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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley Price, Circuit Court Judge
Case No. 2023-CP-10-01941

Appellate Case No. 2023-001928

Meredith Logan Whitehurst, ... Appellant,

v.

Town of Sullivan's Island, ... Respondent.

RESPONDENTS' INITIAL BRIEF

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STATEMENT OF CASE

This appeal from the circuit court arises from the conviction of the Appellant, Meredith Logan Whitehurst ("Appellant"), for violating the disorderly conduct ordinance of the Town of Sullivan's Island, South Carolina (the "Town"). The conviction was the result of a jury trial held on March 21, 2023, in the Sullivan's Island Municipal Court. The jury heard evidence that, in the early morning hours on Saturday, June 11, 2022, the Appellant and one other passenger were picked up on King Street in downtown Charleston by an Uber Driver who was to take them to a destination on Sullivan's Island. **(Trial Tr. at 79:4-16).** The Uber driver, Ahmed Ghozlan (hereinafter, the "Uber Driver") was born in Egypt and emigrated to the United States in 2008. **(Trial Tr. at 78:11-79:03).**

On the way to Sullivan's Island, the Uber Driver requested that Appellant keep her voice down. **(Trial Tr. at 79:22-80:25).** Thereafter, upon entering Sullivan's Island, the Uber Driver activated his dashcam video as the Appellant and the other passenger became agitated and demanded that he pull the minivan over and let them out short of their intended destination. **(Trial Tr. at 82:18-21, 85:01-03); (Dashcam Video, Trial Ex. 1, at 0:31 to 0:59).** What unfolded next was verbal tirade, and even an assault, launched by the Appellant against the Uber Driver and captured on his dash camera. **(*See generally* Dashcam Video, Trial Ex. 1).**[1]

[1] In response to pretrial motion to suppress the dashcam video on "completeness" grounds, the Uber Driver testified as follows:

> Q: Have you seen the video that has been presented not only in this morning's court, but in the past you and I have watched that video together?
> A: Yes, sir.
> Q. Is that a complete and accurate video of what occurred in your

The dashcam video was admitted into evidence and published to the jury at trial. **(Trial Tr. at 85:01-08; 86:22-87:11).** The video shows, at roughly 2:00 a.m. in the morning, *after* the minivan had come to a stop in the road with its side door wide open, Appellant behaved as follows:

- yelling the "f" word at the Uber Driver at least seven times, from inside and outside the vehicle, **(Trial Ex. 1 at 1:14, 1:20, 1:24, 1:29, 1:31, 1:37, 1:41)**;
- daring the Uber Driver to ask her again to exit his vehicle, yelling at him to "say that one more time" and "say that one more fucking time," **(*Id. at* 1:11-1:16)**;
- physically swiping her hand at the Uber Driver's head **(*Id.* at 1:24)**;
- daring the Uber driver to call 911, while leaning aggressively toward him and yelling in his face, "you are not even from our fucking country," **(*Id.* at 1:29)**.
- while standing outside of the minivan, yelling at the Uber Driver, "you fucking Arabic piece of shit," **(*Id.* at 1:31)**.
- while standing outside of the minivan, yelling a second time at the Uber Driver, "You fucking Arabic piece of shit," **(*Id.* at 1:38)**.
- while standing outside of the minivan, yelling at the Uber driver, "Go back to Islam or wherever the fuck you are from . . ." **(*Id.* at 1:41)**.
- while standing outside of and moving away from the minivan, continuing to yell and use profanity in public **(*Id.* at 1:50-2:05)**.

The Uber Driver testified at trial that, after Appellant exited his vehicle, her voice "was very loud, even like, you know, there was like a street there and there was a guy and he stopped there. I felt like people would be watching me." **(Trial Tr. at 84:21-23).**

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vehicle on June 11, 2022?
A. Yes, sir.
Q. You didn't alter that video in any or extrapolate it in any way?
A. No, sir.
Q. And you sent that to Officer DeNett of the Sullivan's Island police Department?
A: Yes, sir.

(Trial Tr. at 50:01-14).

Further, in addition to her verbal tirade making him feel nervous, offended, and insulted, the Uber Driver testified that he felt Appellant touch him when she swiped her hand at his head. **(Trial Tr. at 92:21-93:06; 94:11-95:03; 95:11-14).** According to the Uber Driver, Appellant tried to slap him and take his "ear bud," which is a hands-free cellular phone device that he was using to call the police. **(Trial Tr. at 94:6-13).** Appellant failed to take the earbud, and the Uber Driver was able to summon the police.

Sydney DeNett, one of the Sullivan's Island police officers who responded to the scene and investigated the incident, also testified at trial. **(Trial Tr. 116:01-159:04).** Officer DeNett stated that she received the dash camera video from the Uber Driver via an email from him, and what she received was the same video played for jury and that is described above. **(Trial Tr. 129:09-14).** Officer DeNett also told the jury about her investigation, which was captured on a body camera that she wore that night. **(Trial Tr. 116:01-159:04).** The body camera video was also admitted into evidence and published to the jury. **(Trial Tr. at 121:21-122:04; 129:05-130:06); (*see* Bodycam Video, Trial Ex. 1).**

At trial, Officer DeNett described arriving at the scene to find the Uber Driver in a "very distraught and upset" state. **(Trial Tr. 119:07-09).** According to the officer, the Uber Driver explained to her what had transpired, including that the Appellant's "profane language and shouting occurred inside the vehicle and out in the roadway." **(Trial Tr. 120:15-20); (*see also* 119:13-17).** He also showed his dashcam video to Officer DeNett, which she found to be consistent with his statements. **(Trial Tr. 120:21-25)**. Using an address supplied by the Uber Driver, Officer DeNett then located and interviewed the Appellant and her friend at a nearby residence **(Trial Tr. at 121:04-08).**

Thereafter, Officer DeNett issued a disorderly conduct citation to the Appellant. **(Trial Tr. at 121:09-20).**

When asked on direct examination why she decided to issue the citation to the Appellant, Officer DeNett responded,

> A. Ultimately, I was able to view the [dashcam] footage. I wasn't able to retrieve it at that time. I was able to view it from [Uber Driver's] phone. I observed both females, and they behaved in a loud and boisterous manner inside the van, and then it bled out into the roadway as well, profane language.
>
> Q. Did it have to do anything with the volume of their language outside on the public roadway?
>
> A. Yes, sir.

(Trial Trans. at 128:25-129:08).

Later, on cross examination, Officer DeNett was questioned extensively about her decision to cite the Appellant for disorderly conduct. In response to a question whether her decision to issue the citation was based on "anything in particular that the Appellant said," Officer DeNett stated: "It was the manner, the boisterous manner, the profane language in public into a public roadway as well." **(Trial Tr. at 145:08-15).** She also agreed that in making her decision she considered "the volume of statements that [she] heard while watching th[e] dash camera video[.]" **(Trial Tr. at 147:10-18).** At the conclusion of Officer DeNett's testimony, the Town rested its case. **(Trial Tr. at 156:11-12).**

Before the court charged the jury, Appellant renewed a motion to dismiss on First Amendment and vagueness grounds, as well as a motion to suppress the dash cam video based on its chain of custody and prejudice. **(Trial Tr. at 157:05-160:01).** Following a decision by the Town to prosecute Appellant under only subsections (8) and

(12) of the Disorderly Conduct Ordinance, Appellant also moved for a directed verdict, arguing that the evidence did not show "the public peace was broken or that any member of the public heard [the altercation]." **(Trial Tr. at 161:04-05).** Appellant did not renew a pretrial motion to require the Town to identify specific subsections of the Disorderly Conduct Ordinance being prosecuted prior to trial. **(*See* Trial Tr. at 8:06-23).**[2] Appellant also did not object when the trial judge charged the jury with subsections (8) and (12) of the Disorderly Conduct Ordinance, which provides in pertinent part:

> (A) A person shall be guilty of disorderly conduct if, with the purpose of causing public danger, alarm, disorder or nuisance, or if his or her conduct is likely to cause public danger, alarm, disorder or nuisance, he or she willfully does any of the following acts in a public place or within public view:
>
> > (8) Makes or causes to be made any loud, boisterous and unreasonable noise or disturbance to the annoyance of any other persons nearby, or near to any public highway, road, street, lane, alley, park, square or common, whereby the public peace is broken or disturbed, or the public annoyed; [or]
> >
> > (12) Makes or causes to be made any loud, boisterous or unreasonable noise or disturbance to annoy other persons nearby, or near to any public highway, road, street, lane, alley, park, square, or common, whereby the public peace is broken or disturbed or the traveling public annoyed[.]

Sullivan's Island Town Code at § 132.08(8), (12); *see also* **(Trial Tr. at 178:04-179:06)** (charging elements); **(Trial Tr. at 180:03-08)** (Appellant not objecting to jury charges).[3]

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[2] The Town agreed prior to the start of the trial to proceed against Appellant on the following five subsections of the Ordinance: (4), (7), (8), (12), (18). **(Trial Tr. at 9:14-23).** Then, during the trial, the Town volunteered to narrow its case even further, to subsections (8) and (12). **(Trial Tr. at 111:02-05).** Ultimately, the jury was charged with those two subsections only and no others. **(Trial Tr. at 178-04-179:06).**

[3] Appellant did not object to the municipal court charging the jury with subsections (8) and (12) of the Disorderly Conduct and agreed to the court charging the subsections as an "either/or" offense because the two subsections are "very similar." **(Trial Tr. 110:17-111:05).**

Ultimately, the jury returned a unanimous verdict, finding the Appellant guilty of disorderly conduct. **(Trial Tr. 183:12-20).**

STANDARD OF REVIEW

Convictions in the magistrate court are to be appealed to the Circuit Court. S.C. Code § 18-3-10. Acting as the appellate court, the circuit court reviews the matters raised in the notice of appeal. *Id.* at § 18-3-70 ("The appeal must be heard by the Court of Common Pleas upon the grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses in that court."); *State v. Henderson*, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001) ("In criminal appeals from magistrate or municipal court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception."). Appeals to higher courts are reviewed for errors of law only. *See id.* (citing *State v. Cutter*, 261 S.C. 140, 147, 199 S.E.2d 61, 65 (1973); *State v. Head*, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct.App.1997).

ARGUMENT

In this case, Appellant does not contest that her conduct violates subsections (8) and (12) of the Town's Disorderly Conduct Ordinance, for which the jury convicted her of violating. The evidence at trial, namely testimony of the Uber Driver and Officer DeNett, as well as video of the incident, was clear and undisputed. There was no reasonable doubt regarding Appellant's guilt.

The video evidence alone conclusively established at trial that Appellant waged a relentless verbal, even physical, assault on the Uber Driver in a street on Sullivan's Island at roughly two o'clock in the morning. **(Trial Ex. 1).** Her willful conduct occurred in

a public place and, more specifically, in a public road or street. Further, her conduct was likely to cause, and in fact did cause, public, danger, alarm, disorder or nuisance, and it made or caused to be made a noise, as well as a disturbance, that was loud, boisterous, and unreasonable. That noise and disturbance stopped a pedestrian in the street, left the Uber Driver visibly upset, resulted in the police being summoned to the scene, and broke or disturbed the public peace, if not also annoyed the travelling public or the public in general. Based upon the evidence presented at trial, which clearly established that Appellant violated subsections (8) and (12) of the Town's Disorderly Conduct Ordinance, the jury correctly concluded that she was guilty beyond a reasonable doubt.

I. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE TOWN'S DISORDERLY CONDUCT ORDINANCE DID NOT VIOLATE PLAINTIFF'S FREEDOM OF SPEECH RIGHTS UNDER THE FIRST AMENDMENT, BECAUSE SHE WAS NOT ARRESTED OR CONVICTED MERELY FOR HER WORDS AND, REGARDLESS, SHE USED FIGHTING WORDS.

A. While the Appellant Used Fighting Words, the Jury Convicted Appellant for Her Conduct, Not Merely the Words She Spoke.

In light of the evidence at trial, which conclusively established Appellant's guilt, Appellant cannot, and does not, argue that she did not violate the Town's Ordinance. Instead, she attacks the Ordinance itself. Her first argument is that the Ordinance violates her "private speech" protected by the First Amendment. (Initial Br. of Appellant at p. 6-8). Plaintiff contends that she did not use "fighting words" when she accosted the Uber Driver and, therefore, she is being punished for speech protected by the First Amendment. (Initial Br. of Appellant at p. 7). Appellant's argument fails for two independent reasons: First, subsections (8) and (12) of the Town's Disorderly Conduct Ordinance punish conduct, not merely spoken words. Second, Appellant did, in fact, use

fighting words. For both reasons, this Court should reject Appellant's argument that she is being punished for engaging in protected speech.

In *City of Columbia v. Brown*, this Court affirmed the conviction of an appellant under the City of Columbia's anti-loitering ordinance that proscribed more than just spoken words. 316 S.C. 432, 450 S.E.2d 117 (Ct. App. 1994). The anti-loitering ordinance at issue in that case stated:

> Any person who shall (a) be found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner ... shall be deemed guilty of a misdemeanor . . . .

Id. at 435, 450 S.E. at 119 (citing S.C. Code Ann. § 16-17-530(a)).

The appellant in *City of Columbia v. Brown* had been arrested "while shouting obscenities and racial slurs on a public street where private citizens were approaching . . . [,]" after he interrupted a conversation among police officers and "continued a verbal assault on them after they ignored him and repeatedly asked him to leave." *Id.* at 436-37, 450 S.E. at 120. On appeal, the appellant argued that he had been engaged in protected speech when arrested, such that his rights under the first amendment had been violated. *Id.* at 435, 450 S.E. at 119. This Court rejected that argument.

The Court held that the appellant's constitutional rights had not been violated for several reasons. *Id.* at 437-38, 450 S.E. at 120. In addition to finding that the appellant had used fighting words against the police, the Court reasoned that the anti-loitering ordinance of the City of Columbia "did not punish only spoken words addressed to a police officer, but required that the accused [remain] idle in essentially one location.... in a public place in such a manner as to create or cause to be created any disturbance ... or ... a danger of a breach of the peace." *Id.* at 437, 450 S.E. at 120 (alterations in

original) (internal quotation marks and citations omitted). Thus, the Court remarked, "[b]y the very nature of the ordinance, it is limited in application to situations in which the behavior of the person incites a disturbance or breach of the peace. Appellant was not arrested merely for his words, but for his behavior, which included his words."

In this case, subsections (8) and (12) of Town's Disorderly Conduct Ordinance do not punish only spoken words. Rather, the subsections punish a willful act that occurs in the public, or within public view, and makes or causes to be made a loud, boisterous, and unreasonable noise or disturbance that, among other requirements, breaks or disturbs the public peace or annoys either the travelling public or the public in general. Thus, similar to the City of Columbia's anti-loitering ordinance, the application of the Town's disorderly conduct ordinance does not require the use of spoken words and is limited in application to situations where the willful conduct of the accused results in a breach or disturbance of the public peace or annoyance to the public or the travelling public specifically. Ultimately, Appellant was not arrested or convicted merely because of the words she used but rather because her behavior caused a loud boisterous and unreasonable noise or disturbance that met the multiple elements of the Town's Disorderly Conduct Ordinance.

In any event, if this Court were to consider Appellant's argument that the Town violated her rights under the First Amendment by allegedly "prosecuting her for private speech," (Initial Br. of Appellant at 6), the United States Constitution does not protect the speech that Appellant used during the altercation. As the Supreme Court of the United States recognized in *Chaplinsky v. New Hampshire*, ". . . it is well understood that the right of free speech is not absolute at all times and under all circumstances." 315 S.C.

568 (1942). “There are certain well-defined and narrowly limited classes of speech,” explained the Court, “the prevention and punishment of which have never been thought to raise any constitutional problem.” *Id.* Such speech includes “the lewd and obscene, the profane, the libelous, and *the insulting or fighting words – those that by their very utterance inflict or tend to incite an immediate breach of the peace*.” *Id.* at 571-572 (emphasis added).

To determine whether profanity constitutes fighting words, the courts consider “the circumstances surrounding their utterance.” *Lewis v. City of New Orleans*, 415 U.S. 130, 135, 94 S.Ct. 970 (1974) (Powell, J., concurring). They weigh factors such as “the presence of bystanders, the accompaniment of other aggressive behavior, and whether the words are repeatedly uttered.” *City of Landrum v. Sarratt,* 352 S.C. 139, 143, 572 S.E.2d 476, 478 (2002) (collecting cases). Courts also heavily consider the addressee when gauging whether fighting words were used. *See id.* at 144, 572 S.E.2d at 478 (and cases cited therein). For example, profanities directed at a police officer are not typically considered fighting words, because a trained police officer should be able to exercise more restraint than an “average citizen.” *See id.* (citing *City of Houston v. Hill*, 482 U.S. 451, 462, 107 S.Ct. 2502 (1987).

In this case, Appellant used fighting words. And there is no evidence that the Uber Driver had any special training to withstand her taunts, threats, and abusive language, which targeted his religion and ethnicity. Moreover, not only was the Appellant vile and relentless, but she also behaved aggressively when she swatted at the Uber Drivers’ head and leaned forward, into the front row of the minivan, to yell in his face. Additionally, the disturbance did not occur in private; it unfolded in the middle

of a public street, with multiple people present, including the other passenger and at least one bystander, who the Uber Driver testified stopped in the street. Under the circumstances, it is difficult to imagine words more likely to incite an immediate breach of the peace than those Appellant used while accosting the Uber Driver in public.

B. Appellant Oversimplifies Her Conviction and Misplaces Reliance on *Landrum v. Sarratt*, and She Was Not Convicted Simply For Using Profane Language.

Appellant argues that "[t]he South Carolina Court of Appeals held that even if profanity is used in a public place, 'profane language alone is insufficient to constitute a violation of the public disorderly conduct statute.'" Appellant's Initial Br. at 7 (quoting *Landrum v. Sarratt*, 352 S.C. 139, 141, 572 S.E.2d 476, 477 (Ct. App. 2002). That's wrong.

The *issue*, not the holding, in *Landrum* was "[w]hether the circuit court erred in reversing Sarratt's conviction, finding that although Sarratt used profanity in a public place, profane language alone is not sufficient to constitute a violation of the public disorderly conduct statute." 352 S.C. 141, 572 S.E.2d at 477.

In that case, a man named Sarratt yelled profanities at a mother and son in a municipal parking lot outside of a courthouse." *Id.* at 477. Specifically, "Sarratt called [the son] a crackhead, loudly yelled profanities, and called his mother a 'bitch.'" *Id.* As a result of the incident, Sarratt was charged and convicted of violating a state statute that, in pertinent part, made it unlawful for a person in a public place "[to] conduct[ ] himself in a disorderly or boisterous manner" or "[to] use[ ] obscene or profane language." S.C. Code Ann. § 16-17-530 (1985).

The South Carolina Court of Appeals upheld Sarratt's conviction, stating:

> Applying the fighting words doctrine to the facts of this case, we agree with the magistrate and conclude Sarratt's remarks, accompanied with the loud manner in which they were spoken, constituted fighting words. We find Sarratt's language, especially once he directed vulgarities at Franklin's mother, would incite an ordinary person to violence. Accordingly, the court's order reversing Sarratt's conviction is **REVERSED**.

Landrum, 352 S.C. 145, 572 S.E.2d 479.

Here, the Appellant verbally accosted the Uber Driver in a loud manner, and a parking lot did not separate the two when the incident occurred. Moreover, Appellant did not just use vulgarities; she targeted the man's nationality and ethnicity. She also taunted and dared him to call the police, as if they would not believe or help him. While berating him, she even swiped at the Uber Driver's head with her hand. Clearly, Appellant used fights words. But her conviction was not based merely on the words she used but rather due to the loud, boisterous, and unreasonable noise and disturbance that she caused, which breached the peace and annoyed the public in early morning hours. Thus, the lower courts properly rejected Appellant's First Amendment argument, and this Court should affirm her conviction.

II. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE TOWN'S DISORDERLY CONDUCT ORDINANCE IS NOT UNCONSTITUTIONALLY VAGUE, BECAUSE ITS MULTIPLE ELEMENTS GIVE FAIR NOTICE TO THE PUBLIC AND MOST CERTAINLY APPELLANT, WHO DOES NOT SO MUCH AS ARGUE THAT SHE DID NOT VIOLATE THE ORDINANCE

Appellant argues in her brief that "the Trial Court erred in denying Appellant's Motion to Dismiss on the basis that the Town Ordinance is unconstitutionally vague." (Appellant's Initial Br. at 8).[4] A law is considered unconstitutionally vague if a

[4] Notably, Appellant has <u>not</u> challenged Sullivan's Island's Disorderly Conduct Ordinance on overbreadth grounds. Whereas a law is unconstitutionally vague if it does not allow a reasonable person to discern between prohibited and permitted speech, *see Connally*, 269 U.S. at 391, a law is unconstitutionally overbroad if it restricts significantly

reasonable person cannot determine prohibited speech versus permitted speech. *See, e.g., Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926) (explaining that a law is unconstitutionally vague when people "of common intelligence must necessarily guess at its meaning."). The Supreme Court of the United States has declared laws to be void for vagueness when they are so ambiguous that a reasonable person cannot discern what expression is prohibited. For example, in finding an anti-loitering law to be unconstitutionally vague in *Kolendar v. Lawson*, the Supreme Court explained, "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." 461 U.S. 352, 357 (1983).

Colten v. Kentucky provides an illustrative example of the void for vagueness doctrine in the context of a disorderly conduct conviction. 407 U.S. 104 (1972). In that case, the appellant gathered with other bystanders and refused several requests of a police officer to disburse from a congested roadside where his friend was receiving a traffic ticket. 407 U.S. at 106-107. As a result, he was charged and convicted of a Kentucky disorderly conduct statute that stated:

> '(1) A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> > '(f) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse . . ..'

Id. at 108 (quoting Ky.Rev.Stat. s 437.016(1)(f) (Supp.1968) (alterations in original)).

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more speech than the Constitution allows, such that its overbreadth is "substantial" and "real." *See Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). Appellant has not appealed on overbreadth grounds and did not make any such argument at trial.

The Supreme Court held that the statute was not impermissibly vague. *Id.* "We perceive no violation," stated the Court, "of '(t)he underlying principle . . . that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Id.* at 110 (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954) (alterations in original). The Court reasoned:

> Any person who stands in a group of persons along a highway where the police are investigating a traffic violation and seeks to engage the attention of an officer issuing a summons should understand that he could be convicted under subdivision (f) of Kentucky's statute if he fails to obey an order to move on.

Id.

While the void-for-vagueness doctrine is rooted in a "rough idea of fairness," the Supreme Court noted in *Colten* that "[i]t is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *Id.* at 111. Regarding the disorderly conduct law at issue in *Colten*, the Supreme Court agreed with Kentucky's appellate court that remarked, "'We believe that citizens who desire to obey the statute will have no difficulty in understanding it . . . .'" *Id.* (quoting *Colten v. Commonwealth*, 467 S.W.2d 374, 378 (1971) (internal quotation marks omitted)).

As explained below, the Town's Disorderly Conduct Ordinance was sufficiently specific to give Appellant fair warning about the conduct it prohibited. Had she desired to follow the Ordinance, Appellant would have had no difficulty in understanding that it prohibited the loud ruckus that she caused in a public street at 2 o'clock in the morning on Sullivan's Island. Her conviction was anything but unfair.

A. The Appellant May Not Challenge the Town's Disorderly Conduct Ordinance on Vagueness Grounds Because It Clearly Proscribed Her Conduct and She Does Not Argue Otherwise.

One whose conduct is clearly or unambiguously proscribed by a statute may not raise vagueness as a defense to her own conviction. The Fourth Circuit recently explained this rule in *Carolina Youth Action Project; D.S. by and through Ford v. Wilson*, 60 F.4th 770, 785 (4th Cir. 2023) ("True enough, we recently clarified that a person defending against a current charge may not raise a vagueness defense if their own behavior was unambiguously proscribed by the relevant law.").[5]

In *Carolina Youth Action Project*, a nonprofit organization filed a class action challenging, on vagueness grounds, two South Carolina state laws that generally prohibit disorderly conduct and disturbing schools. 60 F.4th at 776. While both laws were found to be "unconstitutionally vague as applied to elementary and secondary school students," the Fourt Circuit made clear that those whose conduct is clearly prohibited by a statute may not challenge it on vagueness grounds. *See id.* (citing *United States v. Hasson*, 26th F.4th 610, 618-22 (4th Cir. 2022). The vagueness challenge in the *Carolina Youth Action Project* case was allowed, but it was not brought by a person defending against a current charge. *See id.* at 785.

That is not the case here.

As the Fourth Circuit stated in *United States v. Hasson*, "[t]he Supreme Court and this Court have repeatedly held that we must 'consider whether a statute is vague as applied to the particular facts at issue, for '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the

[5] The *Carolina Youth Action Project* case does not support finding a constitutional violation in this case, despite being cited as support by Plaintiff. *See* Appellant's Initial Br. at pp. 9-10.

conduct of others.'" 26 F.4th at 616 (quoting *Holder v. Humanitarian L. Project*, 561 U.S. 18-19 (2010) (quoting *Hoffman Ests. V. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 495 (1982) (alterations in original and added) (internal quotation marks omitted)).

Cases collected by the *Hasson* court underscore that this rule is firmly established in the constitutional law. *See id.* at 616 (citing *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 137 S. Ct. 1144, 1151–1152 (2017) ("A plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim." (brackets and internal quotation marks omitted)); *Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."); *United States v. Moriello*, 980 F.3d 924, 931 (4th Cir. 2020) ("[A] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." (internal quotation marks omitted)); *United States v. Hosford*, 843 F.3d 161, 170 (4th Cir. 2016) (same); *United States v. Jaensch*, 665 F.3d 83, 89 (4th Cir. 2011) (same); *Gallaher v. City of Huntington*, 759 F.2d 1155, 1160 (4th Cir. 1985) (same)). Ultimately, "if a law clearly prohibits a defendant's conduct, the defendant cannot challenge, and a court cannot examine, whether the law may be vague for other hypothetical defendants." *Hasson*, 26 F.4th at 616-17 (quoting *Hosford*, 843 F.3d at 170) (internal quotation marks omitted).

There are two "foundational pillars" to the rule prohibiting those whose conduct is clearly proscribed by a statute from challenging it as vague. First, it would undermine the vagueness doctrine, which is based on principles of fair notice and ascertainable standards, to allow a person to attack a statute as vague when it clearly proscribes his or her conduct. *See id.* at 619. Second, the role of the judiciary is limited and, as the

Fourth Circuit explained,

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. A closely related principle is that constitutional rights are personal and may not be asserted vicariously. These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court[.]

Id. (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610–611 (1973) (citations omitted in original).

In her initial brief, Appellant does not argue that her conduct did not violate subsections (8) and (12) of the Ordinance. To be more specific, Appellant does not contest that:

1) Her conduct was willful;

2) She acted with the purpose of causing, or her conduct was likely to cause, public danger, alarm, disorder, or nuisance;

3) Her conduct occurred in a public place or within public view;

4) Her conduct constituted making or causing to be made a loud, boisterous, and unreasonable noise or disturbance;

5) Her conduct occurred near to any public highway, road, street, lane, alley, park, square, or common; and

6) Whereby the public peace was broken or disturbed or the public or travelling public annoyed.

Instead, Appellant argues broadly and generally that the Town's Ordinance is unconstitutionally vague. *See* Appellant's Initial Br. at pp. 8-14. In effect, Appellant contends that the Ordinance is unconstitutionally vague on its face, as applied to the

conduct of others, not her own conduct. Her argument is improper and should be rejected because Appellant has conceded the issue by not contesting the application of subsections (8) and (12) to her own conduct, *see Hasson*, 26 F.4th at 621 ("Because Hasson does not contest that Section 922(g)(3) clearly applies to his conduct, his attempt to assert a facial vagueness challenge fails."). Moreover, subsections (8) and (12) of the Ordinance clearly proscribe Appellant's conduct, such that her conviction was not unfair. Thus, this Court should affirm the decision of the court below rejecting Appellant's appeal of her conviction on due process grounds.

B. Even if Appellant Properly Asserts Her Vagueness Argument, Subsections (8) and (12) of the Town's Disorderly Conduct Ordinance Are Not Unconstitutionally Vague Because Its Multiple Elements Give Fair Warning to Ordinary Persons Regarding the Conduct Proscribed.

As Appellant recognizes in her brief, a scienter requirement "may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Hoffman Ests. V. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982).

Here, the Town's Ordinance contains the scienter requirement of "willfulness," which is a "well-recognized scienter requirement." *Carolina Youth Action Project*, 60 F4th 770, 793 (4th Cir. 2023) (citing *Bryan v. United States*, 524 U.S. 184, 191 (1998) (explaining that in the criminal context, "willfully" refers to a culpable state of mind, in which the defendant acted with a bad purpose.").[6] The Town's Ordinance contains no alternative scienter requirement, such as "unnecessary," which was a problem with South Carolina's disorderly conduct statute in a case cited in Appellant's brief, *Kenny v.*

[6] It should be noted that the concern that the Fourt Circuit has espoused with the term "boisterous" in a school setting is not present here. *See Carolina Youth Action Project,* 60 F4th 770, 782 (4th Cir. 2023).

Wilson, 566 F.Supp.3d 447, 470 (D.S.C. 2021) (explaining that a person acting without knowledge or intent could be convicted of violating a statute when the terms "willful" and "unnecessary" are used alternatively); *see Appellant*'s Initial Br. at p. 12 (discussing the scienter requirement of "unnecessary," which is not used in the Town's Ordinance).[7]

In addition to *Kenny v. Wilson*, Appellant also misplaces reliance on *Greenville v. Bane*, which is yet another case involving a facial vagueness challenge. 390 S.C. 303, 305 (2010). *Greenville v. Bane* concerned a subsection of a city ordinance that simply made it unlawful "[to] molest or disturb any person by the making of obscene remarks or such remarks and actions as would humiliate, insult, or scare any person," without any other clarifying or narrowing features. *Id.* at 305. The court held:

> We find subsection (3) is unconstitutionally vague because the words 'humiliate,' 'insult,' and 'scare' are not sufficiently definite to give reasonable notice of the prohibited conduct. This provision is subjective because the words that humiliate, insult, or scare one person may not have the same effect on another person. Therefore, people of common intelligence may be forced to guess at the provision's meaning and may differ as to its applicability.

390 S.C. 303, 114.

Here, the Town's Ordinance is far more precise than the ordinance in *Bane* in terms of the conduct it prohibits. As previously mentioned, the noise or disturbance proscribed by subsections (8) and (12) of the Ordinance must be made willfully and with the purpose of causing, or be likely to cause, public danger, alarm, disorder, or

[7] Like *Carolina Youth Action Project*, the case *Kenny v. Wilson* involved a class action brought by a non-profit organization raising a facial vagueness challenge to the State of South Carolina's disturbing schools law and disorderly conduct law as applied to school children. *See* 556 F.Supp.3d at 450, 462. In this case, for the reasons explained *supra*, the Town's Ordinance clearly proscribed Appellant's conduct, and she is barred from arguing that the Ordinance is unconstitutionally vague as applied to others.

nuisance. Further, the noise or disturbance must occur in a public place or within public view, and it must be loud. It must be boisterous. And it must be unreasonable. Additionally, the noise or disturbance must either annoy another person or occur near certain specific public places that include a public road or street. Finally, it must break or disturb the public peace or annoy either the public or, in the case of subsection (12), the travelling public specifically. Ultimately, the Ordinance's scienter requirement of willfulness, its imposition of an objective reasonableness standard, and its multiple other clarifying and narrowing features, such as situs and causation requirements, create sufficient boundaries and give fair warning as to the conduct prohibited. Even if Appellant could challenge her conviction on vagueness grounds, the Town's Ordinance is not so vague that it violates her right to due process. The Circuit Court did not commit an error of law by rejecting Appellant's vagueness challenge and should be affirmed.

III. APPELLANT FAILED TO ESTABLISH THAT THE MANNER IN WHICH SHE WAS CHARGED VIOLATED HER DUE PROCESS RIGHTS, AND SHE FAILED TO PRESERVE AND HAS ABANDONED THE ISSUE.

A. Appellant Fails to Cite Any Authority in Support of Her Argument That The Manner in Which She Was Charged Violates Due Process and, Therefore, Has Abandoned The Issue on Appeal.

"Issues are deemed abandoned and thus not presented for appellate review where they are argued using only short, conclusory statements, without supporting authority." *S.C. Dep't of Soc. Servs v. Hamlin*, No. 2204-UP-262, 2004 WL 6331482, at *2 (S.C. Ct. App. June 7, 2004) (citing *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct.App.2001); *see also First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (holding appellant was deemed to have abandoned issues on appeal, where he failed to provide any argument

or supporting authority); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct.App.2000) (holding where no authority is cited and argument is brief and conclusory, issue is deemed abandoned).

In her brief, Appellant contends that her due process rights were violated by the Town citing her for violating its Disorderly Conduct Ordinance without specifying a subsection thereof. (Initial Br. of App. at p. 14-18). Appellant fails to cite any authority in support of this argument. Accordingly, Appellant has abandoned this issue on appeal, and the lower court's decision to reject her argument regarding the way she was charged should be affirmed.

B. Appellant Failed to Preserve the Argument She Was Charged in a Manner That Violated Her Due Process Rights Because the Magistrate Court Did Not Rule on the Issue at Trial.

Appellant made a pretrial motion before the municipal court "that the State provide a more definite statement or specific charge under the [disorderly conduct] ordinance . . . ." **(Trial Tr. at 8:06-08).** Appellant presented her motion to the municipal court as seeking the following relief: "We would just ask the State be ordered to provide or elect a specific subsection of this ordinance in order to proceed." **(Trial Tr. at 8:21-23).** The Town agreed to do just that by narrowing its charge against the Appellant to subsections (4), (7), (8), (12), and (18) of the Disorderly Conduct Ordinance, before the trial began. **(Trial Tr. at 9:14-23)**. The Town's response appeared to satisfy the Appellant. **(Trial Tr. at 11:05-14)** (Appellant stated, "Sure, Your Honor," in response to the court opining, "So at this time I think that the State has – the Town has narrowed down the specific subsections enough that we can move forward . . . ."). Seemingly because the issue was resolved, the municipal court did not deny or grant the pretrial

motion regarding the specificity of the charge. **(Trial Tr. at 10:21-11:14).**

Later, the Town narrowed its case even further, to subsections (8) and (12) of the Ordinance before resting its case. (T**rial Tr. at 111:02-05).** At the end of the trial, Appellant did not renew any motion regarding the scope of her citation, **(Trial Tr. at 157:04-164:11)**, and she did not object to the municipal court charging the jury with subsections (8) and (12) of the Disorderly Conduct Ordinance. **(Trial Tr. at 178:04-179:06).**

To be preserved for appellate review, an issue must be raised to, and ruled upon, by the trial court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (citing *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997)). Additionally, "an objection must be raised with "sufficient specificity to inform the trial court of the point being urged by the objector." *Id.* (citing *Broom v. Southeastern Highway Contracting Co.*, 291 S.C. 93, 352 S.E.2d 302 (Ct.App.1986); *see also State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 ("A party may not argue one ground at trial and an alternate ground on appeal.").

Here, Appellant did not preserve the issue of whether the way she was charged violated her due process rights. In fact, she received the relief that she sought on this issue at trial, such that the municipal court did not even rule on it. The circuit court subsequently rejected Appellant's appeal on this issue and should be affirmed because the issue was not preserved for appeal.

C. Appellant Has Failed to Establish that the Manner in Which Appellant Was Charged Violate Her Due Process Rights, Which Is Her Burden of Proof.

Even if Appellant somehow preserved this issue and has not abandoned it,

Appellant cites no authority to support her contention that the Town was required to charge her with a specific subsection of its Disorderly Conduct Ordinance. Accordingly, Plaintiff has not carried her burden of proof on this issue. Thus, the circuit court was correct to reject Appellant's argument regarding the way she was charged and should be confirmed.

IV. THE CIRCUIT COURT CORRECTLY DETERMINED THAT APPELLANT'S MOTION TO SUPPRESS THE UBER DRIVER'S DASHCAM VIDEO ON CHAIN OF CUSTODY GROUNDS WAS PROPERLY DENIED, BECAUSE NO LONGER VERSION OF THE VIDEO EXISTED AND STRICT CHAIN OF CUSTODY EVIDENCE WAS NOT REQUIRED BUT WAS INTRODUCED.

Appellant contends that the municipal court erred by denying a motion she made to suppress the dashcam video "on the basis that the clip was not the 'entire video' of the incident and, therefore, was prejudicial." (Initial Br. of App. at p.18). Appellant cites no authority to support this contention in her brief and, therefore, has abandoned the issue on appeal, and the circuit court must be affirmed.

Regardless, "the admission of evidence is within the discretion of the trial court and will not be reversed . . . absent an abuse of discretion." *State v. Smith*, 337S.C. 27, 34 (1999). Moreover, the evidence refuted the theory advanced by Appellant that a version of the dashcam video exists that is longer than the one entered into evidence and published to the jury. That evidence includes the following *in camera* testimony of the Uber Driver:

> Q: Have you seen the video that has been presented not only in this morning's court, but in the past you and I have watched that video together?
>
> A: Yes, sir.
>
> Q. Is that a complete and accurate video of what occurred in your vehicle on June 11, 2022?

A. Yes, sir.

Q. You didn't alter that video in any way or extrapolate it in any way?

A. No, sir.

Q. And you sent that to Officer DeNett of the Sullivan's Island police Department?

A. Yes, sir.

(Trial Tr. at 50:01-14). And further,

Q. Is it your testimony that on the night in question the dash camera was not being used until you plugged in it when you arrived on Sullivan's Island?

A. Yes.

(Trial Tr. at 54:1-5).

Next, Appellant argues that the municipal court erred by denying her motion to suppress the dashcam video on chain of custody grounds "related to the [Uber Driver's] delivery of the video clip to the Town of Sullivan's Island Police Department." (Initial Br. of App. at p.18). Again, Appellant cites no authority in support of her argument and, therefore, has abandoned the issue on appeal.

Nevertheless, the dashcam video is considered a non-fungible item because it is "unique and identifiable." *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741-42 (2005) (finding a gun to be a non-fungible item); *see also State v. Pope*, 410 S.C. 214, 228, 763 S.E.2d 814, 822 (Ct. App. 2014) (finding scales used to weigh drugs to be a non-fungible item); *compare State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007) (explaining that blood samples and drugs are fungible items). Trial courts have "broad discretion" to admit non-fungible items into evidence and may do so "merely on the basis of testimony that the item is the one in question and is in a substantially

unchanged condition." *Freiburger*, 366 S.C. at 134, 620 S.E.2d at 741-42. A strict chain of custody is not required to be established for a non-fungible item to be admitted into evidence*. Id.* at 134, 620 S.E.2d at 741.

Here, because the dashcam video is a nonfungible item, the municipal court, in its broad discretion, could have allowed the evidence based solely on the Uber Driver's testimony that the video was complete, accurate, and the same as the one captured on his camera. **(Trial Tr. at 50:01-08).** No other chain of custody evidence was necessary as a matter of law.

Yet the Uber Driver also testified that he emailed the dashcam video to Officer DeNett, **(Trial Tr. at 50:01-08, 70:13-17, 71:23-72:01),** and Officer DeNett testified that she received the video by email from the Uber Driver. **(Trial Tr. at 129:09-14).** Both witnesses testified that the video exchanged between them was the same video as the one published to the jury and entered into evidence. **(Trial Tr. at 50:01-14, 129:09-14).** The municipal court did not abuse its discretion by denying Appellant's motion to suppress the dashcam video, and the circuit court did not commit an error of law when it rejected Appellant's arguments to the contrary. In fact, both made the correct decision and should be affirmed by this Court.

CONCLUSION

Appellant's conviction for committing disorderly conduct under subsections (8) and (12) of the Town's Ordinance is not based merely on the words she used and, therefore, does not violate her rights under the First Amendment. Her conviction also does not violate her First Amendment rights because she undoubtedly used fighting words when causing a ruckus in the middle of a street at two o'clock in the morning.

Additionally, Appellant's conviction does not violate her due process rights under the Fourteenth Amendment. The Town's Ordinance is not unconstitutionally vague. Its multiple elements provide definiteness sufficient to allow an ordinary person to understand the conduct made unlaw by subsections (8) and (12) thereof. The multiple elements also clearly apply to the conduct for which Appellant was convicted, which not even she disputes. For these reasons, the Ordinance is not unconstitutionally vague as to others, much less Appellant, and she may not even argue a due process violation based on the void-for-vagueness doctrine.

Appellant raises other issues on appeal that are simply throw away arguments. Even if Appellant had preserved and not abandoned the issue, she has not carried her burden of establishing that the citation for violating the Town's Ordinance violated her constitutional rights. In fact, on this issue, the Town voluntarily gave her the very relief she sought, by ultimately narrowing its case to five and then two subsections of its Disorderly Conduct Ordinance. Finally, the circuit court correctly found that the municipal court did not abuse its discretion by denying Appellant's motion to suppress the dashcam video based on a debunked theory that a longer version of the video existed and a hail Mary argument regarding chain of custody.

The Town respectfully requests that this Court affirm the circuit court's order affirming Appellant's conviction.

Respectfully Submitted,

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