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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

Michael G. Nettles, Jr., Circuit Court Judge

Appellate Case No. 2019-001823

THE STATE,

Respondent,

v.

GEORGE HOLMES,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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The trial court correctly denied Petitioner's motion for a directed verdict because: (1) the booking area at the Beaufort County Detention Center was a public place within the meaning of the indecent exposure statute; and (2) the evidence supported a finding that Petitioner's conduct was willful and malicious.

STATEMENT OF THE CASE

A Beaufort County Grand Jury indicted Petitioner for indecent exposure on April 30, 2015. (R. 163-64). On July 26, 2016, Petitioner proceeded to trial before the Honorable Michael G. Nettles, Jr., and a jury. Petitioner was convicted and sentenced to three years' imprisonment suspended upon the service of one year's imprisonment and five years of probation. Petitioner was also ordered to register as a sex offender. (R. 154, lines 13–17; R. 160, lines 7–23).

On September 22, 2016, Judge Nettles convened a hearing on Petitioner's motion to reconsider the requirement that Petitioner register as a sex offender. On September 29, 2016, Judge Nettles issued an order that removed that requirement. Petitioner subsequently appealed his conviction and the Court of Appeals affirmed in an unpublished opinion filed on April 10, 2019. State v. Holmes, 2019-UP-133. Petitioner filed a petition for rehearing on April 25, 2019, arguing that: (1) the Court of Appeals did not address his argument that there was no evidence showing his conduct was willful and malicious; and (2) the Court of Appeals wrongfully rejected his argument that the incident did not occur in a public place. The Court of Appeals issued an amended opinion on August 28, 2019, wherein it expressly rejected Petitioner's argument that the State failed to produce any evidence of willful and malicious conduct. State v. Holmes, 2019-UP-133. Petitioner filed a second petition for rehearing on September 12, 2019, which the Court of Appeals denied on September 20, 2019. This petition for writ of certiorari follows.

STATEMENT OF FACTS

On April 6, 2016, Petitioner was arrested and incarcerated at the Beaufort County Detention Center. Due to threats of self-harm, Petitioner was placed on suicide watch in a holding cell in the jail's booking area. (R. 43, lines 16–25). While in the holding cell, Petitioner verbally abused, threatened, and exposed his penis to the corrections officer who was monitoring him and was subsequently arrested and charged with indecent exposure. (R. 89, lines 17–18; R. 93, lines 16–18).

Before trial, Petitioner moved to dismiss the indictment, claiming his holding cell was not a public place within the meaning of the indecent exposure 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 trial court denied the motion to dismiss, holding 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 have seen Petitioner's conduct. (R. 11, lines 4–6; R. 15, lines 12–17).

The victim, Jessica DeSantis, testified at trial that she was working as the booking officer at the jail. (R. 77). Her duties included conducting counts of inmates in the booking area, serving dinner to the inmates in the holding cells, doing suicide watches and regular watch tours, and assisting others with their watch tours. (R. 78, lines 3–24). She testified Petitioner 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, Petitioner 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 Petitioner 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). Petitioner 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 Petitioner, Officer DeSantis was still able to see into Petitioner's cell from the booking desk where she was working. (R. 88, lines 11–13). Petitioner blocked the cell window with his head and attempted to obscure the camera's field of vision, but Officer DeSantis was still capable of noting Petitioner's activities through the door's gap. (R. 88, lines 17–25; R. 89, line 1). Officer DeSantis was able to see through the gap that Petitioner had his foot on his bunk and was facing the crack in the door, which permitted her to see that Petitioner 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 if 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 Petitioner was masturbating while calling her name and screaming obscenities at her, and that she saw Petitioner's penis multiple times. (R. 89, lines 17–18; R. 93, line 3). Petitioner 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).

While Petitioner was harassing Officer DeSantis, a nurse was present in the booking area, along with other detention center officers, inmates, and 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 Petitioner 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 large enough that inmates can 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, Petitioner 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 under 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 Petitioner'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).

STANDARD OF REVIEW

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 a 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).

ARGUMENT

The trial court correctly denied Petitioner's motion for a directed verdict because: (1) the booking area at the Beaufort County Detention Center was a public place within the meaning of the indecent exposure statute; and (2) the evidence supported a finding that Petitioner's conduct was willful and malicious.

Petitioner contends the circuit court erred by denying his motion for a directed verdict on the charge of indecent exposure. Petitioner 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,[1] and that the State failed to present any direct or circumstantial evidence that Petitioner willfully and maliciously exposed his person or intended to expose his person. The argument is meritless. The circuit court correctly refused to direct a verdict because the holding cell was a public place and the evidence showed Petitioner intentionally masturbated in front of a jail guard while threatening and verbally abusing her. Certiorari should be denied.

a. The Beaufort County Detention Center booking area is a public place.

Petitioner contends that the Beaufort County Detention Center's booking area is not a public place under the indecent exposure statute. To support his contention, Petitioner cites *State v. Williams*, where this Court adopted the Black's Law Dictionary definition of "public place":

> [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.

[1] "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. Code Ann. § 16-15-130(A)(1).

State v. Williams, 280 S.C. 305, 306–07, 312 S.E.2d 555, 556 (1984) (internal citations omitted).[2] Petitioner's argument boils down to the claim that because any person off the street cannot walk into the jail's booking area at pleasure, it cannot be a public place. He further claims that being subjected to this kind of conduct is "part of a correctional officer's job." (Petition at 17). This argument is meritless.

Common sense dictates that a public jail is a public place. Its entire reason for existing is to serve a vital public function— to protect the public and facilitate the administration of justice. It is inhabited by inmates—individuals temporarily stripped of freedom and held under strict state supervision with virtually no privacy. It is essentially the opposite of private property. In the language of *Williams*, it is a place "in which the public has an interest as affecting the safety, health, morals and welfare of the community." *Id.* Put more plainly, it is a place completely public in nature.

In particular, the booking area where this crime occurred meets the factors laid out in *Williams*. The booking area and 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." *Id.* 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 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

[2] The *Williams* court held as a matter of law that the lobby of the "Austin Wilkes Society Home," an apartment building "assisted financially by United Way or other charitable contributions and periodically receive governmental grants," was a public place. State v. Williams, 280 S.C. 305, 307, 312 S.E.2d 555, 556 (1984).

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 via the window at the front and through the several-inch crack in the door. This is particularly true when an inmate positions himself just so as to make himself visible to those outside the cell. Petitioner'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 him. 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 public place for the purposes of the indecent exposure statute.

Though South Carolina courts have not expressly decided the question, other jurisdictions have held that a detention center or prison is a public place in the context of 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 ruling comports with both logic and the law in other jurisdictions. Petitioner has not cited a single case to the contrary. The trial judge correctly held the booking area of the jail was a public place.

b. The State presented evidence sufficient to support a finding that Petitioner's conduct was willful and malicious.

Petitioner claims there was no direct or circumstantial evidence presented at trial to support the charge that Petitioner willfully and maliciously exposed his penis. Petitioner argues the trial judge improperly applied the civil "scintilla of evidence" standard in his determination of whether there was any evidence of willful and malicious intent. Petitioner contends this "much lower" standard inappropriately contributed to the denial of directed verdict.

A trial court should refuse to grant a directed verdict motion if there is *any* direct or substantial circumstantial evidence from which a juror could find the defendant guilty. *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."). In this case there was direct evidence in the form of Officer DeSantis's testimony that Petitioner intentionally exposed his penis while calling her derogatory names and threatening to come to her house. The trial judge's reference to the directed verdict standard as a "scintilla of evidence" was a distinction without a difference. The State presented direct evidence tending to show Petitioner willfully and maliciously exposed his penis to a jail guard. Accordingly, a directed verdict was improper.

Though South Carolina courts have not expressly addressed the issue of proving intent in a case of an inmate's indecent exposure and masturbation, a Missouri court has done just that. 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, consists of actions of a person that are intended to harm or offend 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 Petitioner 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 Petitioner's case, the circumstantial evidence of intent is very similar.

Petitioner's actions were clearly willful and malicious. "[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 Petitioner 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 malicious intent. Circumstantial evidence further indicates that Petitioner's exposure of his person to Officer DeSantis was willful. Not only did Petitioner 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 Petitioner's cell, Petitioner placed a leg up on his bunk to provide an even clearer view of his penis to Officer DeSantis. Also, before Petitioner took these actions, he attempted to cover the camera in his cell. This displays clear forethought and intent. 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 Petitioner 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. Petitioner's exposure of himself to Officer DeSantis, therefore, was voluntary and undoubtedly intentional, i.e. willful.

Petitioner's exposure of himself to Officer DeSantis was also malicious. Not only was his act certain to be offensive and alarming, but his name-calling and the threats to Officer DeSantis were mean-spirited. When considered in the context of the obvious masturbation,

Petitioner'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). It would be difficult to find a clearer example of express malice.

For all of these reasons, there is direct evidence and substantial circumstantial evidence sufficient to support a finding that Petitioner's exposure of himself was both willful and malicious. The evidence strongly supports the court's decision to deny Petitioner's motion for directed verdict. Certiorari should be denied.

CONCLUSION

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

Respectfully submitted,

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December 3, 2019

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

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Michael G. Nettles, Jr., Circuit Court Judge

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THE STATE,

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by delivering two copies of the same addressed to Lara M. Caudy, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589 Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.
This 3rd day of December, 2019.

Anne Mueller

Anne A. Mueller
Legal Assistant

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