Jackson was ultimately charged with disorderly conduct and resisting arrest. For purposes of that appeal, the city conceded the officer did not have probable cause to arrest Jackson for disorderly conduct or resisting arrest, but argued the officer did have probable cause to arrest for trespass after notice although Jackson was never charged with that offense. This Court agreed, because the test is an objective one – "an officer's subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." Id. (citation and internal quotation marks omitted).

In the present case, regardless of whether the officer had probable cause to arrest Appellant for breach of peace, the officer readily had probable cause to arrest Appellant for obstruction of justice and hindering a police officer in performance of his duties. Considering Appellant was breaking the law and then resisted a lawful arrest, the trial court did not err in denying the motion for directed verdict. This Court should affirm the conviction.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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