ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

Michael G. Nettles, Jr., Circuit Court Judge

RECEIVED
SEP 22 2017
SC Court of Appeals

Appellate Case No. 2016-002010

THE STATE,

Respondent,

v.

GEORGE HOLMES,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

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

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

Post Office Box 1880
Bluffton, SC 29526
(843) 255-5880

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

Michael G. Nettles, Jr., Circuit Court Judge

Appellate Case No. 2016-002010

THE STATE,

Respondent,

v.

GEORGE HOLMES,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

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

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

Post Office Box 1880
Bluffton, SC 29526
(843) 255-5880

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

ARGUMENT 8

The trial court properly denied Appellant's motion for a directed verdict for the offense of indecent exposure where the Beaufort County Detention Center's booking area was a sufficiently public place to satisfy the statute for indecent exposure, and where the State presented direct evidence and substantial circumstantial evidence to support the willful and malicious intent behind Appellant's exposure of his person.

CONCLUSION 17

TABLE OF AUTHORITIES

Cases:

Commonwealth v. Hay, 987 S.W.2d 792 (Ky. 1999) 12

Green v. Smith, 149 S.C. 303, 147 S.E. 333 (1929) 15

Jackson v. Virginia, 443 U.S. 307 (1979) 9

Kerbersky v. N. Mich. Univ., 582 N.W.2d 828 (Mich. 1998) 12

Messina v. State, 130 A.2d 578 (Md. 1957) 12

Op. S.C. Att'y Gen., 2007 WL 3244890 (S.C.A.G. Aug. 22, 2007) 12

People v. Giacinti, 358 N.E.2d 934 (Ill. App. Ct. 1976) 12

People v. McNamara, 585 N.E.2d 788 (N.Y. 1991) 12

State v. Bass, 242 S.C. 193, 130 S.E.2d 481 (1963) 17

State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016) 9

State v. Black, 545 S.W.2d 617 (Ark. 1977) 12

State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011) 9

State v. Cherry, 348 S.C. 281, 559 S.E.2d 297 (Ct. App. 2001) 15

State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014) 9, 18

State v. Evans, 202 S.C. 463, 25 S.E.2d 492 (1943) 9, 18

State v. Gilstrap, 205 S.C. 412, 32 S.E.2d 163 (1944) 9, 18

State v. Lewis, 403 S.C. 345, 743 S.E.2d 124 (Ct. App. 2013) 15

State v. McCurtain, 471 S.W.3d 380 (Mo. Ct. App. 2015) 14, 15

State v. Narcisse, 833 So.2d 1186 (La. Ct. App. 2002) 12

State v. Pearson, 415 S.C. 463, 783 S.E.2d 802 (2016) 9

State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990) 9

State v. Robinson, 310 S.C. 535, 426 S.E.2d 317 (1992) 9

State v. Weeks, 185 S.C. 277, 194 S.E. 12 (1937) 15

State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006) 8, 13

State v. Williams, 280 S.C. 305, 312 S.E.2d 555 (1984) 10

Other Authorities:

S.C. Code Ann. § 16-15-130 8

STATEMENT OF ISSUE ON APPEAL

The trial court properly denied Appellant's motion for a directed verdict for the offense of indecent exposure where the Beaufort County Detention Center's booking area was a sufficiently public place to satisfy the statute for indecent exposure, and where the State presented direct and substantial circumstantial evidence to support the willful and malicious intent behind Appellant's exposure of his person.

STATEMENT OF THE CASE

A Beaufort County Grand Jury indicted Appellant for indecent exposure on April 30, 2015. (R. 163-64). On July 26, 2016, Appellant proceeded to trial before the Honorable Michael G. Nettles, Jr., and a jury. Jessica Saxon, Esquire, and Kate Cappelman, Esquire, represented Appellant, and Assistant Solicitors Dustin Whetsel and Melanie Graham represented the State. The jury found Appellant guilty of indecent exposure. (R. 154, lines 13–17). Judge Nettles sentenced Appellant to three years' imprisonment suspended upon the service of one year's imprisonment and five years of probation. Appellant was also ordered to register as a sex offender. (R. 160, lines 7–23).

On September 22, 2016, a hearing was held in which Judge Nettles reconsidered the requirement that Appellant register as a sex offender. On September 29, 2016, Judge Nettles issued an order that revised and removed that requirement.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On April 6, 2016, Appellant was arrested and incarcerated at the Beaufort County Detention Center. Appellant is reportedly mentally ill, and, on the night of his incarceration, stated that he was hearing voices and wanted to harm himself. (R. 43, lines 21–25). Accordingly, he was placed on suicide watch. (R. 43, lines 16–20). In accordance with suicide watch precautions, Appellant was placed in a holding cell, which is monitored personally every fifteen minutes and by computer monitor continuously. (R. 78, lines 12–24; R. 79, lines 22–25). While in the holding cell, Appellant exposed his penis to the corrections officer who was monitoring him and was subsequently arrested and charged with indecent exposure. (R. 163-64).

Pretrial, Appellant moved to dismiss the indictment, claiming that the Beaufort County Detention Center was not a public place under the plain meaning of the indecent exposure statute and was not intended by the Legislature to fall within the purview of the statute. (R. 2, lines 1–25, R. 3, lines 1–15). Defense counsel argued that the cell in the booking area of the Detention Center was not sufficiently public because it was a "small private place" and the cell was further sequestered from the public via the facility's security measures. (R. 2, lines 13–20). The assistant solicitor argued this case presented an issue that is new and entirely novel to South Carolina jurisprudence and, thus, relied on cases from outside South Carolina's courts when arguing that the detention center is a public place. (R. 4–5). Though defense counsel raised the failed attempt of the South Carolina Legislature to statutorily define a public place and the fact that Officer DeSantis, as a corrections officer, was not a member of the public, the trial court denied the pretrial motion to dismiss. (R. 11; R. 12–13). The trial court found that "the jail is indeed a public place for purposes of the statute" and noted the possibility that other people in

addition to guards could be subjected to viewing Appellant's conduct. (R. 11, lines 4–6; R. 15, lines 12–17).

The State first called Investigator Jeff Dowling of the City of Beaufort Police Department, who was assigned Appellant's case for investigation. (R. 27, line 18–R. 28, line 18). As part of his investigation, he interviewed Officer Jessica DeSantis, the corrections officer who was the victim of the incident. (R. 29, lines 4–18). He also subpoenaed video security footage of the holding cell as well as the surrounding booking area. (R. 29, line 9–R. 31, line 4). He testified that admission into the booking area requires passing through a metal detector and through two secured doors that are locked/unlocked from within the facility. (R. 31, lines 15–20; R. 39–41). Dowling testified he took some photographs of the booking area and holding cell and described the several-inch wide crevice between the sliding door and the door jamb. (R. 34, line 2–R. 36, line 25). The photographs were admitted into evidence.

Officer Jeff Vortisch, who was a training lieutenant at the detention center during the time of the incident, testified next. (R. 47, line 18–R. 48, line 24). He described the holding cells that were designed for occupation by a single person when on medical monitoring or suicide watch. (R. 57, lines 1–23; R. 58, lines 8–12). The cells contain a metal toilet/sink combination, a bunk, and the camera by which the inmate's activities are monitored. (R. 53, lines 12–18; R. 66, lines 18–22). The inmates may also be monitored through a small window in the cell's steel door. (R. 58, lines 13–25). Due to the cell's design, the steel door slides closed and, when closed, the door does not sit flush with the cell's doorframe. (R. 54, line 17; R. 55, line 4). He testified that the gap between the door and the frame was a small gap that was not large enough to reach through. (R. 67, lines 11–23). He testified that access to the inside of the detention center is restricted via security protocols but that everybody who gets arrested goes

through booking and that multiple personnel are in and out all day. (R. 59, line 21–R. 60, line 22; R. 65, lines 7–11). From the holding cell, the booking area can be seen in almost its entirety. (R. 61, lines 2–7). He opined that if someone were to look in through the gap, at least a partial view of the cell would be visible. (R. 73, lines 17–20).

On the evening that Appellant was housed in the holding cell, Officer Jessica DeSantis was working as the booking officer at the Beaufort County Detention Center. (R. 77). Officer DeSantis testified that as booking officer, her duties included conducting counts of inmates in the booking area, checking counts of other officers, serving dinner to the inmates in the holding cells and medical cells, doing suicide watches and regular watch tours, assisting others with their watch tours, and helping to transfer or book people into medical. (R. 78, lines 3–24). She testified that Appellant was under her watch and she was responsible for physically checking on him every fifteen minutes by going to look into his cell and also for checking on him via the monitors at the booking desk, just as with any inmate on suicide watch. (R. 79, lines 22–25; R. 80, lines 1–4). According to Officer DeSantis, Appellant began harassing her by calling her by her first name, which is an act forbidden to inmates. (R. 87, lines 2–5). This continued throughout most of the shift and escalated to Appellant calling Officer DeSantis "a cunt, a coke head, a dope fiend, a slut, a whore; pretty much anything that would come to mind . . . ." (R. 87, lines 6–8). Appellant was also banging on the cell door and doing "anything to draw attention to himself, basically." (R. 88, lines 7–9). Though attempting to ignore Appellant, Officer DeSantis was still able to see into Appellant's cell from the booking desk at which she was working. (R. 88, lines 11–13). Appellant's head blocked the cell window and Appellant intentionally attempted to obscure the camera's field of vision, but Officer DeSantis was still capable of noting Appellant's activities through the door's gap when she walked past the cell. (R. 88, lines

17–25; R. 89, line 1). Officer DeSantis was able to see through the gap that Appellant had his foot on his bunk and was facing the crack in the door, which permitted her to see that Appellant had his penis in his hand and was moving the hand in an up-and-down motion. (R. 87, lines 11–15). This was visible as Officer DeSantis walked by the cell, and she stated that it was made to be very obvious, whereas every other inmate, in her experience as a correctional officer, had taken care to be more modest as they masturbated. (R. 89, line 25; R. 90, lines 1–2; R. 95, lines 1–5). Officer DeSantis summed up the incident by explaining that Appellant was masturbating while calling her name and screaming obscenities at her, and that she saw Appellant's penis multiple times. (R. 89, lines 17–18; R. 93, line 3). Appellant also told Officer DeSantis that he knew where she lived and was going to come visit her at her home. (R. 92, lines 16–18). The incident was contemporaneously documented in an incident report that Officer DeSantis authored. (R. 98, lines 1–3).

During the time Appellant was harassing Officer DeSantis, a nurse was also present in the booking area, in addition to the detention center officers, other inmates, and other arrestees who were waiting to be booked. (R. 85, line 15–R. 86, line 1). Officer DeSantis testified that despite the extensive security protocols that control access to the detention center, frequent visitors to the booking area of the detention center include members of the public such as attorneys, police officers, and maintenance crews. (R. 81, lines 13–17). Nurses are also frequently in the booking area in order to administer medications because "medical" is also in the booking area. (R. 85, lines 3–4, 25; R. 86, lines 1–3). Additionally, people who are being booked do not cease to become members of the public until they are out of police custody and are in a detention center uniform and registered "on the board" in the booking area. (R. 81, lines 6–9).

Officer DeSantis testified that Appellant was held in cell IH-1. (R. 79, lines 8–14). By design, a gap is left between the door and the doorframe, which is of sufficient size that inmates have been able stick their fingers into the space. (R. 91, lines 15–20). Officers have reportedly been assaulted through this gap. (R. 91, lines 18–20).

At the close of the State's evidence, Appellant moved for a directed verdict and renewed all motions. (R. 106, lines 3–7). He argued first that the jail was not a public place for satisfaction of the statutory definition of indecent exposure. (R. 106, lines 8–20). Second, he argued there was no evidence of actual exposure. (R. 107, lines 2–7). When denying the motion for directed verdict, the trial judge stated (regarding Officer DeSantis' statement that she had seen Appellant's penis), "I find that there is indeed a scintilla of evidence just by virtue of the fact that she said she saw it. I think that is clearly a legitimate question of fact that needs to be resolved by the jury. With regard to whether it is a public place or not and with regard to whether or not she saw his penis and whether or not he intentionally displayed his penis to her." (R. 119, lines 23–25; R. 120, lines 1–5). Ultimately, the jury found Appellant guilty of indecent exposure, and Judge Nettles sentenced him to three years' imprisonment suspended upon the service of one year's imprisonment and five years of probation. (R. 154; R. 160).

ARGUMENT

The trial court properly denied Appellant's motion for a directed verdict for the offense of indecent exposure where the Beaufort County Detention Center's booking area was a sufficiently public place to satisfy the statute for indecent exposure, and where the State presented direct and substantial circumstantial evidence to support the willful and malicious intent behind Appellant's exposure of his person.

Appellant contends the circuit court erred in denying his motion for a directed verdict on the charge of indecent exposure. Appellant contends that the holding cell at the Beaufort County Detention Center is not a public place for purposes of S.C. Code Ann. § 16-15-130 as intended by the Legislature or as defined by the Supreme Court, and that the State failed to present any direct or circumstantial evidence that Appellant willfully and maliciously exposed his person or intended to expose his person. However, the circuit court correctly denied Appellant's motion, as there was sufficient evidence to require the matter to go to a jury for determination and the holding cell was properly deemed to be a public place. As a result, the circuit court did not abuse its discretion in denying Appellant's motion for directed verdict and allowing the case to proceed to the jury for consideration. This Court should affirm.

It is axiomatic that in ruling on a motion for a directed verdict, the trial court is concerned only with the existence of evidence, not its weight. *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. *Id.* "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury." *Id.* at 292–93, 625 S.E.2d at 648. Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. *State v. Robinson*, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any

rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). The task of the trial court is to simply determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016). The reviewing court should affirm if in viewing the evidence in the light most favorable to the State, "the evidence could induce a reasonable juror to find [the defendant] guilty." *See State v. Pearson*, 415 S.C. 463, 474, 783 S.E.2d 802, 807 (2016).

Further, an appellate court will not overturn a decision made by the trial court that was based on harmless error, where an error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained and where it appears from the record that the conviction is clearly correct on the merits, that the accused had a fair trial, and where no other verdict could reasonably have been returned on the evidence. *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014); *State v. Gilstrap*, 205 S.C. 412, 32 S.E.2d 163 (1944); *State v. Evans*, 202 S.C. 463, 25 S.E.2d 492 (1943). Determining if an error is harmless is not subject to a definite rule, but is assessed in light of the circumstances of the case and if, in this light, the error was not unduly prejudicial and material. *State v. Byers*, 392 S.C. 438, 447–48, 710 S.E.2d 55, 60 (2011) (quoting *State v. Reeves*, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990)).

a. The Beaufort County Detention Center is a sufficiently public place to satisfy the indecent exposure statute

Appellant contends that the Beaufort County Detention Center's booking area is not a public place as required under the indecent exposure statute. To support his contention, Appellant cites *State v. Williams*, which defines a public place as follows:

> [a] place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public. Any place so situated that what passes there can be seen by any considerable number of persons, if they happen to look. Also, a place in which the public has an interest as affecting the safety, health, morals and welfare of the community. A place exposed to the public, and where the public gather together to pass to and fro.

State v. Williams, 280 S.C. 305, 306–07, 312 S.E.2d 555, 556 (1984).

Appellant places a particular emphasis on the phrases: (1) "[a] place to which **the general public has a right to resort**," (2) "a place visited by many persons and usually **accessible to the neighboring public**," and (3) "**[a] place exposed to the public, and where the public gather together to pass to and f[ro].**" (App.Br.11).

Appellant seems to claim that, because the Beaufort County Detention Center's booking area does not adhere to every facet of this definition, then the booking area cannot be a public place. This is, however, misguided. For the purposes of the indecent exposure statute, the booking area of the Beaufort County Detention Center is a public place, as the booking area adheres to two different facets of the *Williams* definition of "public place": "Any place so situated that what passes there can be seen by any considerable number of persons, if they happen to look" and "Also, a place in which the public has an interest as affecting the safety, health, morals and welfare of the community." Each of these is discussed below.

The booking area of the detention center and, more specifically, the holding cell therein both fit within the definition of "any place so situated that what passes there can be seen by any considerable number of persons, if they happen to look." A considerable number of people pass through the booking area, including corrections officers, attorneys, maintenance staff, nurses, inmates who are working, and anyone being booked. Though the area is undoubtedly well-

secured and inaccessible to a person without authorization, there are a great many people who pass through the area on a daily basis who could see what passes there if they happen to look. The holding cell, though not accessible to as many people as the booking area, is also a public place. The key aspect of the definition is "if they happen to look": though the holding cell is not as open as the booking area itself, its interior is easily visible by anyone who would look inside. The holding cell's interior is visible to a "considerable number of persons" both via the window at the front and through the several-inch crack in the door. While it is true that Appellant blocked the window with his head during the time in which he exposed himself, his activity was, by his very design, entirely visible through the crack between his cell door and the wall. Though this is a smaller area through which to view the cell, the record shows that, if someone looked through the crack, the inside of the cell was definitely visible. Appellant's masturbation was entirely visible to Officer DeSantis when she looked through the cell door as she passed by, and anyone else who passed and looked could have also seen the activity. Because the inside of the holding cell and whatever occurs therein is visible to any number of persons who pass by and may look through both the cell window and the crack in the door, the cell is also a sufficiently public place for the purposes of the indecent exposure statute.

The detention center is also a public place by virtue of being a place "in which the public has an interest as affecting the safety, health, morals and welfare of the community." As a place in which those who commit crimes are removed from society and through which the general public is protected from the dangers of those individuals, a detention center most certainly affects the safety, health, morals, and welfare of the community in that it protects society from the criminal element. Everyone's safety, health, and welfare are affected in a beneficial manner when a criminal is removed from the streets and housed in a facility away from the community,

and the morals of the community are also protected by this same removal. As such, the public has a definite interest in a detention center as affecting the safety, health, and welfare of the community. Because of this, a detention center is a public place, and, by virtue of being within the detention center and also serving the same functions, the booking area of the detention center and the holding cell are also public places for purposes of the indecent exposure statute. Accordingly, the trial judge did not err in determining both the booking area of the detention center and the holding cell were public places.

Though the South Carolina courts have never adjudicated the matter of whether or not a detention center is a public place for purposes of indecent exposure, other jurisdictions have definitively held a detention center or prison to be sufficiently public for indecent exposure. In general, the majority of jurisdictions, when determining if a prison is a public place, apply a test that identifies a place as public if activity conducted there could reasonably be perceived by others, even if it is not open to all members of the public. *See Commonwealth v. Hay*, 987 S.W.2d 792, 796 (Ky. 1999) ("[T]he jail is public property provided at the public expense for public uses . . . ."); *Kerbersky v. N. Mich. Univ.*, 582 N.W.2d 828, 832–33 (Mich. 1998) (prisons are public buildings); *People v. McNamara*, 585 N.E.2d 788, 793 (N.Y. 1991); *State v. Black*, 545 S.W.2d 617, 619 (Ark. 1977) (finding jail was a public place within the meaning of the public sexual indecency statute); *Messina v. State*, 130 A.2d 578, 579–80 (Md. 1957); *State v. Narcisse*, 833 So.2d 1186, 1191–92 (La. Ct. App. 2002); *People v. Giacinti*, 358 N.E.2d 934, 937 (Ill. App. Ct. 1976) (concluding that a prison cell is a public place); *Op. S.C. Att'y Gen.* 2007 WL 3244890 (S.C.A.G. Aug. 22, 2007) (supporting the conclusion that at least parts of a prison or detention center may be considered a public place). Thus, the trial court's conclusion that the booking area and holding cell of the detention center are public places within the meaning of

section 16-15-130, the indecent exposure statute, comports with both logic and other jurisdictions. The detention center and the holding cell are both "places so situated that what passes there can be seen by any considerable number of persons, if they happen to look."

b. There was direct evidence and substantial circumstantial evidence to support the willful and malicious intent behind Appellant's exposure of his person

Appellant contends there was no direct or circumstantial evidence presented by the State at trial to support the charge that Appellant willfully and maliciously exposed his person or intended to expose his person. A central part of Appellant's argument is that the trial judge improperly applied the civil "scintilla of evidence" standard in his determination of whether or not there was sufficient evidence of Appellant's willful and malicious intent to deny the motion for directed verdict. (App.Br.10). Appellant contends this lower standard inappropriately contributed to the denial of directed verdict. The State concedes that the proper standard of review for directed verdict is whether any direct or substantial circumstantial evidence exists. *See State v. Weston*, 367 S.C. 279, 292–93, 625 S.E.2d 641, 648 (2006) ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury."). However, in this case there was direct evidence in the form of Officer DeSantis's testimony that Appellant exposed his penis while calling her derogatory names. Thus, although technically not the proper standard of review, the trial judge's mistaken reliance on a "scintilla of evidence" was a distinction without a difference. The State presented direct evidence and substantial circumstantial evidence sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt of willfully and maliciously exposing his person.

Though South Carolina courts have yet to grapple with the issue of proving the element of intent in a case of an inmate's indecent exposure and masturbation, a Missouri court has done

just this. In *State v. McCurtain*, 471 S.W.3d 380, 383 (Mo. Ct. App. 2015), an inmate appealed his conviction for sexual misconduct, which is similar to South Carolina's indecent exposure offense in that it occurs when a person exposes his/her genitals under circumstances which he or she knows is likely to cause affront or alarm. Here, the intent element likewise encompasses the intent to cause affront or alarm. "Willfully and maliciously," as found in South Carolina's indecent exposure statute, is used to describe the actions of a person that are intended to harm another person. McCurtain contended that the State had not presented sufficient evidence of his intent to cause affront or alarm, but the court found the circumstantial evidence of intent presented was sufficient to permit a reasonable juror to find the requisite intent to be present *McCurtain*, 471 S.W.3d at 383–84 (finding the circumstantial evidence included the facts that appellant waited to masturbate until the victim was at his cell, after he had requested something of her that required her presence and, once he had sufficiently positioned himself so that he was sure he could be seen by her, and that he failed to stop when the victim ordered him to do so). Though Missouri's statute and the exact intent required in *McCurtain* are not identical to Appellant's case, the circumstantial evidence sufficient to prove the element of intent is similar.

Appellant's actions in exposing himself were most certainly willful and malicious, as they were intended to cause harm. "[I]ntent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred. 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." *State v. Lewis*, 403 S.C. 345, 358, 743 S.E.2d 124, 131 (Ct. App. 2013) (Few, C.J., dissenting) (quoting *State v. Cherry*, 348 S.C. 281, 288, 559 S.E.2d 297, 300 (Ct. App. 2001)). A willful act is one that is voluntary and intentional, and a malicious act is one

that is intentional and wrongful and is performed without legal justification or excuse. *Black's Law Dictionary* 977, 1630 (8th ed. 2004). Furthermore, an act of malice inherently consists of the intent to commit harm and has been construed by South Carolina courts to encompass its more popular meaning: the act was done out of sheer meanness and a depraved spirit. *Green v. Smith*, 149 S.C. 303, 147 S.E. 333, 335 (1929); *State v. Weeks*, 185 S.C. 277, 194 S.E. 12 (1937).

Here, direct evidence in the form of Officer DeSantis's testimony that Appellant exposed his penis while standing directly in front of the crack in the door, while at the same time calling her names and threatening that he knew where she lived, indicates willful and malicious intent by Appellant. Circumstantial evidence further indicates that Appellant's exposure of his person to Officer DeSantis was entirely willful. Not only did Appellant position himself so that his penis could be seen by Officer DeSantis as she passed by his cell, but he also called out to her repeatedly, not only beckoning her by name but also banging on his cell door while using expletives when referring to her in order to draw her attention to him. At one point, according to testimony and as corroborated by video evidence from inside Appellant's cell, Appellant placed a leg up on his bunk to provide an even clearer view of his penis to Officer DeSantis. Also, before Appellant took these actions, he attempted to cover the camera in his cell. This displays clear forethought and knowledge that the exposure was intended. Were the Appellant to masturbate without intending for anyone to see and without any wrongful intent, he would have no need to obstruct the camera's view. Officer DeSantis testified that masturbation is a regular occurrence in jail, but that inmates are generally modest about the act. Covering the camera before proceeding to position himself at the door's gap demonstrates Appellant fully intended to expose himself to Officer DeSantis, as covering the camera was the best way to insure that no

video evidence of his wrongful act would exist. Appellant's exposure of himself to Officer DeSantis, therefore, was voluntary and undoubtedly intentional; his conduct was willful.

Appellant's exposure of himself to Officer DeSantis was also malicious. The circumstantial evidence demonstrates that when exposing himself to Officer DeSantis, Appellant certainly intended to commit harm. The act was done out of meanness and a depraved spirit: not only was his extremely visible masturbation certain to be offensive and alarming, but his name-calling and the threats to Officer DeSantis were mean. When considered in the context of the explicitly obvious masturbation, Appellant's calling Officer DeSantis a "a cunt, a coke head, a dope fiend, a slut, a whore" and threatening her by telling her that he knew where she lived and was going to pay her a visit make quite clear that the act was borne out of meanness and an obvious intent to commit harm by alarming Officer DeSantis and threatening her. (R. 87, lines 6–8). The act, therefore, was malicious.

For all of these reasons, there is direct evidence and substantial circumstantial evidence to support the jury's finding that Appellant's exposure of himself was both willful and malicious, and the denial of the directed verdict was proper in light of the need to submit the matter to the jury.

Finally, the trial judge's use of the "scintilla of evidence" standard of review was harmless error. Here, questions of credibility necessitated the denial of the directed verdict motion and the submission of the matter to the jury. Substantial circumstantial evidence was presented to submit the case to the jury to determine whether Appellant exposed himself willfully and maliciously. The trial judge properly denied Appellant's motion for a directed verdict. Accordingly, Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

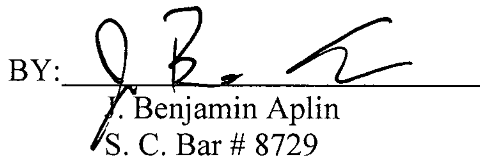
Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

BY:

J. Benjamin Aplin
S. C. Bar # 8729

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

ATTORNEYS FOR RESPONDENT

September 19, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

Michael G. Nettles, Jr., Circuit Court Judge

Appellate Case No. 2016-002010

THE STATE,

Respondent,

v.

GEORGE HOLMES,

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

JENNIFER ELLIS ROBERTS
Assistant Attorney General

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

RECEIVED
SEP 22 2017
SC Court of Appeals

BY:
J. Benjamin Aplin
S.C. Bar # 8729

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

ATTORNEYS FOR RESPONDENT

September 19, 2017