ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Roger M. Young, Sr., Circuit Court Judge

Case No.: 2011-GS-10-05232
Case No.: 2011-GS-19-04844
Appellate Case No.: 2013-000376

The State of South Carolina.....Respondent,

v.

Robert Harvey Payne ..... Appellant.

FINAL BRIEF OF APPELLANT

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II. Did the trial court err in failing to direct a verdict of not guilty on the charge of Pointing and Presenting a Firearm where the evidence of record is not sufficient to convict Appellant?

STATEMENT OF THE CASE

Robert Harvey Payne ("Payne") was arrested on May 30, 2011. The grand jury for Charleston County indicted him on September 13, 2011 for the charge of Indecent Exposure. (R. p. 1). Payne was arrested again on July 9, 2012. The grand jury indicted him on July 11, 2012 for the charge of Pointing and Presenting a Firearm. (R. p. 6). A direct indictment against Payne was returned on the first day of trial for the charge of Assault and Battery in the First Degree. (R. p. 14, l. 3 – p. 16, l. 7). All of these charges arose from an incident that occurred on May 29, 2011. Payne was tried before The Honorable Roger M. Young, Sr., and a jury from February 4 through February 8, 2013. He was found not guilty of Assault and Battery in the First Degree and its lesser included offenses. He was convicted on charges of Indecent Exposure and Pointing and Presenting a Firearm, and sentenced to three and five years, respectively. (R. p. 447, l. 4 – p. 475, l. 1). This appeal followed.

FACTS

For two years prior to May 29, 2011, Robert Payne lived on his houseboat in marshland adjacent to Shem Creek in Charleston County, South Carolina. His houseboat was moored in front of his friend Jerry Moore's home. Moore lived in a small coastal development called Bayview Acres in Mount Pleasant, South Carolina. (R. p. 51, ll. 1-12). Moore had allowed Payne to tie the boat, which was leaking, in front of his home while he made repairs. (R. p. 294, ll. 4-13). Graham Stone also lived in Bayview Acres, four houses away from Moore. (R. p. 54, ll. 12-13).

According to Payne, Stone had harassed him for two years. He testified that during the time his boat was parked for repairs, Stone harassed, stalked, and called the police and other agencies on him regularly. Payne testified that his boat was out of sight of Bayview Acres lots, except for his friend Moore's lot. Stone's interference and harassment interrupted Payne's work on his boat and generally caused him trouble. (R. p. 321, l. 15 – p. 322, l. 2).

On May 18, 2011, Payne attempted to move his houseboat, but it became stranded in the middle of the marsh. (R. p. 53, ll. 10-15). Stone testified that he had "tremendous conflict" with Payne over the location of his boat. (R. p. 51, ll. 17-20). In fact, on May 18, the very day Payne attempted to move his boat, Stone called the police yet again to obtain a trespass notice against Payne. (R. p. 95, l. 19 – p. 187, l. 7). The police issued the trespass notice, but it was later withdrawn on the advice of the attorney for the Town of Mount Pleasant. (R. p. 97, ll. 8-12). On May 24, 2011, Stone again called police, claiming that Payne shined a flashlight at his home. The police investigated but made no

arrest. (R. p. 98, ll. 5-13). While Stone never directly asked Payne to move his boat, he contacted all manner of government agencies, lodging complaints about Payne. (R. p. 353, l. 12 – p. 451, l. 7).

According to Harry Sewell, former Mount Pleasant Chief of Police, the neighborhood was "up in arms" after Payne's boat moved on May 18, 2011. Chief Sewell visited Payne to discuss the issue. He testified that there were legal processes going on, but his goal was to be a "neighborhood solver." (R. p. 277, ll. 7-23). Chief Sewell and Payne reached an agreement that Payne could repair his boat and float it out on the expected high tide between June 1 and June 4, 2011. (R. p. 277, l. 24 – p. 278, l. 10).

Stone testified that he observed Payne on the afternoon of May 29, 2011 on his boat. According to Stone, Payne was sunbathing, drinking, and "giving us the finger." (R. p. 56, ll. 11-13, p. 57, l. 16 – p. 58, l. 13). Stone took his wife to an evening event. He testified that when he returned, Payne removed his swim trunks and while "proffering his genitals," gave him "the double finger." (R. p. 58, l. 22 – p. 59, l. 12).

Payne acknowledged that he did show his genitals, and urinated off the side of his boat in the direction of Stone's property, while also giving the "bird," all as a sign of contempt for the entire situation and Stone's participation in harassing him. (R. p. 320, ll. 13-24; p. 350, ll. 21-24).

Stone called 911. (R. p. 61, ll. 5-7). He testified that the police responded "instantly." (R. p. 63, ll. 5-6). Stone directed the police 150 yards down his street to the neighborhood marsh access, which then gave the police access to the causeway, where Payne's boat was moored. (R. p. 63, ll. 14-21). According to Stone, Payne exited his

boat while the police were traveling there, and "disappeared into the brush on the island, and I heard this bang, like – it sounded like a gun." (R. p. 64, l. 2 – p. 156, l. 1). He testified that he did not know where the noise came from. (R. p. 65, ll. 20-21). Stone testified that Payne then emerged from the brush on the island, and had what appeared to be "a stick or maybe a baseball bat" in his hand. He testified that Payne pointed the item at him, and he "thought he was just playing, like when he gives me the finger, and then he fired." (R. p. 66, l. 13 – p. 158, l. 1). According to Stone, the two shots occurred within seconds of each other. (R. p. 78, ll. 5-17). Stone testified that he made a second 911 call.

Stone did not at any time during the second call tell police that Payne had fired at him, or even in his direction. (R. p. 71, ll. 11-15). Stone acknowledged that he was outside at the time he believed Payne shot at him. He did not hear any falling shot, he was not struck by any projectile, and there was no property damage to his home or property. (R. p. 80, l. 10 – p. 172, l. 11).

Stone later gave police a signed statement. (R. p. 73, ll. 15-19). In this statement, Stone told police, twice, that Payne pointed the gun "at or above my house and fired it." Stone signed each page of the four page statement. (R. p. 83, ll. 13-25, p. 175, ll. 9-22). At trial, Stone testified that Officer Robert Basile, who took his statement "just wrote down whatever he wanted to write down." (R. p. 84, ll. 5-6). He admitted, however, that Officer Basile did not make up facts and put them into his statement. (R. p. 82, ll. 11-14). He ultimately stated, when asked to acknowledge the truth of the contents of his statement, "I have no objection to it." (R. p. 84, ll. 20-22).

Several months after the incident, in February 2012, Stone testified under oath to obtain a restraining order against Payne. At this hearing, Stone admitted that he could

not tell whether the shot was aimed at or above him. (R. p. 85, ll. 1-8). Stone testified that Payne fired the shot in question from approximately 175 yards away. (R. p. 98, l. 21 – p. 99, l. 22).

Scott Anderson also lives in Bayview Acres, around 200 feet further down the street from Stone. Anderson testified that he was grilling out in his back yard on the evening of May 29, 2011 and could see Payne's boat in the marsh. (R. p. 167, ll. 17-19). Anderson testified that while he and his son were grilling and going in and out of the house, he heard a boom. (R. p. 168, ll. 11-22). He later picked up the scope from a pellet gun, and saw Payne emerge from the woods on the island. (R. p. 169, ll. 3-14). He testified that Payne then fired a shotgun at him. He called 911. (R. p. 169, ll. 15-17; p. 170, ll. 2-3).

Like Stone, Anderson did not during the 911 call ever tell the authorities that Payne had fired the shotgun at him and his son. (R. p. 171, l. 23 – p. 172, l. 2). In his written statement, Anderson stated that he heard the boom around 30 minutes before Payne emerged from the woods on the island with the shotgun. (R. p. 180, ll. 10-25). Officer Robert Basile interviewed Stone on May 29, 2011. He testified concerning his training to take witness statements, and that the statement he prepared was accurate. (R. p. 285, l. 21 – p. 292, l. 8).

Benjamin Wells is an officer with the Mount Pleasant police department. (R. p. 192, l. 10-11). Officer Wells responded to Stone's 911 call concerning Payne's nudity. (R. p. 193, ll. 2-7). Officer Wells used binoculars to find Payne, who was walking in the marsh. He noticed that he had something in his hand, but could not tell what it was. (R. p. 193, ll. 18-22). Officer Wells joined other responding officers, and as they were

making their way into the marsh, he heard a loud bang come from the marsh area. (R. p. 194, ll. 3-7). Within five to ten minutes of responding to the call, the officers took Payne into custody. (R. p. 196, ll. 5-8). Officer Wells testified that from the time he arrived on the scene until the moment of Payne's arrest, he only heard one shot. (R. p. 205, ll. 4-12).

Officer Joseph Zeitner also responded to the May 29, 2011 incident. (R. p. 210, ll. 11-13). Officer Zeitner walked out to the island once Payne was in custody, and recovered a single spent shotgun shell casing. (R. p. 217, l. 19 - p. 218, l. 2). Officer Zeitner also performed measurements to determine the distance between where Payne fired and Stone and Anderson's respective properties. He found that the distance to Stone's property was 537 feet (179 yards) and the distance to Anderson's property was 812 feet (270 yards). (R. p. 225, l. 19 – p. 226, l. 16). Officer Zeitner testified that there was no report of a gunshot prior to his arrival on the scene on May 29, 2011, and that he only heard one shot between his arrival and Payne's arrest. (R. p. 229, l. 6 – p. 230, l. 1).

Lieutenant Donald Quick was the third officer on the scene on May 29, 2011. (R. p. 234, ll. 2-3). Lieutenant Quick heard only one shot after he responded. (R. p. 238, l. 18-22; p. 239, ll. 8-9).

Mark Kelly was offered by the prosecution as a general expert in firearms. (R. p. 119, ll. 12-14). Kelly testified that Payne used a 20 gauge Mossberg shotgun that used three inch number two buck shot. (R. p. 121, ll. 8-10; p. 127, ll. 6-14). Kelly testified that Payne's shotgun had an 18 ¼ inch barrel. Kelly used as a test weapon a 20 gauge Mossberg shotgun with a 28 inch barrel. (R. p. 129, ll.16-24). Kelly testified that the test weapon would fire a longer distance, and with more accuracy. (R. p. 130, ll. 2-17).

Kelly was able to testify concerning the shot pattern of the shotgun at 100 yards. However, he admitted that "the performance of these pellets as they go further distance is something that I honestly don't know the answers to." (R. p. 132, ll. 11-20). Kelly testified that the shotgun was designed as a short-range weapon, and does not have a long-range purpose. (R. p. 132, l. 21 – p. 133, l. 3).

Payne testified that on May 29, 2011 he decided to fire a 20 gauge short barrel shotgun that he found in Moore's truck, in order to make noise and bother Stone. (R. p. 312, ll. 9-25). Payne testified that he wanted to make sure no one saw him actually fire the shotgun, since he thought it might be illegal to do so within the city limits. He fired one shot into the air from inside his boat, through a hatch. About 30 minutes later, he went into the woods on the island, and - hidden from view – fired another shot into the air. He testified that he did this with the goal of annoying Stone. (R. p. 322, l. 22 – p. 324, l. 13; p. 333, l. 24 – p. 334, l. 12). Payne testified that he ejected the spent shell casing at the edge of the woods. (R. p. 325, ll. 2-4). Among other health issues, Payne has trouble with distance vision. He testified that he could not discern people from a distance of 170 yards or more. (R. p. 332, ll. 1-18). He also testified that he did not point the shotgun at Stone or Anderson. (R. p. 335, l. 12 – p. 336, l. 3).

STANDARD OF REVIEW

In considering a motion for directed verdict, the trial court is concerned with the existence or nonexistence of evidence. State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986). While the Court of Appeals must view the evidence in the light most favorable to the State, it must also reverse the trial court's denial of a directed verdict if it is not supported by either direct evidence or substantial circumstantial evidence of the

defendant's guilt. State v. Gibson, 390 S.C. 347, 701 S.E.2d 766, 769 (Ct. App. 2010); citing State v. Weston, 367 S.C. 279, 625 S.E.2d 641, 648 (2006).

ARGUMENT

I. Did the trial court err in failing to direct a verdict of not guilty on the charge of Indecent Exposure based on nudity as expressive speech protected by the South Carolina and United States Constitutions?

S.C. Code Ann. § 16-15-130(A)(1) provides that it is unlawful for a person to wilfully, 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. S.C. Const. Art. I, § 2 provides that the General Assembly "shall make no law . . . abridging the freedom of speech." See also, U.S. Const. Amend. I. Payne's action was a statement of disdain and/or disrespect that was intended as expressive behavior. Article I, Section II of the South Carolina Constitution provides that no statute can impinge on the freedom of expression or speech. The First Amendment to the United States Constitution provides that the states cannot abridge free speech.

Expressive conduct, or "symbolic speech," is entitled to First Amendment Protection. United States v. O'Brien, 391 U.S. 367, 376 (1968). In State v. Ramsey, 311 S.C. 555, 559, 430 S.E.2d 511, 514 (1993), the South Carolina Supreme Court recognized that the First Amendment "ensures that persons may speak as they think on matters vital to them, and that noxious doctrines may be refuted and their evil averted by the courageous exercise of the right of free discussion." Id. at 514. The Court further held that "[c]onduct may be sufficiently imbued with elements of communication so as to fall within the scope of the First Amendment. Id. at 514, citing Texas v. Johnson, 491

U.S. 397 (1989). The Court admonished that "[a]s disagreeable as the symbolic conduct may be, the First Amendment mandates that government may not prohibit the expression of ideas simply because society finds the ideas themselves to be offensive." Id., citing Johnson, 491 U.S. at 414.

Public nudity, generally, is not proscribed by South Carolina law. See, e.g., Diamonds v. Greenville County, 325 S.C. 154, 480 S.E.2d 718, 719-20 (1997). Symbolic speech is protected by the First Amendment when it is intended to convey a particularized message and it is likely that the message would be understood by those viewing it. Texas v. Johnson, 491 U.S. at 404. Therefore, a display of nudity, done as symbolic speech, is protected from punishment by enforcement of the Indecent Exposure statute.

Payne made clear in his testimony that displayed himself to Stone in the manner that he did in order to convey a message of disdain and contempt for Stone's harassment and perceived misuse of complaints to government officials to deprive Payne of his right to have his boat in a particular location. The fact that he shot "the bird" in conjunction with the display underscores this fact. In turn, Stone understood that message.

Payne's action was a statement of disdain and/or disrespect that was intended as expressive behavior, and was understood that way.

Further, the Indecent Exposure statute need not be invalidated as overbroad, as long as it is subject to a limiting construction, and is interpreted to prohibit only indecent exposure that is not intended as protected symbolic speech or a communicative act. In re:

Amir X.S., 371 S.C. 380, 639 S.E.2d 144 (Ct. App. 2006); City of Portland v. Gatewood, 708 P.2d 615 (Or. Ct. App. 1985). The application of the statute to Payne's behavior under the circumstances is unconstitutional, even if the statute as written is not overbroad as a matter of law.

The State and the trial court were in agreement that Payne's behavior was not intended – or received – in any sexual way, nor did it have any kind of sexual or prurient connotation. The trial court appears to have sent the determination of this charge to the jury because Payne could have just been behaving out of "meanness:" The State had the burden of proving that Payne was acting solely out of maliciousness. It did not. The record shows that Payne had been subject to a pattern of harassment and manipulation from the homeowners in Bayview Acres, and in particular by Stone, wherein connections with law enforcement and other public officials had been used to push him out of a place that he believed he had a legal right to live. That is the context in which Payne was acting when he exposed himself to Stone. Trial counsel rightly compared Payne's behavior to that of protestors at the White House – they may or may not know whether the President is at home, but that does not dilute the message of protest that they are making outside of his residence.

Expressive, or symbolic, speech is intended to convey a particularized message Payne's testimony demonstrated that he intended the message for Stone. Stone, in turn, received and understood it. There was no testimony or evidence in the record that anyone other than Stone received Payne's message. The message was so clear that the trial court

should have decided, as a matter of law, that the activity was constitutionally protected, and therefore did not support a violation of the Indecent Exposure statute.

II. Did the trial court err in failing to direct a verdict of not guilty on the charge of Pointing and Presenting a Firearm where the evidence of record is not sufficient to convict Appellant?

"A basic principle of criminal law is that the State has the burden of proof as to all of the essential elements of the crime." State v. Attardo, 263 S.C. 546, 550, 211 S.E.2d 868, 870 (1975). S.C. Code Ann. § 16-23-410 provides that it is unlawful for a person to present or point at another person a loaded or unloaded firearm.

The jury struggled with the term "present." (R. p. 500). The term "present" is not defined by statute. The South Carolina Supreme Court has shed light on actions that constitute "presentment." In State v. Reese, 370 S.C. 31, 633 S.E.2d 898, 900-01 (2006), overruled on other grounds, State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), the Court held that the defendant "presented" a firearm when he waved it in the victim's face. In State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522-526-27 (2004), the Court held that the defendant's conduct in showing his victim pistol and forcing her to walk toward a truck could constitute the crime of presenting a firearm within the terms of the statute. The implication in both of these cases is that a defendant must "present" a firearm in close enough proximity to a victim such that it constitutes a threat.

In In re: Spencer R., 387 S.C. 517, 692 S.E.2d 569, 573 (Ct. App. 2010), the Court recognized this ambiguity, and sought to more clearly define presentment. It held that the task of defining an otherwise undefined term requires determination of its plain and ordinary meaning as the term arises in other contexts. Id. at 572. Evaluating statutes

from other jurisdictions, determined that "present" in the South Carolina statute means "to show in a threatening manner." Id. at 572.

The Court further held that the State must prove presentment by adducing evidence that the defendant **intended** to present a firearm at a victim. In Spencer, the Court held that because there was no evidence in the record that established Spencer's intent to threaten two of the alleged victims, those charges must be dismissed. This was so even though these two alleged victims viewed Spencer in his driveway with the wielding the weapon. With respect to the third alleged victim, the Court noted testimony from several witnesses that Spencer had stated his intent to shoot the victim on the day that he sat in his driveway with an assault rifle near the bus stop where the victim stood, and also testimony that Spencer stood in his driveway and stared at the victim while holding the assault rifle. Id. at 573.

The Court determined that, taken as a whole, Spencer's threats combined with his deliberate action in sitting in view of the bus stop for an extended period of time, and where he knew the victim would be, was evidence of a deliberate intent to present his rifle at the victim in a threatening manner. Id. at 573.

The State therefore had to prove beyond a reasonable doubt that Payne pointed or presented a firearm at a person, and that Payne **intended** to do so. In a case in which a person's intent is the issue before the jury, the evidence is nearly by definition circumstantial. The South Carolina Supreme Court has held that "intent is seldom susceptible to proof by direct evidence and must ordinarily be proved by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred." State v.

Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971); see also 29A Am. Jur. 2d Evidence § 1469 at 849-850 (1994) ("Circumstantial evidence alone is often sufficient to show criminal intent because the element of intent, being a state of mind or mental purpose, is usually incapable of direct proof.").

The trial court erred in failing to direct a verdict on the charge of Pointing and Presenting a firearm. The only evidence of Payne's intent is that he went to great lengths to hide when he fired the shotgun into the air. First he hid within his own boat, and then he went to the island and hid in the woods and brush. Completely missing from the State's case was any evidence that Payne intended to point or present a firearm at Stone or Anderson.

Even if the State had met its burden with regard to intent, South Carolina, unlike other states, specifically requires that a weapon be pointed or presented "at" someone. Spencer, 692 S.E.2d at 573. The State "must offer direct or circumstantial evidence that a person specifically intended to present a firearm **at** someone before a conviction may be sustained under Section 16-23-410." Id. at 573, f.n. 2. This is in sharp contrast to other states, where Payne's conduct could possibly have constituted pointing and presenting. Cf. State v. Johnson, 964 S.W.2d 465, 468 (Mo. Ct. App. 1988) (holding, unlike South Carolina, that the exhibiting of a weapon does not require that the weapon be seen, only evidence of or visible signs of existence of the weapon).

Stone testified that he could not even tell what Payne was holding, and thought it was a stick or a bat, until he heard the noise of the shot. Likewise, Anderson was required to pick up a firearm scope in order to determine what Payne might have been

holding while emerging from the woods 270 yards away. No reasonable juror under the facts presented at trial could find evidence of pointing and presenting "at" anyone because the gun was between 179 yards and 270 yards from Stone and Anderson, respectively. Appellant thus submits that the State did not meet its burden of proving that Payne presented a firearm at either Stone or Anderson.

Finally, even if there was sufficient evidence of presentment, the indictment charges that Payne pointed and presented a firearm at Stone, Anderson, and Anderson's son. The indictment essentially charges three separate offenses in one instrument. The overwhelming evidence of record proves that Payne fired one shot after the police arrived on the scene. This was the shot that was purportedly aimed at all three victims, simultaneously, even though they were located on properties at least 200 feet apart.

Appellant contends that the shot went up in the air. However, viewing the evidence in the light most favorable to the State, as we must, either the shot went toward Stone, or toward Anderson. The single shot could not have gone toward both of them at the same time. Because of this inherent flaw and impossible contradiction in both the charging document and the evidence, the trial court erred in failing to direct a verdict of not guilty on the charge of Pointing and Presenting a Firearm.

CONCLUSION

For the reasons set forth herein, this Court should reverse the convictions of Robert Harvey Payne and direct that a judgment of not guilty be entered in this matter on the charges of Indecent Exposure and Pointing and Presenting a Firearm.

January 14, 2015

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, the undersigned, hereby certify the Final Brief of Appellant in the above referenced matter was mailed, postage prepaid, to Respondent's Attorney, T. Parkin C. Hunter, Assistant Attorney General, by sending to the SC Attorney General's Office at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, on January 14, 2015.

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