ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
J. Derham Cole, Circuit Court Judge

Appellate Case No. 2016-001633

THE STATE, ...RESPONDENT

v.

DOSSIE FAISON, JR., ...APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General
S.C. Bar No. 8729

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

180 Magnolia Street
Spartanburg, South Carolina 29306
(864) 596-2575

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2. Whether Appellant's argument that the trial court erred in denying his motion for a new trial on the basis there was insufficient corroboration of the victim's allegations should be deemed abandoned as conclusory, whether the issue is preserved for appellate review where it was not specifically raised to or ruled upon by the trial court and, even if preserved, whether the trial court properly denied Appellant's argument because it is based on a fundamentally flawed premise.

3. Whether Appellant's argument that the trial court erred in refusing to quash the indictment on grounds that it subjected him to double jeopardy is preserved for appellate review where this argument was not raised to or ruled upon by the trial court, whether his argument that the trial court erred in refusing to quash the indictment on grounds it was void for vagueness is preserved where he waived that argument when he was subsequently arraigned prior to trial and, even if preserved, whether the trial court properly denied the motion to quash because neither ground advanced by Appellant warranted quashing the indictment for indecent exposure.

STATEMENT OF THE CASE

Dossie Faison, Jr., (Appellant) was indicted at the October 1, 2015 term of the grand jury for Cherokee County for indecent exposure (2015-GS-11-938). He was represented by Fletcher N. Smith, Jr., Esquire. Respondent (the State) was represented by Assistant Solicitor Kimberly Leskanic of the Seventh Circuit Solicitor's Office. On August 2-3, 2016, Appellant proceeded to trial by jury pursuant to which he was found guilty as indicted. He was sentenced by the Honorable J. Derham Cole to three (3) years' imprisonment suspended upon the service of eighteen (18) months' imprisonment and five (5) years' probation. The trial judge also ordered that Appellant be required to register as a sex offender pursuant to section 23-3-430 of the South Carolina Code. (R.p.4-8; R.p.15-p.20; R..p.155-p.156). Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

In her opening statement, the solicitor summarized the testimony and other evidence she intended to introduce during the State's case-in-chief. She said that at approximately 10 p.m. on September 1, 2014, the victim, Ms. Barbara Humphries, stopped by the Harry's Food Mart in Blacksburg to pick up a pack of cigarettes on her way to work. As she was exiting the store she had a brief conversation with Appellant in response to his request for a cigarette. At that point, Appellant pulled his penis out of his pants and started flopping it in and out and said, "My name is Dicky, I work for women." Although Ms. Humphries went back into the store and reported the incident to the store clerk shortly after it occurred, she did not report it to the police until later that night when a co-worker noticed she was upset. The following morning, on September 2, 2014, she made a formal report in which she gave a description of the person and the vehicle in which she believed he had been a passenger. Ultimately, the police put Appellant in a lineup and on September 11, 2014, Ms. Humphries picked him out as the person who exposed himself to her. (R.p.40-p.44).

At the start of the trial, following jury qualification and selection, the trial court asked if any matters needed to be addressed before the jury was sworn. Appellant said he was "challenging the indictment as being unconstitutional." He referenced the language alleging he "did maliciously, indecently expose his person" and argued the term "person" is not specific enough. Appellant claimed it was so broad and vague that the indictment was constitutionally invalid and therefore due process barred it under the 14th Amendment to the United States Constitution and under the South Carolina Constitution. (R.p.15-p.26; p.27, line 15-p.28, line 3). The solicitor responded that the term "person" has been interpreted to mean a person's genitalia. She noted the statute itself is for indecent exposure, which in common terms has been used to refer to exposure of "private parts." Finally, the solicitor referenced a commonly used source for

jury charges which says indecent exposure involves the exposure of the private parts to public view. (R.p.28, lines 5-19). Appellant replied that he believed a criminal statute must be sufficiently definite to allow a citizen of common intelligence to understand the particular acts prohibited and that the indecent exposure statute fails to tell what specific acts are forbidden. (R.p.28, lines 20-25). Ultimately, the trial court ruled as follows:

> All right. I note your exception and your objection and I'm going to deny your motion to dismiss based upon the unconstitutionality of the statute, based upon the fact that in my view while an alien might come to earth and not know what is meant by expose his person, I think everybody else who already resides on earth accepts the fact that exposing your person means to expose your genitalia in a public place. And based upon that common acceptance I'm gonna deny your motion for dismissal.

(R.p.29, lines 1-10).

Immediately following the ruling, the solicitor advised the trial judge the indictment was true billed on October 1, 2015, and asked that Appellant be arraigned prior to starting the trial. (R.p.30, lines 5-10). The following colloquy then occurred between the court, Appellant's trial counsel, and Appellant:

> THE COURT: Mr. Smith, does your client need to be arraigned or does he waive arraignment?
>
> MR. SMITH: We waive reading of the indictment.
>
> THE COURT: Okay. You've been over the indictment with him?
>
> MR. SMITH: Yes, sir.
>
> THE COURT: You've explained to him the Charge?
>
> MR. SMITH: Yes, sir.
>
> THE COURT: He understands what they've brought against him?
>
> MR. SMITH: Yes, sir.
>
> THE COURT: And you've told him what the potential sentence is?

MR. SMITH: Yes, sir.

THE COURT: All right. You understand all that, Mr. Faison?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. All right. Any other matters we need to address before the jury is brought in?

(R.p.30, line 11-p.31, line 4).

After this colloquy, the jury returned to the courtroom and was sworn before the trial court gave preliminary instructions. These included an instruction on the jury's exclusive duty to determine the facts and be the sole judge of credibility of each witness. (R.p.31-p.40). The trial court advised the jurors they "could believe one witness as opposed to several or several as opposed to one." (R.p.39, lines 4-5). The parties then proceeded to give opening statements outlining the likely evidence and theories of the case. (SROA.p.1-p. 9). Next, the State presented its case-in-chief.

First, the State called Ms. Humphries to the stand to describe the incident. On the night of September 1, 2014, before going to her third-shift job at Sumino Textile, Ms. Humphries stopped by a convenience store in Blacksburg to get a pack of cigarettes. On her way out, Appellant asked her for a cigarette. She gave him one, but when he said it was not his brand she offered him a dollar instead. At that point, Appellant pulled his penis out of his pants and said, "My name is Dicky, I work for women, I really do." Ms. Humphries got in her car while Appellant walked around the building and across the road. She sat in her car for a minute but then went back into the store and reported the incident to the store clerk. She declined his request to call 911 because she had to go to work. At work, one of Ms. Humphries' friends asked what was wrong with her. She told the friend what had happened and her friend told her to

call and report the incident. She then called the Blacksburg Police Department and told them what happened earlier that night at the store. (R.p.45-p.48).

The next morning, Ms. Humphries went to the police station to make a report. She testified she did not know the defendant before the incident and had never seen him before, but she gave a description of him to the police and was later shown a photo lineup by Detective Vanderburg. Ms. Humphries picked Appellant from the photo array as the person who exposed himself to her. She testified she was quickly able to recognize him and was 100% positive of the identification. Ms. Humphries was also able to identify a photograph of the vehicle she says he was standing beside that night. She then identified security video from the convenience store and it was admitted into evidence. Ms. Humphries testified she was very certain what she saw was Appellant's penis and was 100% certain Appellant was the individual who exposed his penis. She then made an in-court identification. (R.p.48-p.68). On cross-examination, Appellant attempted to attack Ms. Humphries' testimony by pointing out the lack of corroboration. (R.p.78-p.80).

Next, the State called Ms. Humphries' co-worker, Lori Culbreath, to the stand. Ms. Culbreath also worked third shift at Sumino Textile and saw Ms. Humphries when she came in to work on September 1, 2014. Ms. Culbreath said Ms. Humphries was shaking, crying, physically upset, and could not even talk. She asked Ms. Humphries what was wrong and after hearing about the man who exposed his penis to her at the convenience store, Ms. Culbreath helped Ms. Humphries call the police. (R.p.81-p.83; p.85). The State then called Prkashbhaj Patel, the owner of the Harry's Food Mart, to the stand. He was working at the store on September 1, 2014, and remembered Ms. Humphries coming into the store to make a purchase that night, going out, and then coming back in. Mr. Patel testified Ms. Huphries looked upset

when she came in the second time. She tried to tell him what happened outside but he did not understand because he has a hard time understanding English. He offered to call the police but she declined, so he accompanied her back out of the store and told Appellant to leave the property. Mr. Patel then confirmed the video recordings previously admitted into evidence were from the store that night. (R.p.86-p.90).

Finally, the State called Detective Mark Vanderburg of the Blacksburg Police Department to the stand. He met with Ms. Humphries at the police station the day after the incident, on September 2, 2014. Based on her description, Detective Vanderburg identified a suspect and had SLED put together a photo lineup which included Appellant. He also took photos of Appellant's car. On September 11, 2014, Ms. Humphries returned to the station, viewed the photo lineup, and picked Appellant as the man who exposed himself at the convenience store. Detective Vanderburg testified Ms. Humphies was 100% certain of the identification and was also able to recognize his vehicle from the photographs. (R.p.91-p.95).

After the State rested, Appellant moved for a directed verdict, arguing that when viewed in the light most favorable to the State, the evidence did not show he flashed his penis at Ms. Humphries on the night in question. The trial court denied the motion. (R.p.96-p.97). After the trial court questioned Appellant in regard to his right to testify, Appellant proffered testimony from possible defense witness Lisa Bickers Randolph; however, the trial court would not allow her testimony because it was not relevant. (R.p.97-p.106). The defense ultimately rested without presenting evidence and court adjourned for the day. Appellant did not renew his motion for a directed verdict. (R.p.107-p.109).

The parties then gave closing arguments. (R.p.110-p.132). During his close, Appellant highlighted the absence of any other witness who could corroborate Ms. Humphries' testimony.

(R.p.127-p.128). Next, the trial court charged the jury on the law including charges on the State's burden of proof, the presumption of innocence, reasonable doubt, the role of the jurors as sole judge of the facts and the credibility of witnesses, the role of the judge as the sole judge of the law, the elements of the charged offense, and the defendant's right not to testify. (R.p.132-p.146). When the trial judge asked for exceptions or objections, Appellant renewed his pretrial challenge to the constitutionality of the indecent exposure charge; however, that challenge was again denied. (R.p.147).

The jury then began deliberations before sending out a note which resulted in the trial judge recharging reasonable doubt. The jury resumed deliberations and ultimately returned with a guilty verdict for indecent exposure. (R.p.147-p.153). After hearing from Appellant's counsel in mitigation, the solicitor described Appellant's prior record. (R.p.153-p.154). The trial judge then stated: "I'm trying to find the sex offender registry provision, should there be one. I've looked at 23-3-430. What's you all's position on whether or not it requires registration?" The solicitor responded: "Your honor, I believe the statute, I don't have it in front of me, but this is the provision it specifically mentions indecent exposure and says that it is in the Court's discretion. If the Court makes a finding on the record that this case would necessitate or the sex offender registry would be appropriate." She went on to say: "And the State is requesting registry in this case, Your Honor, due to the facts where he exposed himself to Ms. Humphries." Appellant's counsel then stated: "Your Honor, we take the presumptive position he shouldn't be on the sex registry and ask that you use your discretion not to place him on the sex offender registry." After imposing a sentence of three years' imprisonment suspended upon the service of eighteen months' imprisonment and five years' probation, the trial judge ruled as follows: "And I find, based upon the circumstances of this case, that the defendant should be required to register

pursuant to 23-3-430 on the sex offender registry." (R.p.154, line 25-p.156, line 13). Appellant did not object to or otherwise challenge the sufficiency of this finding. Rather, Appellant moved for a judgment notwithstanding the verdict and/or a new trial based on the sufficiency of the evidence. Those motions were denied. (R.p.157).

ARGUMENT

I.

Appellant's argument that the trial court erred in ordering him to register as a sex offender should be deemed abandoned as conclusory. Furthermore, the issue is not preserved for appellate review because it was not raised to or ruled upon by the trial court. Even if preserved, the trial court properly exercised its discretion pursuant to section 23-3-430 (D) to order that Appellant be included in the sex offender registry after finding good cause for registration based on the circumstances of the case.

Appellant argues the trial court erred in ordering him to register as a sex offender where the Court failed to make specific findings on the record as to why he should be given such a status. He acknowledges the trial court found that "based upon the circumstances of the case that defendant should be required to register pursuant to 23-3-430 on the sex offender registry"; however, he argues this pronouncement by the Court is not a sufficient finding to warrant being placed on the sexual registry. (Brief of Appellant, p.4). The State disagrees and submits Appellant's argument should be denied and dismissed on several grounds.

First, Appellant's argument should be deemed abandoned on appeal because it is conclusory. *See State v. Howard*, 384 S.C. 212, 217-18, 682 S.E.2d 42, 45 (2009) (finding "[a]n issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority"); *State v. Hill*, 394 S.C. 280, 297, 715 S.E.2d 368, 377-78 (Ct. App. 2011) (finding an issue is deemed abandoned on appeal where appellate counsel made a "two sentence conclusory argument with citation to only *Brady* and no analysis whatsoever as to why or how *Brady* applies"). In his brief, Appellant argues the trial court's finding regarding sex offender registration was insufficient, but he fails to cite authority for this proposition and provides no analysis as to why any further findings should be required. Thus, Appellant's challenge to the sex offender registry has been abandoned.

Second, Appellant's argument is not preserved for appellate review because it was not specifically raised to and ruled upon by the trial court. *State v. Brown*, 402 S.C. 119, 125 n.2, 740 S.E.2d 493, 496 n.2 (2013) (describing the four basic requirements for preserving issues at trial for appellate review, including the requirement that the issue must have been raised to and ruled upon by the trial court); *State v. Policao*, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) ("The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal."); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). South Carolina law requires a contemporaneous objection with specific grounds to preserve an error for review. *State v. Byers*, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) ("An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error."); *State v. Hoffman*, 312 S.C. 386, 440 S.E.2d 869 (1994) (finding that a contemporaneous objection is required to preserve an issue for appellate review); *State v. Bailey*, 253 S.C. 304, 170 S.E.2d 376 (1969) (holding that specific grounds are required and that a general objection preserves nothing).

Although Appellant took "the presumptive position he shouldn't be on the sex registry" and asked the judge "to use your discretion not to place him on the sex offender registry" (August 3, 2016 Tr. p.50, lines 17-20), Appellant never challenged the court's subsequent finding that "based upon the circumstances of the case that defendant should be required to register pursuant to 23-3-430 on the sex offender registry." (August 3, 2016 Tr.p.51, lines 11-13). He did not argue this finding was insufficient or that it needed to be more specific or robust in any fashion and he made no post-trial motions in this regard. As a result, the trial court was not given an opportunity to make a ruling about any challenge to the sufficiency of its finding. Likewise, the trial court was deprived of the opportunity to make a more detailed finding as to

why it reached its ultimate conclusion. Instead, the trial court simply rejected Appellant's request to not order registration and found the circumstances of the case warranted his placement on the sex offender registry. Because the argument and grounds now raised in this appeal were neither raised to nor ruled upon by the trial court, they are not preserved for review. Rule 103, SCRE; *Brown*, 402 S.C. at 125 n.2, 740 S.E.2d at 496 n.2; *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94; *Byers*, 392 S.C. at 446, 710 S.E.2d at 59; *Bailey*, 253 S.C. at 304, 170 S.E.2d at 376.

Finally, Appellant's argument is without merit. The South Carolina Code provides a specific list of offenses that, upon conviction, plea, or adjudication, require the defendant to register pursuant to the provisions of the sex offender registry. S.C. Code Ann. §§ 23-3-400 to -430 (2007). Indecent exposure (S.C. Code § 16-15-130) is not included in the specific list. The Code goes on to provide,however, that:

> Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person of an offense not listed in this article, the presiding judge may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the solicitor.

S.C. Code Ann. § 23-3-430(D) (2007). Here, the trial included detailed testimony about the indecent exposure for which Appellant was convicted. At the conclusion of trial, the solicitor advised: "The State is requesting registry in this case . . . due to the facts where he exposed himself to Ms. Humphries." (R.p.155, lines 14-16). As noted above, the trial judge then concluded: "I find, based on the circumstances of this case, that the defendant should be required to register pursuant to 23-3-430 on the sex offender registry." (R.p.155, lines 11-13). Although the trial court did not use the exact phrase "good cause is shown by the solicitor," the finding that the circumstances of the case warrant registration unequivocally demonstrates the trial court concluded that "good cause" was indeed shown during the course of trial. Thus, the trial court

did not err and the order that Appellant be included in the sex offender registry should be affirmed.

II.

Appellant's argument that the trial court erred in denying his motion for a new trial on the basis there was insufficient corroboration of the victim's allegations should be deemed abandoned as conclusory. Furthermore, the issue is not preserved for appellate review because it was not specifically raised to or ruled upon by the trial court. Even if preserved, the trial court properly denied Appellant's argument because it is based on a fundamentally flawed premise.

Appellant argues the trial court erred in denying his motion for a new trial on the basis that there was insufficient corroboration of the victim's allegations to warrant his conviction by the jury for indecent exposure. The State disagrees and submits Appellant's argument should be denied and dismissed on several grounds.

First, Appellant's argument should be deemed abandoned on appeal because it is conclusory. In his brief, Appellant complains of the lack of corroboration for the victim's testimony and argues the trial court erred in not granting a new trial on this basis (Brief of Appellant, p.4-p.5); however, he fails to cite authority for this proposition and provides no analysis as to why corroboration would be required. Thus, Appellant's challenge to the lack of corroboration has been abandoned. *Howard*, 384 S.C. at 217-18, 682 S.E.2d at 45; *Hill*, 394 S.C. at 297, 715 S.E.2d at 377-78.

Second, Appellant's argument is not preserved for appellate review because it was not specifically raised to and ruled upon by the trial court. Although Appellant moved for a new trial after the verdict and argued "there's no evidence that he committed the crime of indecent exposure" (R.p.157, lines 11-12), he never argued this was due to insufficient corroboration of the victim's testimony. Indeed, Appellant never made any argument at trial that a conviction cannot stand based solely on the testimony of the victim. As a result, the trial court was not given an opportunity to make a ruling on this claim. Because the argument and grounds now

raised in this appeal were neither raised to nor ruled upon by the trial court, they are not preserved for review. *Brown*, 402 S.C. at 125 n.2, 740 S.E.2d at 496 n.2; *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94; *Byers*, 392 S.C. at 446, 710 S.E.2d at 59; *Bailey*, 253 S.C. at 304, 170 S.E.2d at 376.

Finally, Appellant's argument is entirely without merit because it is based on a fundamentally flawed premise. While Appellant may be under the impression that an accused cannot be convicted of a crime solely on the testimony of the alleged victim, decades of precedent in South Carolina belie that impression. *See State v. Smith*, 227 S.C. 400, 410, 88 S.E.2d 345, 350 (1955) ("[T]he jury must necessarily pass upon the credibility of the witness .... The jury may believe one witness and disbelieve another, may believe one portion of a witness' testimony and disregard another portion of such testimony."); *State v. Bamberg*, 270 S.C. 77, 82, 240 S.E.2d 639, 641 (1977) (acknowledging it was appropriate to charge the jury it was judge of witness' credibility and that it could believe one witness against many and only portions of a witness' testimony); *State v. Stukes*, 416 S.C. 493, 502, 787 S.E.2d 480, 484 (2016) (Kittredge, J., dissenting) (quoting with approval the trial court's credibility charge to the jury which read in part: "In determining the believability of witnesses who have testified in this case, *you may believe one witness over several witnesses or several witnesses over one witness.*") (emphasis in original). Here, the trial court preliminarily charged the jurors they "could believe one witness as opposed to several or several as opposed to one." (R.p.39, lines 4-5). At the close of the case, the trial court then charged the jurors they must decide the weight, value, and effect to give any particular witness' testimony and could believe as much or as little of a witness' testimony as they deemed appropriate. (R.p.137-p.138). During trial, Ms. Humphies provided direct, eyewitness testimony that Appellant committed the crime of indecent exposure.

Her testimony alone was sufficient to support the jury's verdict, regardless of corroboration. Thus, the trial court's refusal to grant a new trial based on insufficient corroboration was proper, and Appellant's conviction should be affirmed.

III.

Appellant's argument that the trial court erred in refusing to quash the indictment on grounds that it subjected him to double jeopardy is not preserved for appellate review because this argument was not raised to or ruled upon by trial court. His argument that the trial court erred in refusing to quash the indictment on grounds it was void for vagueness is not preserved because he waived that argument when he was subsequently arraigned prior to trial. Even if preserved, the trial court properly denied the motion to quash because neither ground advanced by Appellant warranted quashing the indictment for indecent exposure.

Appellant argues the trial court erred in denying his pretrial motion to quash the indictment for indecent exposure on two grounds: double jeopardy and vagueness. The State disagrees and submits Appellant's arguments are not preserved for appellate review because they were either not raised to the trial court or were expressly waived prior to trial. Furthermore, the arguments are without merit.

Double Jeopardy

Appellant first argues the indictment should have been quashed on double jeopardy grounds. He contends he was previously indicted for the offense and claims the State dismissed the first indictment and then reindicted him alleging the same facts but with a different offense date. Appellant argues this violated the constitutional prohibition against double jeopardy. Appellant's double jeopardy argument is not preserved for appellate review because it was not raised to or ruled upon by the trial court. Indeed, there is nothing in the record to substantiate the scenario now described in Appellant's brief regarding dismissal of a prior indictment. Although Appellant made a pretrial motion challenging the constitutionality of the indictment (R.p.27-p.28) he never argued this was based on a double jeopardy violation and never provided any information to support such a claim. As a result, the trial court was not given an opportunity to make a ruling and Appellant's double jeopardy argument is not preserved for review. *Brown*,

402 S.C. at 125 n.2, 740 S.E.2d at 496 n.2; *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94; *Byers*, 392 S.C. at 446, 710 S.E.2d at 59; *Bailey*, 253 S.C. at 304, 170 S.E.2d at 376. Even if preserved, the argument is without merit.

The United States Constitution and the South Carolina Constitution offer protection to citizens from being subjected to double jeopardy for the same offense. *See* U.S. Const. amend. V ("No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb . . . ."); S.C. Const. art. I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . ."). The guarantee against double jeopardy offers three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense after an improvidently granted mistrial. *State v. Kirby*, 269 S.C. 25, 27-28, 236 S.E.2d 33, 34 (1977); *State v. Cuccia*, 353 S.C. 430, 434, 578 S.E.2d 45, 48 (Ct. App. 2003). However, the guarantee against double jeopardy does not prevent the State from dismissing an indictment for mistake or lack of specificity and then filing a new, more specific charge based on the same underlying conduct. *See State v. Dawkins*, 297 S.C. 386, 389-90, 377 S.E.2d 298, 300 (1989) (affirming the trial court's denial of defendant's motion to quash four new indictments on grounds they were vindictively filed after he refused to plead guilty on a single indictment covering the same conduct); *State v. Wells*, 162 S.C. 509, 161 S.E. 177, 181 (1931) (affirming the trial court's denial of defendant's motion to quash a new indictment on grounds it was duplicitous to a previously issued indictment based on the same conduct which had been nol prossed by the solicitor). Thus, the trial court properly denied Appellant's motion to quash his indictment where there was no basis to quash under the constitutional guarantees against double jeopardy.

Vagueness

Appellant next argues the indictment should have been quashed because the underlying statute "does not define what a private part is." He contends that because the term "private parts" is not adequately defined, the statute is void for vagueness. (Brief of Appellant, p.5). The State disagrees and submits this argument should be denied and dismissed for several reasons.

First, the State submits Appellant's argument should be dismissed out-of-hand because the statute in question never uses the term "private parts." Although at trial Appellant challenged the term "person" as used in the statute and claimed it was unconstitutionally vague, on appeal he never mentions the term "person" and instead argues the term "private parts" is not adequately defined. For this reason, Appellant appears to have abandoned this issue on appeal. *Howard*, 384 S.C. at 217-18, 682 S.E.2d at 45; *Hill*, 394 S.C. at 297, 715 S.E.2d at 377-78.

Second, the State submits Appellant effectively waived any claim that either the statute or his indictment was void for vagueness during his pretrial arraignment for the charge. Prior to the jury being sworn, the solicitor asked that Appellant be arraigned on the indictment before the start of the trial. Appellant's counsel told the court Appellant wished to waive reading of the indictment. He said he had been over the indictment with Appellant and explained the charge and the potential sentence and that Appellant understood what charge the State had brought against him. The trial court asked Appellant if he understood all of that and Appellant said he did. (R.p.30, line 5-p.31, line 4). By admitting he understood the charge the State had brought against him and the potential sentence, Appellant acknowledged he had notice of and understood the conduct prohibited in the indecent exposure statute. Consequently, he waived any prior challenge he made in regard to the statute or the indictment being unconstitutionally vague. *See*

State v. O'Neal, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) (recognizing a previously-raised objection can be waived).

If this Court somehow finds the issue is preserved, Appellant's argument still fails because it does not meet the requirements for unconstitutional vagueness. "Statutes are to be construed in favor of constitutionality; the Court will presume a legislative act is constitutionally valid unless a clear showing to the contrary is made." *State v. Michau*, 355 S.C. 73, 77, 583 S.E.2d 756, 758 (2003) (citing *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994)). The test for determining whether a statute is unconstitutionally vague is as follows:

> The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise judge and jury of standards for the determination of guilt. If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional.

Guinyard v. State, 260 S.C. 220, 226, 195 S.E.2d 392, 394 (1973) (quoting *State v. Albert*, 257 S.C. 131, 134, 184 S.E.2d 605, 606-07 (1971)).

The due-process standard regarding the vagueness doctrine is whether the statute "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *State v. Sullivan*, 362 S.C. 373, 376, 608 S.E.2d 422, 424 (2005) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)); *see also Michau,* 355 S.C. at 75-78, 583 S.E.2d at 758-59 (applying the principle). So long as the statute clearly defines the offense in language that gives notice of the prohibited conduct, our Supreme Court has found it neither vague nor ambiguous. *Guinyard*, 260 S.C. at 226, 195 S.E.2d at 394.

Here, the statute at issue provides: "It is unlawful for a person to willfully, maliciously, and indecently expose his person in a public place, on property of others, or to the view of any person on a street or highway." S.C. Code Ann. § 16-15-130(A)(1) (2016). This language certainly gives notice of what conduct is prohibited and does not define the "act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." In *Guinyard*, where the prohibited conduct was "having sexual intercourse with a patient or trainee of any State mental health facility," the Supreme Court concluded that "[a]ll that a person need do to avoid the penalties of the statute is simply to refrain from sexual intercourse with a patient of a State mental health facility." *Guinyard*, 260 S.C. at 227, 195 S.E.2d at 395. Following that logic, all a person would need to do here would be to refrain from willfully, maliciously, and indecently exposing his person in a public place, on property of others, or to the view of any person on a street or highway.

Other statutes that have been found not to be unconstitutionally vague include section 16-17-490 (10), "To so deport himself or herself as to wilfully injure or endanger his or her morals or health or the morals or health of others," where the Supreme Court found that "[a] person of ordinary intelligence and judgment need not guess at conduct which would 'endanger the morals or health' of a minor." *Michau,* 355 S.C. at 77, 583 S.E.2d at 759. In *State v. Green*, our Supreme Court determined that "[a]lthough each of these terms is not defined, we believe a person of common intelligence would not have to guess at what conduct is prohibited by the statute" in regard to section 16-15-342, the criminal solicitation statute. 397 S.C. 268, 280, 724 S.E.2d 664, 670 (2012). Notably, the Court found that even though no terms were defined, the statute was simple enough for a person of common intelligence to understand. Here, as noted by the trial judge, the term "person" in the context of a charge explaining the prohibited conduct is

"indecently exposing his person" is easily understood by a person of common intelligence to include exposure of the person's genitals.

In sum, the State submits the issue of whether the statute is void for vagueness was affirmatively waived by Appellant during arraignment. Furthermore, this particular statute gives reasonable notice of the prohibited conduct in terms that are not so obscure that people of common intelligence would have to guess at their meaning. Thus, the statute is constitutional and Appellant's conviction should be affirmed.

CONCLUSION

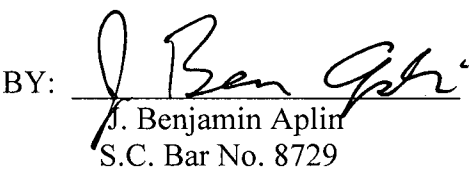
For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

BY: 
J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
May 11, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
J. Derham Cole, Circuit Court Judge

Appellate Case No. 2016-001633

THE STATE,.....RESPONDENT

v.

DOSSIE FAISON, JR.,.....APPELLANT.

CERTIFICATE OF COUNSEL

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

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

BY: _____
J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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