

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

RECEIVED
MAR 23 2017
SC Court of Appeals

THE STATE,

RESPONDENT,

v.

CLARENCE DUANE ABNEY,

APPELLANT

APPELLATE CASE NO 2016-002394

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

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?

STATEMENT OF THE CASE

On February 13, 2016, the Lexington County Grand Jury indicted Appellant Clarence Duane Abney for indecent exposure. R. * (Indictments). On November 17, 2016, Appellant proceeded to a bench trial before the Honorable Eugene C. Griffith, Jr. R. 1. J. Walt Whitmire represented Appellant. Assistant Solicitor Sustania A. Radlein represented the State. Judge Griffith found Appellant guilty as charged and sentenced him to twelve months imprisonment suspended on the service of twenty-two days and eighteen months of probation. R. 60, ll. 21-25

ARGUMENT

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?

Relevant Facts

On February 23 2015, Appellant went to a party in Batesburg-Leesville around 1:30 a.m. R. 40, l. 9 – 42, l. 20. While Appellant was not from the area, he went to high school with many of the people expected to attend the party and he believed it would be a good chance for him to catch-up with old friends. *Id.* Appellant does not drink. R. 43, ll. 7-22.

At the party, Appellant ran into a friend from high school, Deshontel Whitfall. After several hours at the party, Appellant and Whitfall decided to go to a nearby Waffle House. *Id.* Appellant and Whitfall arrived at the Waffle House at around 4:00 a.m. The Waffle House was “packed with people,” but Appellant managed to find a seat at the counter, facing the kitchen. R. 44, l. 1 – 49, l. 5.

A woman sitting next to Appellant started aggressively flirting with him. *Id.* Appellant politely declined her advances, explaining that he was happily engaged. *Id.* In response to his rejection, the woman became loud and boisterous. *Id.* Having not yet ordered food, Appellant decided to leave the Waffle House with Whitfall. As he stood up from the counter, the woman’s boyfriend came out of the crowd and grabbed Appellant’s shirt. *Id.*

Appellant reacted by pushing the boyfriend’s hand away. *Id.* Appellant recalled at trial that he tried to leave the Waffle House without further incident, but that the crowd of people and the woman’s angry boyfriend prevented him from leaving:

So he put his hands on me so all of a sudden the crowd start pushing and all this stuff. I don't know these people so right now I'm looking like these people about to jump me or anything might happen right now so I got on defense, you know. So I wasn't - I

wasn't ready to fight him. He was making it seem like I'm ready to fight him, but all of a sudden all along he's coming at me acting wild and all I'm telling him is go talk to your girlfriend. . . But after a while I just got mad cus' everybody pushing me and all kind of stuff. So after a while ain't no customers take me out the door. [Whitfall] came over there and he got me and said go out the door, you know.

R. 45, l. 22 – 46, l. 8. Whitfall and Appellant eventually escaped the hostile crowd of inebriated locals and reached the Waffle House parking lot.

Appellant, upset at the boyfriend, stood at the window and tried to get the boyfriend to come out a fight him. R. 46, ll. 9-24. The boyfriend, surrounded by his friends, refused to go outside, but continued to mock Appellant. Appellant became more upset and started banging on the window of the Waffle House. He admitted at trial that he was “acting crazy.” *Id.*

The Waffle House’s manager, William Keeble, testified that after Appellant and the woman sitting at the counter started arguing, the crowd of customers in the restaurant forced Appellant outside. Once outside, Appellant punched and banged on the glass so hard that Keeble said, “I honestly thought he was going to break the window.” R. 10, ll. 5-19. In an effort to keep control over the situation, Keeble called the police. R. 7, l. 2 – 21, l. 13.

While on the phone with 911, Keeble claimed that Appellant took out his penis and “started waving it at everybody in the Waffle House.” R. 12, ll. 1-15. According to Keeble, Appellant put his penis back into his pants after a few seconds and resumed punching the window. *Id.* A short time thereafter, Appellant walked away from the window and into a waiting car. R. 32, ll. 1-18.

As the car pulled away, police arrived and detained Appellant. *Id.* None of the Waffle House customers cooperated with police. R. 36, ll. 12-23. Appellant was arrested after Keeble described what he claimed to have seen to officers. Only Keeble, his wife (a Waffle House

waitress), the cook, and the arresting officer testified for the State. Consistent with their refusal to cooperate with police during the investigation, none of the Waffle House customers testified. Appellant testified in his own defense and steadfastly denied exposing his penis at the restaurant window. R. 36, l. 14 – 37, l. 22.

At trial the police introduced Keeble's 911 call reporting the incident and the video surveillance from the Waffle House. R. 17, l. 22 – 18, l. 20. The video footage did not capture Appellant as he stood at the window. R. 15, l. 14-24.

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).

Discussion

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. Appellant'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.

Appellant’s actions were, in the light most favorable to the State, a statement of disdain and disrespect for the violent crowd at Waffle House. R. 44, l. 1 – 49, l. 5. Moreover, his expressive conduct was clearly understood that way by the crowd, none of whom thought the incident warranted criminal investigation. *Id.*; *see also* R. 7, l. 2 – 21, l. 13.

Further, S.C. Code Ann. § 16-15-130 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 Appellant'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 Appellant's behavior was not intended – or received – in any sexual way, nor did it have any kind of sexual or prurient connotation. R. 61, ll. 2-7. The State had the burden of proving that Appellant was acting solely out of maliciousness. *State v. Bryant*, 316 S.C. 216, 447 S.E.2d 852 (1994) (reversing conviction where evidence was insufficient to establish defendant intended to “wilfully” and “maliciously” damage patrol car by throwing police officer into it during struggle.).

It did not. The record shows that Appellant was the victim of harassment and threats from a drunken mob. Appellant was outnumbered. Waffle House employees made no effort to protect Appellant from mob violence and, in fact, called police to have Appellant arrested prior to the Appellant allegedly exposing his penis to the Waffle House. R. 7, l. 2 – 21, l. 13. That is the context in which Appellant was acting when he exposed himself. *Johnson*, 491 U.S. at 414.

Expressive, or symbolic, speech is intended to convey a particularized message. Appellant's testimony demonstrated that he intended the message for the mob that had just thrown him out of Waffle House. R. 12, ll. 1-15. The mob, in turn, received and understood it. 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 S.C. Code Ann. § 16-15-130.

CONCLUSION

For the reasons set forth herein, this Court should reverse the convictions of Appellant Clarence Abney and direct that a judgment of not guilty be entered in this matter on the charge of indecent exposure.



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of August, 2017.

STATE OF SOUTH CAROLINA

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Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

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CLARENCE DUANE ABNEY,

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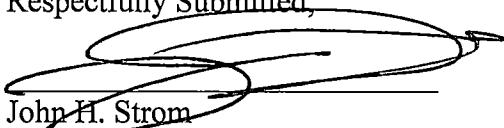
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Clarence Abney states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Eugene C. Griffith, which was held on November 17, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Clarence Abney.

Respectfully Submitted,



John H. Strom
Appellate Defender
ATTORNEY FOR APPELLANT

This 23rd day of August, 2017.

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Transcript of November 17, 2016 General Sessions Trial; and
- (3) State's Exhibit 1.

I certify that this designation contains no matter which is irrelevant to this appeal.

August 23, 2017



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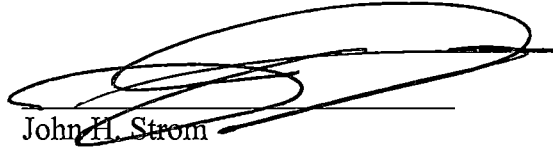
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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 23, 2017.



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