

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SEP 29 2014

Appeal From Oconee County
Alexander S. McCauley, Circuit Court Judge **S.C. Supreme Court**

THE STATE,

Respondent,

vs.

TRAVIS N. BUCK,

Petitioner.

**RETURN TO PETITION
FOR WRIT OF CERTIORARI**

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STATEMENT OF ISSUES ON APPEAL

I.

Petitioner's invitation to shove a request "sideways up the [victim's] ass" and his veiled threat served no purpose but to harass and threaten victim; Petitioner's language was directed at a person who is not a law enforcement officer and his speech is not constitutionally protected; and the issue is not preserved for review.

II.

The Court of Appeals properly determined that Petitioner abandoned any claim that the trial court erred in providing his requested instruction to the jury.

III.

Petitioner is responsible for establishing a sufficient record for review and therefore, cannot argue that the Respondent was responsible for establishing a sufficient record for review; and further, Petitioner failed to properly raise this issue to the circuit court or the Court of Appeals.

IV.

The Court of Appeals correctly recognized evidence in the record supporting the history of harassment by Petitioner; Petitioner confuses the existence of evidence with the weight of evidence; and the sufficiency of evidence is now the law of the case since the issue of whether directed verdict should have been granted was not raised in the petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioner Buck was arrested for unlawful use of a telephone in violation of S.C. Code Ann. § 16-17-430(A). Buck was convicted as charged by a jury in Oconee County Magistrate's Court. On May 4, 2011, the Honorable William F. Derrick sentenced Appellant to thirty days in jail or a \$470.00 fine. Buck appealed to the Court of Common Pleas. After argument was heard on August 1, 2011, the Honorable Alexander S. Macauley affirmed the conviction and sentence.

Buck appealed to the Court of Appeals. After briefing, the Court of Appeals affirmed the conviction and sentence without oral argument. State v. Buck, 2014-UP-230 (S.C. Ct. App. filed June 18, 2014). Buck filed a petition for rehearing, which was denied on August 25, 2014.

STATEMENT OF FACTS

Petitioner Buck unlawfully used a telephone when he called the victim's work cell-phone and left an obscene, unsolicited, and harassing message.

On November 20, 2010, Petitioner was dove hunting in Oconee County when the victim, Charlie Blaine, with the United States Forrest Service, approached Buck and a friend and asked them for their identification and hunting licenses. R. p. 4. After determining Buck and his companion were not hunting in violation of the law, Blaine departed.

On November 22, 2010, Buck placed a call to Blaine's work-related cellular phone and left a voicemail message as follows:

The next time you ask for my hunting license, and try to enforce state law, you can take your request, polish it up real nice, and shove it sideways up your ass. You got me buddy? You'd better fucking make sure, and goddamn sure that you are operating under a mutual understanding with either the DNR or the sheriff's department before you even have a word with me again.

(Compact Disc recording of call, on file with Court of Appeals).

After listening to the voicemail left by Buck, Blaine called the sheriff's office, and a warrant was issued for Buck's arrest. R. p. 4.

ARGUMENT

I.

Petitioner's invitation to shove a request "sideways up the [victim's] ass" and his veiled threat served no purpose but to harass and threaten victim; Petitioner's language was directed at a person who is not a law enforcement officer and his speech is not constitutionally protected; and the issue is not preserved for review.

Buck argued in his brief to the Court of Appeals that the trial court should have a granted a directed verdict because: (1) the language he used, while offensive, was not obscene, (2) the abusive language was addressed to a law enforcement officer so the trial court should have applied a heightened standard in the instant case, and (3) the trial court failed to apply the proper standard of State v. Brown, 274 S.C. 506, 266 S.E.2d 64 (1980).

In this petition, he frames his first issue as follows:

I. THE COURT OF APPEALS SHOULD HAVE
RECOGNIZED THE PETITIONER'S LANGUAGE WAS
CONSTITUTIONALLY PROTECTED AS IT WAS
DIRECTED AT LAW ENFORCEMENT

The Court of Appeals found that Buck was not entitled to a directed verdict. Buck does not appear to argue this issue and therefore it appears he has abandoned it in his petition for writ of certiorari.

Buck seems to be arguing that his speech is protected because it was directed at a law enforcement officer. The Court of Appeals correctly found that the issue was not preserved because it was not ruled upon by the circuit court. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court].").

Further, evidence refutes that Blaine, a Georgia native, had state law enforcement powers and therefore, City of Houston v. Hill, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987) does not apply. Specifically, the previous agreement between the Oconee Sheriff's Office and the United States Forest Service had expired and the record fails to reflect it was renewed. R. p. 4. Additionally, the phone call obviously was not made while Blaine was executing his duties in Buck's presence, unlike Hill; instead the call was made two days after an encounter between the two.

Further, the obscene and threatening phone call is not protected speech and falls within the purview of the statute. The record reflects Buck made multiple calls to the office and was harassing Blaine by making obscene gestures and yelling at Blaine whenever he drove past Blaine. In the message he leaves for Blaine, Buck makes vulgar, violent, and sexual suggestions to Blaine and ominously advises Blaine he "better fucking make sure" the next time. Buck does not say what would happen if Blaine did not "make sure" next time and it is the unknown answer to that question that was undoubtedly vexing to Blaine given the other harassing conduct. Blaine felt matters had escalated to the degree that he should contact the Sheriff. The call was nothing short of threat, vulgar and without any intent but to harass, and is not protected speech. Further, evidence presented indicates Blaine did not have law enforcement powers. R. p. 4. The issue is therefore one, even under Brown, that was properly presented to the jury.

Even if this Court were to construe one of the four issues raised in this petition as a challenge to the sufficiency of the evidence, the magistrate did not err. "Upon a motion for directed verdict, a trial court is concerned only with the existence of evidence, not its

weight.” State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). “When reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the state.” State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999). “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 the case was properly submitted to the jury.” State v. Harris, 351 S.C. 643, 653, 572 S.E.2d 267, 273 (2002); State v. Venters, 300 S.C. 260, 264, 387 S.E.2d 270, 272-73 (1990).

Appellant was charged and convicted under S.C. Code Ann. § 16-17-430(A), which proscribes, in relevant part, the following:

(A) It is unlawful for a person to:

(1) use in a telephonic communication or any other electronic means, any words or language of a profane, vulgar, lewd, lascivious, or an indecent nature, or to communicate or convey by telephonic or other electronic means an obscene, vulgar, indecent, profane, suggestive, or immoral message to another person;

(2) threaten in a telephonic communication or any other electronic means an unlawful act with the intent to coerce, intimidate, or harass another person;

(3) telephone or electronically contact another repeatedly, whether or not conversation ensues, for the purpose of annoying or harassing another person or his family.

“The State has a legitimate interest in prohibiting obscene, threatening or harassing telephone calls.” State v. Brown, 274 S.C. 506, 508, 266 S.E.2d 64, 65 (1980) (“We shall not repeat the words appellant allegedly used in the telephone calls to Mrs. Odom. Suffice it to say they were lewd, lascivious and indecent as those words are generally defined and

understood.”). “The use of one’s telephone involves substantial privacy interests which the State may protect. Section 16-17-430 seeks to protect that interest from an invasion made in a shocking manner.” Id.

Brown found the statute only proscribed calls “initiated by one with the intent and sole purpose of conveying an unsolicited obscene, imminently threatening and/or harassing message to an unwilling recipient.” Id.

“A resort to epithets of personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act raises no constitutional question.” Cantwell v. Connecticut, 310 U.S. 296, 309-310, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1940) (quoted in Baker v. State, 494 P.2d 68 (Ariz. Ct. App. 1972); Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed.2d 1031 (1942) (quoting the same with approval).

“A threat need not be in any particular form or in any particular words, and it may be made by innuendo or suggestion. All that is necessary is that it be definite and understandable to a mind of ordinary intelligence.” State v. McGinnis, 243 N.W.2d 583, 589 (Iowa 1976).

“Evidence of the language used in an alleged violation of the harassment statute is relevant to show the intent of the accused in making the telephone call as well as the likelihood of its causing annoyance or alarm.” State v. Lewton, 497 A.2d 60, 63 (Conn. App. Ct. 1985); see also State v. Adams, 67 P.3d 103 (Id. Ct. App. 2003) (finding the requisite intent to convict of telephone harassment where the defendant called the investigating officer an “asshole” within twenty-one seconds into the conversation before proceeding to use other

profane language and threaten the lives of another officer).

Buck attempts to rely on definitions found in S.C. Code Ann. § 16-15-305. That statute is inapplicable, as that statute proscribes dissemination of materials among individuals or to the public at large, and not use of offensive language as part and parcel of a campaign to harass the unwanted recipient in a phone conversation. The Arizona Court of Appeals noted, in assessing its statute proscribing harassing telephone calls, that “we are not here faced with the complexities of the sexual connotation of obscene as used in obscenity statutes and applied to literature or the theater.” Baker, at 71. “It would be . . . inane to interpret the word obscene in the context of Roth standards when dealing with obscene phone calls.” Id. (referring to Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957)).

Further, Buck’s arguments that he is allowed to be more abusive to Blaine as opposed to private individuals is without merit. Even though dealing artfully with a venting public may be a dimension of employment for government employees, their positions require significant public contact that should require some protection from such outlandish bullying as demonstrated in the instant case. Evidence refutes that Blaine, a Georgia native, had state law enforcement powers and therefore, City of Houston v. Hill, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987) does not apply. Specifically, the previous agreement between the Oconee Sheriff’s Office and the United States Forest Service had expired and the record fails to reflect it was renewed. R. p. 4. Additionally, the phone call obviously was not made while Blaine was executing his duties in Buck’s presence, unlike Hill; instead the call was made two days after an encounter between the two.

Further, Hill is inapplicable to the instant case. In Hill, the city ordinance at issue

was overbroad because it prohibited an individual who in any manner verbally interrupts a police officer. Id. In the instant case, the threatening and harassing nature of the phone call takes the case outside the confines of any protection Hill offers. For instance, in Johnson v. State, 37 S.W.3d 191 (Ark. 2001), the Arkansas Supreme Court found that Johnson's conduct was sufficient to support the crime of disorderly conduct where Johnson was shouting: "Why are you fucking harassing me" and "flailing his arms, cursing loudly, and eventually demonstrating a violent demeanor toward [the officer]." Id., at 348. The court found that they could not ignore that fact that police officers knew Johnson previously assaulted a police officer and was now cursing them. Id. The court concluded that while the words alone would not support conviction, the language in conjunction with Johnson's actions did support conviction. Id.

In State v. Lynch, 392 N.W.2d 700 (Minn. Ct. App. 1986), Lynch was convicted for disorderly conduct and interfering with a police officer. Her first amendment claims were rejected, with the Minnesota Court of Appeals where Lynch approached officers that had made a stop of another individual and:

immediately started swearing at us. Her immediate term was motherfucker and then [she] called us motherfucking pigs and stated that we had no business stopping this person for no reason at all and that the only reason we were stopping him is because he was black.

Id. at 702. Officers noted a crowd had gathered, including some who were carrying clubs and others were swearing at police. She then was arrested with some resistance. The court concluded that whether words are "fighting words" depends on the circumstances surrounding their utterance. Id. at 704. The additional facts of the crowd gathering

supported conviction. Id.

Likewise in the instant case, the language, which was threatening as well as obscene, in conjunction with circumstances leading to the call, support conviction. Blaine testified at trial that he had “dealt with” the Appellant previously, and “he has been harassing me.” R. p.

4. The victim further testified that Appellant “continues to call USFS office and leave messages, calls supervisor, refers to me by middle name. Attempting to intimidate and agitate me.” R. p. 4.

Buck would drive past Blaine, make obscene gestures and yell at him. R. p. 4. This dispute concerns Buck’s authority to hunt, so the record suggests he owns a gun. The phone call, inviting Blaine to shove an imaginary item up Blaine’s ass sideways and letting him know he “fucking better” make sure Buck’s unilateral conditions are met next time they meet¹, in light of the evidence presented in this case, clearly indicate the phone call was intended solely to harass Blaine with vulgar, obscene, and profane language and veiled threats.

¹ If the “next time” they met was for Blaine to check a permit again while Buck was hunting, then Buck would be armed. So Blaine would reasonably be concerned Buck would perhaps resort to violence and shoot him if Blaine attempted to check the permit, especially in light of the escalating conduct. In this context, the jury rightfully could find the call was intended to intimidate Blaine.

II.

The Court of Appeals properly determined that Petitioner abandoned any claim that the trial court erred in providing his requested instruction to the jury.

The Court of Appeal correctly determined that Petitioner abandoned any claim that the magistrate's court properly charged the jury, relying on Wright v. Craft, 372 S.C. 1, 20, 640 S.e.2d 486, 497 (Ct. App. 2006) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."). As the Court of Appeals noted, Buck cited two cases, but failed to explain how they pertained to the magistrate's instructions to the jury. Buck failed to explain the applicability of these two cases. State v. Tyndall, 336 S.C. 8, 16-17, 518 S.E.2d 278, 282-83 (Ct. App. 1999) (finding appellant abandoned an issue where he cited several cases but failed to "include in his argument any discussion of [the] decision or their applicability to his situation").

Indeed, his discussion of the second issue fails to clarify the issue he wishes to discuss. The issue is framed as follows:

THE PETITIONER DID RAISE AND PRESERVE BOTH STATE V. BROWN AND STATE V. BUCKNER IN BOTH THE INITIAL BRIEF AND THE FINAL BRIEF. AS WELL AS BOTH THE MAGISTRATE AND CIRCUIT COURT PROCEEDINGS.

Once again, Buck merely cites three cases and states the Court of Appeals erred. However, how the cases applied to the instant case is not made clear: Buck fails to clarify whether his citation goes to a claim that the magistrate should have provided additional instructions to the jury or if the magistrate should have granted some other relief. Buck complains the Court of Appeals ignored State v. Brown, 274 S.C. 506, 266 S.E.2d 64 (1980).

The Court of Appeals cited Brown and noted on the directed verdict issue that “Buck’s assertion that his phone call was not obscene is inapposite because the unlawful communications statute is not limited to obscenity.” Buck, supra. Buck never explains why the instructions should have been given and fails to suggest how he might have been prejudiced by the failure to receive the instruction. To warrant reversal, a trial court’s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Gaines, supra; State v. Burkhardt, 350 S.C. 252, 565 S.E.2d 298 (2002). It is not clear from the record the verbiage of the requested instruction. Instead, Buck, perhaps sarcastically, suggests his comments were merely a suggestion, not a threat. Respondent is left guessing at the focus of Buck’s argument to this Court. Accordingly, certiorari should not be granted on Buck’s ambiguously stated and argued second issue.

III.

Petitioner is responsible for establishing a sufficient record for review and therefore, cannot argue that the Respondent was responsible for establishing a sufficient record for review; and further, Petitioner failed to raise this issue to the circuit court or the Court of Appeals.

For the first time on appeal, Buck argues the State failed to present a sufficient record for review. The appellant has the burden of presenting an adequate record that is sufficiently complete so that the appellate court is able to review the lower court's actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999). The objection to proceeding on appeal from a magistrate's court conviction with an inadequate record should be raised to the circuit court in order to be preserved for review. See South Carolina Law Enforcement Division v. 1-Speedmaster, 397 S.C. 94, 100, 723 S.E.2d 809, 812 (Ct. App. 2011) (finding issue of whether new hearing was warranted due to tapes of magistrates court proceeding being lost was not preserved for review where appellant acquiesced in proceeding forward with the appeal in circuit court instead of seeking a remand). In the instant case, Buck did not attempt to obtain the tapes of the proceeding until the appeal was already pending with the Court of Appeals.

This issue was not raised to the Court of Appeals in petitioner's final brief and therefore should not be reviewed by this Court. State v. Primus, 349 S.C. 576, 583, 564 S.E.2d 103, 107 (2002) (finding an issue not raised in the brief to the Court of Appeals, but instead raised for the first time in the petition for rehearing is not properly preserved for the Supreme Court's consideration in a petition for writ of certiorari) *overruled on other grounds* by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

IV

The Court of Appeals correctly recognized evidence in the record supporting the history of harassment by Petitioner; Petitioner confuses the existence of evidence with the weight of evidence; and the sufficiency of evidence is now the law of the case since the issue of whether directed verdict should have been granted was not raised in the petition for writ of certiorari.

Petitioner argues by way of his statement of issue that the “Court of Appeals should have recognized there is nothing in the record to support that there was nothing in the record to support the assertion that there was a history of harassment by Petitioner.” Pet for Writ, p.

4. The record refutes his claim of “no evidence,” where the magistrate summarized the proceedings as follows:

[Victim] – U.S.F.S. Officer, filed report. Received call from defendant. Has dealt with him before, and he has been harassing me. Recognized number and voice as defendant. Subject continues [sic] to call USFS Office and leave messages, calls supervisor, refers to me by middle name. Attempting to intimidate and agitate me. . . . Subject rides up and down road, flips me off and yells, blows horn, situation is escalating and deiced [sic] to take action this time.

Petitioner confuses existence of evidence with his own personal view of the evidence. Further, nothing in the record supports his assertion that Victim “illegally arrested the Petitioner resulting in an investigation into his actions. This resulted in his [eventual] transfer to another district. It also result[ed] in a civil suit in which the petitioner prevailed.” Pet. for Writ, p. 4.

Further, Petitioner failed to address his concerns about the accuracy of the record with the circuit court or in his Brief to the Court of Appeals. The objection to proceeding on

appeal from a magistrate's court conviction with an inadequate record should be raised to the circuit court in order to be preserved for review. See South Carolina Law Enforcement Division v. 1-Speedmaster, 397 S.C. 94, 100, 723 S.E.2d 809, 812 (Ct. App. 2011) (finding issue of whether new hearing was warranted due to tapes of magistrates court proceeding being lost was not preserved for review where appellant acquiesced in proceeding forward with the appeal in circuit court instead of seeking a remand); State v. Primus, 349 S.C. 576, 583, 564 S.E.2d 103, 107 (2002) (finding an issue not raised in the brief to the Court of Appeals, but instead raised for the first time in the petition for rehearing is not properly preserved for the Supreme Court's consideration in a petition for writ of certiorari) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Finally, the existence of evidence in the record is a matter concerning the directed verdict issue which Petitioner has not challenged in this petition. Therefore, sufficiency of the evidence is now the law of the case. Burton v. County of Abbeville, 312 S.C. 359, 440 S.E.2d 396 (Ct. App. 1994) (finding circuit court ruling that was not mentioned or challenged in appellant's brief was the law of the case); State v. Sampson, 317 S.C. 423, 454 S.E.2d 721 (Ct. App. 1995) (unchallenged rulings are the law of the case).

The fact that Blaine checked Petitioner's dove license did not warrant the highly offensive phone call. But it was more than a "suggestion" no matter how Buck attempts to minimize his words and conduct. Instead, it was a further step in a campaign to bully a forest ranger based on Petitioner's own views of the law. Victim was reasonable in taking action in view of the escalating situation. Accordingly, the petition for writ of certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court grant the writ of certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

September 29, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

The Honorable Alexander S. McCauley, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

TRAVIS N. BUCK,

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Travis N. Buck
499 Woodall Shoals Rd.
Longcreek, SC 29658

This 29TH day of September, 2014


NORMA BIGBEE
LEGAL ASSISTANT