STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

TRAVIS N. BUCK,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court correctly affirmed the magistrate's denial of directed verdict on the charge of unlawful use of a telephone where Buck'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 (Appellant's Issues I, II, and III).

STATEMENT OF THE CASE

Appellant 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. Appellant appealed to Common Pleas. After argument was heard on August 1, 2011, the Honorable Alexander S. Macauley affirmed the conviction and sentence.

STATEMENT OF FACTS

Appellant 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, Appellant 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 Appellant's arrest. R. p. 4.

ARGUMENT

The circuit court correctly affirmed the magistrate's denial of directed verdict on the charge of unlawful use of a telephone where Buck'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 (Appellant's Issues I, II, and III).

Buck argues 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).[1] However, 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

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[1] Buck also raised the issue in circuit court that the trial court erred in denying Buck's requests to charge the jury on Brown; however that issue is not raised in his brief and therefore is abandoned on appeal. Fields v. Fields, 342 S.C. 182, 191, 536 S.E.2d 684, 689 n.8 (Ct. App. 2000) (finding appellant included issue in the statement of issues on appeal, but failed to argue the issue in the body of the brief); State v. Bray, 342 S.C. 23, 535 S.E.2d 636, 639 n.2 (2000) (a reviewing court should not consider an issue that is not presented on appeal); see also State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (finding the argument was so conclusory that it was deemed abandoned).

any intent but to harass, and is not protected speech. Further, evidence presented indicates Blaine did not have law enforcement powers. The issue is therefore one, even under Brown, that was properly presented to the jury.

"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." Cantwellv. 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 statue 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. Concerning this dispute concerns Buck's authority to hunt, 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 meet[2], 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.

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[2] 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.

The evidence in the light most favorable to the State supports conviction. Accordingly, the trial court did not err in denying the motion for directed verdict.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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November 13, 2012

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CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

This 13th day of November, 2012

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