

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from York County

Honorable Brian M. Gibbons, Circuit Court Judge

RECEIVED

JUL 12 2018

SC Court of Appeals

RESPONDENT,

THE STATE,

V.

TONY MCKINLEY DILLARD,

APPELLANT

APPELLATE CASE NO. 2017-001895

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to direct a verdict on the charge of indecent exposure, since an inmate in his cell that has no window to the outside is not on the "property of others" within the meaning of South Carolina Code § 16-15-130?

STATEMENT OF THE CASE

Appellant was indicted at the April 6, 2017, term of the York County Grand Jury for indecent exposure pursuant to S.C. Code § 16-15-130. R. 116 – 117. His case was called to trial on September 6, 2017, before the Honorable Brian M. Gibbons. Geoff Dunn represented appellant. Erin Joyner was the assistant solicitor.

On September 7, 2017, the jury found appellant guilty. R. 108, ll. 4-9. Judge Gibbons sentenced appellant to three years imprisonment. R. 113, l. 19 – 114, l. 3.

This appeal follows.

STANDARD OF REVIEW

“A case should be submitted to the jury when the evidence is circumstantial ‘if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.’” State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). “Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt.” Id. “Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error.” Id. at 139, 708 S.E.2d at 776-777. “On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state.” Id. at 139, 708 S.E.2d at 777; see also State v. Hepburn, 406 S.C. 416, 429 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court’s denial of the directed verdict motion. Hepburn, 406 S.C. at 416, 429 S.E.2d at 409.

ARGUMENT

The court erred by refusing to direct a verdict on the charge of indecent exposure, since an inmate in his cell with no window to the outside is not on the “property of others” within the meaning of South Carolina Code § 16-15-130?

Relevant Facts

Prior to trial, defense counsel Dunn moved to quash the indictment on the basis that the York County Detention Center, and particularly the I-block where appellant was incarcerated, that did not even have windows so that a street or highway could be viewed, was not a public place or the “property of others” within the meaning of S.C. Code §16-15-130. R. 14, l. 19 – 16, l. 9. The assistant solicitor argued that appellant exposed himself to a female officer, Officer Davis, and he claimed the detention center was “the property of others” within the meaning of the statute. R. 16, l. 13 – 18, l. 9. The judge denied the motion to quash the indictment. R. 18, ll. 1-15.

Gary Davies was a “security captain” at the York County Detention Center. R. 31, ll. 13-25. He said there were twelve units within the detention center, and that an average unit held seventy-two inmates. There were two hundred and fifty security cameras within the detention center. R. 32, l. 9 – 33, l. 9.

Davies confirmed appellant was an inmate at the detention center on December 19, 2016. He was being held in housing unit I, cell number 42. R. 34, l. 14 – 35, l. 3. No one disputed the assertion by defense counsel that there were no windows to the outside on this unit.

Davies remembered that an alarm was activated -- a smoke detector -- or some other alarm that day. Davies said the windows on most *of the doors* to the internal cell block came down to about the inmate’s waist. R. 43, ll. 5-20. All of this would go to whether appellant

intentionally and maliciously exposed himself *if* a detention center was the “property of others” within the meaning of the statute. Davies testified the glass on the window in the cell doors was “tinted glass.” In addition, there was more “privacy” in the area of the toilet in the prison cell. R. 45, l. 13 – 47, l. 1.

Jasmine Davis was the correctional officer at issue. R. 48, l. 11 – 49, l. 21. She had worked for four and a half years in the Georgia Department of Corrections, and one and a half years at the York County Detention Center. R. 48, l. 11 – 49, l. 21. Davis testified on December 19, 2016, appellant exposed himself to her while he was in his prison cell behind closed doors, and while she walked in the internal cell block of the detention center. R. 50, l. 4 – 51, l. 23.

Davis remembered that a fire alarm had gone off, and that “whenever a fire alarm goes off we have to put all of the inmates up, the whole facility shuts down, we were going into the unit to put an inmate up that was out on rec.” Davis maintained that appellant intentionally stepped up on his bunk and the toilet so that she could see him while he exposed himself to her, and masturbated. R. 52, l. 2 – 53, l. 4. Davis said she told appellant: “He’d be written up and I walked out of the unit.” R. 53, ll. 2-4.

Davis confirmed that inmates in the detention center were locked down twenty-three hours a day, and were only allowed out of their cells for one hour to use the phone, walk around in the day room area or take recreation. R. 53, ll. 5-23; R. 55, ll. 3-10. Davis said appellant later “buzzed her,” and he asked her not to “write him up.” Davis responded that she had already “written him up.” Davis described herself as a loud prison guard who controlled the environment, and she was annoyed with appellant, not traumatized. R. 61, l. 10 – 62, l. 16.

On cross-examination, Davis admitted that she did *not* put in her report that appellant was standing on the toilet at the time he allegedly intentionally exposed himself to her. R. 65, l. 6 –

67, l. 9. Davis claimed she subsequently was advised to ensure her reports had enough details of an incident in them that the reader could understand the nature of her allegations. R. 66, ll. 6-12.

The state rested after Davis' testimony, and Defense Counsel Dunn moved for a directed verdict. Dunn argued that the detention center was not a public place or "the property of others" within the meaning of the indecent exposure statute, S.C. Code § 16-15-130. Counsel further argued appellant was locked in his cell, and this was his bathroom or bedroom since he was there involuntarily. R. 74, l. 22 – 76, l. 11.

The solicitor argued that appellant was "in our detention center" and that it was "the property of others." The solicitor maintained that appellant had purposely "positioned himself up high so that he can be seen by her," and he argued appellant was not intending to have privacy at the time. R. 76, l. 13 – 77, l. 14. Again, this unit, and appellant's cell had no window to the outside world or public. The judge denied the directed verdict motion just as he denied the motion to quash on this basis. R. 77, l. 15 – 78, l. 3

Discussion

A prison cell in a local detention center -- especially one that does not have a window to the outside world -- is not a place that is on the "property of others" within the meaning of S.C. Code §16-15-130. Further, it is elementary that criminal statutes must be strictly construed against the state, in favor of the defendant, and that any ambiguity therefore must be resolved in favor of the defendant. Hair v. State, 305 S.C. 77, 408 S.E.2d 332 (1991); Hinton v. S.C. Dep't. of Probation, Parole and Pardon Services, 357 S.C. 327, 339, 592 S.E.2d 335, 336 (Ct. App. 2004); State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980). The statute focuses on exposing oneself in a public place or within the view of any person on a street or highway, or on the property of others.

“Statutes of this nature are directed against acts committed openly and affecting the public, and in order to outrage public decency openly, the act must be openly done in public *instead of secretly with the public excluded from observing it.*” 67 C.J.S. Obscenity § 8. (emphasis added).

Defense counsel correctly argued that appellant was locked in his single jail cell with the door closed. In essence, this was appellant’s bedroom and bathroom where he was housed against his will. The door showed the prisoner from the waist up to the inside cell block guards, the glass on the door was tinted, and there was apparently greater “privacy” around the toilet.

The purpose of S.C. Code § 16-15-130 was to protect citizens from having to see the indecent exposure of another person. Respectfully, the legislature understood that prison guards were often going to see naked inmates, and that sexual acts occur in prisons. The statute sought to protect the public from indecent exposure, and the cardinal rule of statutory construction is to give effect to the intent of the legislature. S.C. Coastal Conservation League v. S.C. Dep’t. of Health and Environmental Control, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010); Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

“The legislature is presumed to have fully understood the meaning of the words used in the statute and, unless this meaning is vague or indefinite, intended to use them in their ordinary common meaning or their well-defined legal sense.” Pee v. AVM, Inc., 344 S.C. 162, 168, 543 S.E.2d 232, 235 (Ct. App. 2001).

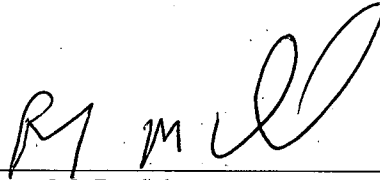
A trial court should direct a verdict where there is no direct or substantial circumstantial evidence of the defendant’s guilt. State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011). A judge should grant a directed verdict motion when the evidence merely raises the suspicion that the accused is guilty. State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-52 (1984).

Here, defense counsel correctly argued that appellant's prison cell, that did not even have a window to the outside world, was not the "property of others" within the meaning of the indecent exposure statute. There are laws protecting prison guards from inmates throwing fluids on them, or assaulting them. The indecent exposure statute, S.C. Code § 16-15-130, was not enacted to "protect" prison guards inside the prison walls from seeing undressed prisoners or undressed prisoners engaged in sexual acts with themselves or with others.¹ The trial court respectfully should have directed a verdict.

¹ Appellant understands the state must prove an inmate's actions were malicious but the legislature respectfully did not intend to protect prison guards from seeing exposed inmates or even inmates engaged in sex acts in the inner walls of the prison where the public cannot possibly see an exposed inmate.

CONCLUSION

By reason of the foregoing arguments, this Court should issue an order of acquittal.

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of July, 2018.

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Honorable Brian M. Gibbons, Circuit Court Judge

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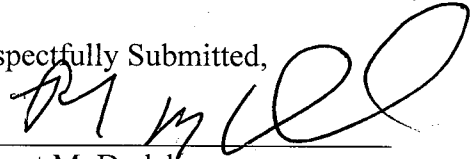
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tony McKinley Dillard states:

1. He is Chief 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 Brian M. Gibbons, which was held on September 7, 2017, 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 Tony McKinley Dillard.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 12th day of July, 2018.

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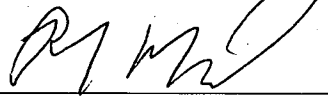
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment;
- (2) Entire trial transcript.
- (3) State's Exhibit #1 (Interview with Defendant)

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

July 12, 2018



Robert M. Dudek
Chief Appellate Defender

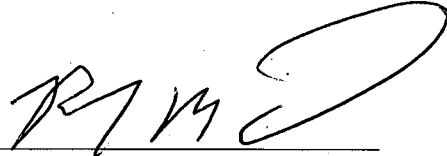
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Defense
Division of Appellate Defense
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Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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."

July 12, 2018.



Robert M. Dudek
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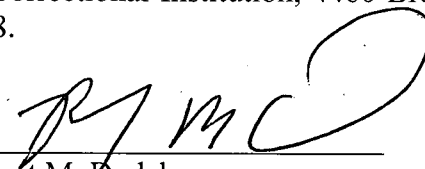
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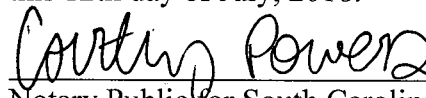
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Tony McKinley Dillard, 373859, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 12th day of July, 2018.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of July, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 2, 2027.