STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Beaufort County

Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GEORGE HOLMES,

APPELLANT

APPELLATE CASE NO. 2016-002010

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the court err by failing to direct a verdict for the offense of indecent exposure where the alleged exposure occurred in a holding cell at the Beaufort County Detention Center, which is not a public place as intended by the legislature or as defined by our Supreme Court, and where the state failed to present any direct evidence or circumstantial evidence that Appellant willfully and maliciously exposed his person or intended to expose his person?

STATEMENT OF THE CASE

A Beaufort County Grand Jury indicted Appellant on April 30, 2015 for indecent exposure. R. 163. His case was called to trial on July 26, 2016 before the Honorable Michael G. Nettles, Jr., and a jury. R. 1. Assistant Solicitors Dustin Whetsel and Melanie Graham represented the state, and Jessica Saxon and Kate Cappelmann represented Appellant. R. 1.

On July 27, 2016, the jury found Appellant guilty. R. 154, ll. 13-17. He was sentenced on September 12, 2016 to three years suspended upon the service of one year imprisonment and five years' probation. He was also ordered to register as a sex offender. R. 160, ll. 7-23.

On September 22, 2016, a hearing was held on Appellant's motion to reconsider the requirement that he register as a sex offender. By order dated September 29, 2016, Judge Nettles amended the original sentence and ordered Appellant was not required to register as a sex offender. R. 161.

This appeal follows.

STATEMENT OF THE FACTS

On April 6, 2014, Appellant was incarcerated at the Beaufort County Detention Center. He suffers from severe mental illness, including schizophrenia, and was placed on suicide watch after complaining of hearing voices and stating he was going to harm himself. R. 43, l. 16 – 44, l. 5. An inmate on suicide watch is required to be continually monitored and visually observed by a correctional officer every fifteen minutes. R. 58, l. 13 – 59, l. 14. Consequently, such inmates, like Appellant, are housed in a single person holding cell in the booking area of the detention center. R. 58, ll. 1-12.

In order to reach the booking area from outside the detention center, one must first sign in and pass through a metal detector. After going through the metal detector, the individual must pass through "a secured locked door that is controlled from a central location." This first secured door leads to "sort of an in-between area" before the individual reaches a second secured locked door. After being granted access through this second secured door, the individual finally reaches the booking area. R. 39, l. 20 – 41, l. 16; R. 31, ll. 15-20. Because it is a jail, the detention center has numerous security protocols in place. R. 41, ll. 17-22; R. 65, ll. 7-11.

Appellant was placed in a holding cell identified as IH-1. R. 79, ll. 8-14. This cell, along with others used to house inmates on suicide watch, has a surveillance camera that captures what occurs inside the cell. R. 53, ll. 12-18. Additionally, each cell has a metal toilet, sink, and bunk. R. 66, ll. 18-22. The door to each cell is made of steel and slides shut from left to right. When closed, there is a small gap between the door and the wall approximately one and a half to two inches wide. R. 54, l. 17 – 55, l. 4. The door itself also has a very small window that officers use to monitor inmates housed inside. R. 58, ll. 13-25.

The state alleged at trial that on the evening of April 6, 2014, Appellant masturbated inside his cell and purposefully positioned himself so that a female correctional officer, Jessica DeSantis, could see him. DeSantis claimed that she could see Appellant's penis through the small one and a half to two inch gap between the cell door and the wall. R. 87, l. 1 – 90, l. 2; R. 93, ll. 1-3. She also claimed that while Appellant was masturbating, he yelled obscene words at her, such as slut and whore. R. 87, ll. 6-10; R. 92, ll. 8-18.

Nearly three months later, after consulting with the solicitor's office and waiting for the results of a mental health evaluation Appellant had undergone, law enforcement charged Appellant with indecent exposure pursuant to S.C. Code Ann. § 16-15-130. R. 44, l. 6 – 45, l. 15. This statute reads in relevant part: "(A)(1) It is unlawful for a person to willfully, maliciously, and indecently expose his person in a public place, on property of others, or to the view of any person on a street or highway."

Appellant moved pretrial to dismiss the indictment arguing that the Beaufort County Detention Center is not a public place under the plain meaning of the statute, and thus Appellant could not be convicted of indecent exposure. R. 2, l. 1 – 3, l. 11. Defense counsel argued that at the time of the alleged offense Appellant was housed in a very "small private place" behind a steel door in a "highly secured government building that the public does not have general access to." R. 2, ll. 13-20. Because the state must prove Appellant exposed himself in a public place, counsel concluded that the prosecution could not meet all the elements of the offense and that the indictment should be dismissed.

The assistant solicitor admitted "there is no South Carolina law on point when it comes to [what constitutes] a public place." However, the solicitor asserted that "the Attorney General published a memo back in August of 2007 where they were responding to a question of graffiti

inside of a detention center and if it would fit the statute because it [the statute] required that it [the graffiti] be publically viewable. So the Attorney General put out an opinion and they cited several cases and I want to hand these up to Your Honor." R. 4, l. 20 – 5, l. 6. Relying on cases from other jurisdictions cited by the Attorney General in its August 2007 opinion, some of which are unpublished and most of which are not directly on point, the solicitor argued that the holding cell in the Beaufort County Detention Center where Appellant was being housed at the time of the alleged exposure constituted a public place.

Defense counsel stated in response "that our general assembly at the beginning of 2015 attempted to amend our public indecent exposure statute to specifically include a jail as a public facility for purposes of the statute" but the amendment "was killed by the house without being passed." Consequently, counsel argued that the "legislative intent is not to include the jail house as a public place in the state of South Carolina." R. 12, ll. 1-14. She later continued, "And our legislature attempted to change that act and it failed. And that I think is extremely damning to the State's argument that this is in any way shape or form a public place for the purposes of the statute." R. 13, ll. 19-23.

Moreover, defense counsel asserted that the statute is "designed to protect the public from instances of indecent exposure . . .[and] as much as Ms. DeSantis [the correctional officer] may not [have] enjoyed having to see that and as much as other C-O's [correctional officers] probably don't like it either unfortunately they are not considered the public under the law. This is part of their job." R. 13, ll. 3-13. Lastly, defense counsel stressed that the holding cell where Appellant was housed at the time of the alleged exposure "is behind two remote control locked doors, a guarded security desk and a metal detector [and] is not a public place at all." R. 13, ll. 14-19.

The trial court ultimately denied the pretrial motion to dismiss. The court found "the jail is indeed a public place for purposes of this statute [S.C. Code Ann. § 16-15-130]." R. 49, ll. 4-6. The court emphasized that because correctional officers were required to visually check on Appellant while he was placed in IH-1 on suicide watch and because other people, including inmates, could walk by and potentially see the alleged exposure, the area was a "public place." R. 15, ll. 12-17.

At the conclusion of the state's presentation of evidence, Appellant moved for a directed verdict and renewed and incorporated the arguments he raised during the pretrial motion to dismiss. The following exchange took place between defense counsel and the court:

> Ms. Saxon: Again, I stand by my earlier argument that the jail for the purpose of the statute and the cell where all of this occurred as we have now seen is not a public place. It is not someplace that people freely have access to. The alleged exposure occur[ed] through maybe a one inch, two inch at the most, crack in a cell door.
>
> As we see from the video you don't see anything. You see Mr. Holmes['] [Appellant's] back the entire time. And you never see him expose himself openly to a camera. He does not run out into the booking area and rip off his suicide gown, which has been testified to be a solid piece. And the entire time based on the evidence you see he is also up against a door, Your Honor. And so when you are talking about exposure there has to be some exposure. There has to be something that we can actually see and show and say look jury, this is how this happened, this is what happened. And **there has been no evidence of actual exposure in this case.**
>
> There again as I stated there has been nothing to support the idea that the jail is a public place or somewhere that the people have general access to, which is required in my opinion under the statute. I think for those reasons Your Honor I would ask you to direct a verdict in favor of Mr. Holmes [Appellant].
>
> The Court: What do you think about the fact that this is like a one to two inch crack **it seems to me like you would almost have to go peek into it to see it.**
>
> Ms. Saxon: That's my opinion too, Your Honor. And when you are in the jail and if you look at the videos and the photos that have been presented this is not a wide gap. **This is something that takes a deliberate action upon the**

other person to go and look through. It is not something where you can shove his - -

The Court: - - this is a lot different than - - you can see and hear tell of a lot of public defenders who find themselves going into pods and there are people [inmates] out and about and there is full on masturbation and they will drop their britches to the floor and masturbate. This isn't what that is.

Ms. Saxon: No it's not, Your Honor. And that's one of the reasons that I have felt so strongly about this particularly because of where it did occur which is in this very confined cell where Mr. Holmes is allegedly masturbating against a door with the exposure being this two inch maybe, maybe two inch crack and the State still has to prove that he had an intent to expose himself.

There is criminal intent in any criminal crime and they've not offered any evidence to that because it wasn't like he was trying to shove himself through the crack. He wasn't jumping up on his bed to try to get [a] better view of the window; nothing of that nature. And I think here particularly - -

The Court: - - I think perhaps it's clear that he might have been masturbating based on what he was saying and she [DeSantis] might be right in that regard. But I don't think - - **she said she saw it. I'm not really sure how she did.**

Ms. Saxon: I agree with you, Your Honor. And I would ask that you direct a verdict for Mr. Holmes [Appellant].

The Court: There might be **a scintilla of evidence** because of the fact that she said she saw him. I don't know.

R. 106, l. 3 – 108, l. 25 (emphasis added).

In response to defense counsel's argument, the solicitor asserted that whether DeSantis saw Appellant's penis or whether Appellant intended to expose himself was a question of fact for the jury. R. 109, l. 1 – 114, l. 7.

The trial court ultimately denied the motion for a directed verdict finding "that there is indeed **a scintilla of evidence**" that Appellant exposed himself based on Officer DeSantis' testimony that she saw Appellant's penis through the crack between the cell door and the wall. The court continued, "I think that is clearly a legitimate question of fact that needs to be resolved by the

jury . . . [w]ith regard to whether it is a public place or not and with regard to whether or not she [DeSantis] saw his penis and whether or not he intentionally displayed his penis to her. So we will proceed forward with the trial." R. 119, l. 23 – 120, l. 5.

During deliberations, the jury requested to be recharged on the definition of a public place. It also requested to rewatch the video from the surveillance camera inside Appellant's cell at the time of the alleged offense, which was marked as State's Exhibit No. 13 and is on file with this Court. R. 151, l. 18 – 152, l. 23.

ARGUMENT

The court erred by failing to direct a verdict for the offense of indecent exposure where the alleged exposure occurred in a holding cell at the Beaufort County Detention Center, which is not a public place as intended by the legislature or as defined by our Supreme Court, and where the state failed to present any direct evidence or circumstantial evidence that Appellant willfully and maliciously exposed his person or intended to expose his person.

"It is a fundamental concept of criminal law that the State must prove beyond a reasonable doubt all the elements of the offense charged against the defendant." State v. Cain, 419 S.C. 24, 30, 795 S.E.2d 846, 849 (2017) (quoting State v. Brown, 360 S.C. 581, 590, 602 S.E.2d 392, 397 (2004)) (internal quotation marks omitted). "If there is **any direct evidence or any substantial circumstantial evidence** reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001) (citing State v. Rowell, 326 S.C. 313, 315, 487 S.E.2d 185, 196 (1997)) (emphasis added).

When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (citing State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)).

Likewise, a directed verdict is proper when the evidence produced "merely raises a suspicion the accused is guilty." State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001) (citing State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000)); State v. Arnold, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984). Our

courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256 (citing State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963)).

When ruling on Appellant's motion for a directed verdict, the trial court erred by applying an incorrect standard of review. The court found the state presented "at least a **scintilla of evidence**" and therefore denied Appellant's motion. R. 114, ll. 8-11 (emphasis added); see also R. 119, ll. 23-25; R. 115, ll. 17-18. This was clearly error. The correct standard when ruling on a motion for a directed verdict during a criminal trial where an individual's liberty is at stake is whether there is "**any direct evidence or any substantial circumstantial evidence** reasonably tending to prove the guilt of the accused." McGowan, 347 S.C. at 622, 557 S.E.2d at 659 (emphasis added). The trial court erroneously relied upon the *much lower* standard that is used in civil cases when ruling on a motion for summary judgment. See Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802 (2009) (holding in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment, but in cases requiring a heightened burden of proof or in cases applying federal law, the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment).

Under the proper standard of review, the trial judge should have directed a verdict of acquittal because the state failed to present any direct evidence or substantial circumstantial evidence that Appellant willfully and maliciously exposed his person or intended to expose his person. Moreover, the state could not prove all the elements of the offense because the holding cell at the Beaufort County Detention Center where Appellant was housed when he allegedly exposed himself is not a public place under S.C. Code. Ann. § 16-15-130.

Appellant was indicted for indecent exposure under § 16-15-130. This statute reads in relevant part: "(A)(1) It is unlawful for a person to willfully, maliciously, and indecently expose his person in **a public place**, on property of others, or to the view of any person on a street or highway." (emphasis added). The single person holding cell at the Beaufort County Detention Center where Appellant allegedly exposed himself while masturbating does not constitute a public place under the statute.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) (quoting Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)) (internal quotation marks omitted). "As such, a court must abide by the plain meaning of the words of a statute." State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (citing Hodge v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). Also, penal statutes must be strictly construed against the state and in favor of the defendant. Hair v. State, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991) (citing State v. Cutler, 274 S.C. 376, 378, 264 S.E.2d 420, 420-421 (1980)); State v. Muldrow, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2002).

In State v. Williams, 280 S.C. 305, 312 S.E.2d 555 (1984), our Supreme Court held the following definition of a "public place" was "proper and satisfactory:"

> A place to which **the general public has a right to resort**; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually **accessible to the neighboring public**. Any place so situated that what passes there can be seen by any considerable number of persons, if they happen to look. Also, a place in which the public has an interest as affecting the safety, health, morals, and welfare of the community. **A place exposed to the public, and where the public gather together or pass to and for**."

Id. at 306-307, 312 S.E.2d at 556 (internal citations omitted) (emphasis added).

In Williams, the Supreme Court held that the lobby of the Austin Wilkes Society Home was a public place under the public disorderly conduct statute because it was common knowledge that the homes, which received financial assistance from United Way and governmental grants, were not private residences. Id. at 307, 312 S.E.2d at 556. Moreover, the lobby where the conduct occurred was a large waiting area and game room with a television that was commonly used by both tenants and guests. Id.

Here, Appellant was housed in a single person holding cell in the booking area of the detention center. Because it is a jail, the Beaufort County Detention Center has numerous security protocols in place and the general public does not have access to the facility or any right to resort at the facility. See Williams, 280 S.C. at 306-307, 312 S.E.2d at 556. The evidence established that in order to reach the booking area of the detention center one has to first sign in at a guarded desk and pass through a metal detector. The individual then has to be granted access through two separate secured doors that are controlled from a central location. R. 39, l. 20 – 41, l. 16. The only people granted access to the booking area are recently arrested individuals who are accompanied by law enforcement officers, correctional officers, fellow inmates, and nurses who treat inmates. Again, the general public does not have access to the area. Because it is a private, secured facility, the detention center, and even more specifically, the booking area, is not a "public place" under the plain meaning of the statute.

Further, the legislature did not intend for the jail to be considered a public place under the indecent exposure statute. As defense counsel argued below, the general assembly attempted to amend our public indecent exposure statute in early 2015 to specifically include a jail as a public place for purposes of the statute, but the amendment "was killed by the house without being passed." R. 12, ll. 1-14. Additionally, the indecent exposure statute was designed to protect

members of the public, not correctional officers. Observing masturbating inmates, hearing foul language, and dealing with similar conduct is a part of a correctional officer's job.

Moreover, the state failed to present any direct evidence or substantial circumstantial evidence that Appellant willfully and maliciously exposed himself or intended to expose himself. Appellant was allegedly masturbating behind the closed steel door of the private holding cell where he was housed. Because Appellant was up against the door, it was physically impossible for anyone to observe Appellant masturbating through the small window located at the top of the steel door. When closed, this door supposedly has a less than two inch gap between the door and the wall. Officer DeSantis claimed she could see Appellant's penis through this very small gap. However, the state presented no evidence that Appellant knew it was physically possible that another individual could see him masturbating through this gap or that he willfully intended DeSantis to see his penis. The trial judge even commented that "it seems to me like you would almost have to go peek into it [the gap] to see it." R. 107, ll. 14-16. The judge also said, "[S]he [DeSantis] said she saw it [Appellant's penis]. I'm not really sure how she did." R. 108, l. 20.

Because there was no direct evidence or substantial circumstantial evidence that Appellant willfully and maliciously exposed his person, the trial judge erred by failing to grant a directed verdict. Moreover, the judge also erred because the holding cell within the booking area at the Beaufort County Detention Center where Appellant allegedly exposed himself is not a public place for purposes of the indecent exposure statute. Appellant respectfully requests this Court direct a verdict in his favor.

CONCLUSION

By reason of the foregoing argument, Appellant respectfully requests this Court direct a verdict of acquittal in his favor.

Respectfully submitted,

Lara M. Caudy

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Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of September, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 20, 2017

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