

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

Appellate Case No. 2020-000533

The Honorable William A. McKinnon

Trial Court Case No. 2017GS4603041

The State,

Respondent,

v.

Jeffrey Jack Dauer,

Appellant.

INITIAL BRIEF OF APPELLANT

October 23, 2020

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STATEMENT OF ISSUES ON APPEAL

Did the trial judge err in not granting a directed verdict at the close of the state's case?

Did the trial judge err in not striking Stephanie Jarrett's none responsive statement as to the Appellant's state of mind.

Did the trial judge err in not charging the jury on a definition of indecent as a Appellant requested?

STATE OF THE CASE

The defendant was indicted on the charge of indecent exposure, violation of South Carolina Code Section 16-15-130. The grand jury indicted him on July 20, 2017 (Indictment). The state called the case for trial on March 10, 2020 and the trial ended with a guilty verdict on March 11, 2020. The Appellant was sentenced to probation. The Appellant was not placed on the sexual offender registry. (Sentencing Sheet). The Appellant timely appealed his sentence on March 20, 2020.

STATEMENT OF FACTS

The Appellant was charged with indecent exposure, violation of South Carolina Code Section 16-15-130 and the indictment was True Bill on July 20, 2017. The indictment alleged that the Appellant on April 21, 2017 did indecently expose himself in the City of York, Walmart parking lot. The indictment tracks the language of the statute. The State called the case to trial and presented the testimony of Sergeant Baker, III, Officer Williams, Officer Hawkins, Kassie Parker (Walmart Loss prevention) Michael Davis (Solicitors office IT person) and Stephanie Jarrett. The first three witnesses were officers who responded to the scene. Officer Baker and Officer Williams stopped the appellant, removed him from the car and waited until Officer Hawkins arrived. Officer Hawkins met with Stephanie Jarret for a few minutes, came to where the officer were detaining the placed the Appellant under arrest. Kassie Parker worked for Walmart in loss prevention and authenticated the unredacted video tapes which were used throughout the trial of this case. Mr. Davis works for the solicitor's Office of the 16th Judicial Circuit and spliced the various videos together and highlighted the Appellant's route in the

Walmart parking lot. Stephanie Jarrett was the individual who testified she saw the appellant and is the basis of the indecent exposure charge.

In summary, none of the officers saw the Appellant engage in any indecent conduct. The videos which were introduced as exhibits 1, 3, 4, 8, 9 and 10 reflect what occurred throughout the entirety of the officer's interaction with the appellant. The officers pulled the appellant over. He exited the vehicle. The officers testified that his shorts were loose and his drawstrings were untied. All of this interaction is visible on the videos. Exhibit 1, 3 and 4 are the videos of the Appellant's unredacted interaction with the officers. Exhibits 1 and 3 are the videos of the officers as they stop the Appellant. Of significance on these videos is that when they pull the Appellant over, his car windows are up on the front passenger side, the driver side and the rear windows are only partially down. The rear windows are also tinted. In addition, the videos show the clutter on the interior of the vehicle as it existed when the appellant was pulled over immediately after Ms. Jarrett states she observed Appellant. The videos also show the appellant with his shorts pulled up and a set of boxers underneath his shorts.

Exhibit 4 includes the contact and interview of Officer Hawkins with Stephanie Jarrett in the parking lot. In this initial exchange that lasted just a few minutes, she told the officer all the windows were down in Appellant's vehicle, the vehicle had been driving around numerous times and allegedly pacing her. At trial, the videos which were produced and played demonstrated that this is not accurate. The videos also show that Appellant's vehicle passed Ms. Jarrett while she was walking to her vehicle with her on the passenger side of the vehicle and the Appellant never slowed or stopped and he took less than 2 seconds to go past her.

The witness Kassie Edge provided the court with Exhibit 8 and Exhibit 9 which were the complete videos from the various locations at Walmart. Most importantly, Exhibit No. 10 is the compilation which Michael Davis put together. This video shows Appellant's vehicle highlighted as it traveled throughout the parking lot. Of note is that the vehicle is gone for approximately 6 to 7 minutes from the video. In addition, in studying the video, it is evident that the windows in the Appellant's vehicle on the passenger side were definitely up when he drove by Stephanie Jarrett. In addition, Stephanie Jarrett acknowledged at trial the Appellant was not pacing her or following her. (Transcript page 218, line 16 to line 25) The substance of Stephanie Jarrett's testimony as to the indecent exposure on direct is as follows:

- A. And when I glanced over I saw into his vehicle.
- Q. What did you see when you looked into the vehicle?
- A. His fully erect penis with his hand at the base.
- Q. His hand was at the base of what?
- A. Of his penis.

Transcript p .199

On redirect,

- Q. Ms. Jarrett, thorough which window did you see Mr. Dauer's penis?
- A. The front passenger.
- Q. And could you clearly see the penis from where you were standing?
- A. Yes

Transcript p. 220

On recross:

- Q. You were just asked if your saw his penis.
- A. Yes
- Q. was he doing anything.
- A. His hand was at the base of his penis.
- Q. Hand was at the base of his penis?
- A. And I could see his penis.
- Q. You could see his penis?

A. Yes.

Q. In that split-second that the car went by?

A. Yes

Q. You didn't see the water bottle? You didn't see the bag of clothes?

Ms. Holt: Objection, Asked and answered.

The court: Overruled

A. He made sure I could see it.

Q He made----your honor, I move to strike that. How could she know what he was doing?

The court: I'm going to overrule the objection.

Q. In that split second?

A. Yes.

In the entire trial, that was the entirety of the testimony as it relates to any type of exposure. All three exchanges dealt with the same split second incident. In prior testimony, it was brought out that the appellant was not pacing her. (Transcript., p. 218, lines 16 to 25). In addition, upon a review of the video tapes, Exhibit 10, it is clear the windows on Appellants car were up when he was pulled over and stopped. (Exhibit 1 and 3). When the Appellant drove past Ms. Jarrett, the windows were up (Exhibit 8 , 9 and 10. The time stamp to look at on the videos is 3:19:00 to about 3:23:00.) In addition, Mr. Davis substantiated the split second amount of time Ms. Jarrett was near the Appellant (Transcript pp. 187, line 24 to p.193 line 25.)

The Appellant made a motion for a directed verdict at the close of the state's case, Tr. p. 222 to p. 230.) The trial court denied the motion for a directed verdict. The trial court stated:

I'm going to deny the motion. The basis for the motion is- obviously, it's not my job to waive the evidence. It's whether the evidence exists or not, the evidence that exist Hass to be viewed in the light most favorable to the state.

There was testimony that his erect penis was visible and I think that, obviously, the state of mind is something that has got to be -- the jury's got to make a decision based on circumstantial evidence. People very rarely give direct evidence of their state of mind, and I think the fact that the defendant allegedly, according to the witness, was driving around in front of a busy store in the middle of the afternoon in broad daylight, I think that's enough to submit to the jury. (Transcript p. 230, lines 4 to 18)

Immediately prior to the court questioning the appellant as to his right to testify and after the charge conference, the appellant again raised the issue relating to a directed verdict and the trial judge again denied the same. (Transcript p. 241 line 10 to p. 243 line 16)

The Appellant rested and did not present any evidence. The Appellant requested the court to charge the following: " Indecent refers to the state or condition of being offensive, especially in a vulgar or sexual way, indecent means offensive, modest, obscene and unseemly." (Transcript, p 240, lines 19 to 24). (This request to charge was made during the charging conference.) State, Appellant and trial judge spent time discussing having a charge defining indecent but the trial judge declined to charge a definition of indecent. (Transcript, pp 238, line 1 to page 240 . line 24). The court charged the statutory elements of Indecent Exposure. (Transcript p. 268, lines 11 to 25).

The jury convicted the Appellant and the trial judge sentenced the Appellant.

ARGUMENT

I. THE TRIAL JUDGE ERRED IN NOT GRANTING A DIRECTED VERDICT AT THE CLOSE OF THE STATE'S CASE

The appellant timely made a motion for directed verdict at the close of the state's case. Appellant set forth that the state has failed to present substantial circumstantial evidence that appellant committed the crime charged. Appellant argued that the state's evidence merely created a suspicion that the appellate committed the crime and the suspicion was not sufficient to survive a directed verdict motion. In addition, Appellant argued that the court had to consider the existence of competent evidence because the physical evidence that existed which the state presented contradicted the Ms. Jarrett's statement that she saw his penis. Appellant submitted that the court must take into account the evidence and to some degree

the weight of the evidence in making a decision as to whether to allow the case to proceed. If the physical evidence is totally inconsistent with the statement of the victim which is the only evidence of the elements of the crime, then the directed verdict should have been granted.

Appellant recognizes that when ruling on a motion for directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Hepburn, 406 S.C. 416, 428, 753 S.E.2d 402, 408 (2013). “The trial court should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty, as suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.” Id. At 409. The court further stated that on appeal, when reviewing a denial of a directed verdict motion, the court must view the evidence and all reasonable inferences in light most favorable to the state. Id. at 409.

The state had the burden of providing direct evidence of the elements of guilt or substantial circumstantial evidence of guilt. State v. Smith, 359 S.C. 481, 490, 597 S.E.2d 888, 893 (Ct. App. 2004). In the case at hand, the state was required to prove 1) the Appellant exposed his private parts; 2) it was an indecent exposure; 3) the exposure was willful and malicious; and 4) the exposure occurred in a public place on the property of others or for the view of any person on the street or highway. (Transcript p. 268, lines 15 – 20; S.C. Code Section. 16-15-130). The appellant asserted that he did not expose his private parts, it was not indecent and the exposure was not willful or malicious if it did occur. (Transcript pp 224, lines 12 to p. 225, line 7). The appellant included the entirety of the state’s case so this court has all the evidence the trial judge had when it decided the directed verdict motion.

Appellant submits that as to element one, the exposure of his private parts, there was no competent direct evidence. Although the law is clear that the trial court does not weigh the evidence, at the same time the trial court cannot ignore the fact that the evidence the state relies upon is physically and factually impossible based upon the videos the state has presented and put into evidence. Stated differently, even though a person might testify she saw something, if the physical evidence demonstrates what she says she saw was impossible to observe, Appellant submits the trial judge should and must consider the same and take that into account. For instance, a witness can assert that she saw a man's heart explode inside his body and therefore die of a heart attack but it would be impossible to physically see the heart explode. The court could not rely upon a testimony that the person's heart exploded to prove he died of a heart attack. Despite a statement being made that his heart exploded, Appellant submits that if that were the issue, the court could not accept that as evidence. Likewise, when the State relies upon direct evidence, the trial court has to at least view the evidence in light of the physical evidence the state produced to substantiate that direct evidence. If the physical evidence contradicts the statement, appellant submits it's no longer competent evidence. In fact, it should not be considered at all if the testimony contradicts the physical evidence.

In this case, the physical evidence, the videos, contradict what the witness says she could see. The physical evidence demonstrates that appellants vehicle was next to the victim for approximately 1 to 2 seconds while constantly moving, never slowed, never stopped and the appellant was in a SUV while the victim was walking and was some distance from the SUV. The car windows were closed contrary to the victim's assertion that the windows were all open.

The vehicle did not slow or stop contrary to the victim's original statement that the appellant was pacing her. The back windows were tinted. These inconsistencies discount entirely the direct evidence the state relied upon for the first element, the exposure.

As to the second element, the state did not present substantial circumstantial evidence to substantiate the same. Appellant requested the court to charge the jury on a definition of indecent but the trial court refused. The same is addressed below. The question is what is indecent. **Black's Law Dictionary, Fourth Edition**, defines indecent exposure as "exposure to site of the private parts of the body in a lewd or indecent manner in a public place.... Term refers to exhibition of those private parts which instinctive modesty, human decency or self-respect require shall be kept covered in presence of others; exposure of person becomes indecent when it occurs at such time and place where reasonable man knows or should know his act will be open to observation of others." In this case, if there was an exposure, it was inside of Appellant's vehicle while he was driving, not stopping and not doing anything to call attention to himself. His windows were closed. As such, the only evidence is circumstantial that an exposure was indecent. This will be further addressed below.

The next element is that the exposure was willful and malicious. A willful act is one that is voluntary and intentional and malicious is intentional and deliberate doing of a wrongful act intending it to be wrong in committing the act without just cause. (Transcript p. 269, lines 16 to 25) The trial judge set forth that state of mind is something that has got to be made based on circumstantial evidence. As the appellant was arguing, the trial judge agreed that the state was relying upon circumstantial evidence to prove several of the elements of indecent exposure. In this case, there is not substantial circumstantial evidence to support the elements of willful and

malicious and indecent. The state relied upon the fact that the appellant was driving around in the Walmart parking lot during the day to support its allegation that indecent exposure occurred. The state argued this to the trial judge . The problem is that there was absolutely no evidence the Appellant was doing a wrongful act intending it to be wrong. The appellant had every right to drive his vehicle around in a public parking lot. He could have been waiting for a family member. He could have dropped someone off or he could have been meeting someone at Walmart or Lowes. No law or ordinance was violated with the Appellant driving around the parking lot. There was nothing to support the elements of willful or malicious conduct on the part of the appellant assuming his penis was visible. He did not slow down. He did not stop. He did nothing to call attention to himself. As such, Appellant submits the trial judge erred in refusing to grant a directed verdict.

II. THE TRIAL JUDGE ERRED IN NOT STRIKING STEPHANIE JARRETT'S STATEMENT "HE MADE SURE I COULD SEE IT"

In recross examination, the question directed to Ms. Jarrett was "You didn't see the water bottle? You didn't see the bag of clothes?" Ms. Jarrett stated "He made sure I could see it." Appellant contemporaneously moved to strike that statement. The trial judge overruled the request to strike. (Transcript, P. 221, lines 11 to 17)

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. In addition, to warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice. Prejudice occurs when there is a reasonable probability the wrongly admitted evidence

influence the verdict. State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). See also State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015)

The failure of the trial judge to strike this testimony was an error of law and prejudicial. First, the statement is a statement of the appellant's state of mind without any basis or foundation. In addition, it was not responsive to any question. The statement was not cumulative to any other evidence in the record. As seen above, the Appellant's state of mind was an issue and the trial court even commented the state had to rely upon circumstantial evidence in attempting to prove the Appellant's state of mind as to willful and malicious. Ms. Jarrett was the only witness to any of the substantive evidence of the crime. Her testimony has already been shown to be inconsistent with the physical evidence of the videos. To have allowed this unsolicited statement to go before the jury and not strike it and direct the jury to disregard it was clearly prejudicial and unfairly prejudiced the jury.

III. THE TRIAL JUDGE ERRED IN NOT CHARGING THE JURY ON A DEFINITION OF INDECENT.

The appellant requested that the court charge the jury on the definition of indecent. The appellant gave a specific charge that he requested for the jury. The issue of indecent was an issue before the court and was strenuously argued during the directed verdict motion. In addition, the witness was questioned as to what she saw.

The law to be charged to the jury is determined by the evidence presented at trial. State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993). A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. Id. A trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence. State v. Peer, 320 S.C. 546, 466 S.E.2d 375 (Ct.App.1996). See

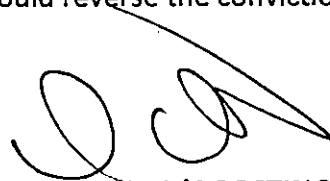
also State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989) (defendant is generally entitled to requested jury instruction if it is a correct statement of the law on an issue raised by the indictment); State v. West, 138 S.C. 421, 136 S.E. 736 (1927)(it is duty of court to charge jury as to law which is applicable to facts as brought out in testimony). In this case, there was no evidence to support the issue of indecent, malicious or willful. Appellate was entitled to have the trial judge explain what indecent was based upon the law. It was reversible error, appellant submits, do not advise the jury of the definition in Black's Law Dictionary defining indecent as the state or condition of being offensive, especially in a vulgar or sexual way. Indecent means offensive, and modest, obscene and unseemly. The same as the definition and would have properly guided the jury. To fail to provide this guidance to the jury was error and prejudicial to the appellant. As pointed out in the statement of facts, the entire case rested upon one and a half seconds. The trial testimony by the witness was inconsistent with the physical evidence.

CONCLUSION

For the reasons stated above, this court should reverse the conviction of the Appellant.

Respectfully submitted

October 23, 2020



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PROOF OF SERVICE

I certify that I have served the **Appellant's Initial Brief and Designation of Matters to be Included in the Record on Appeal** by depositing a copy in the United States Mail, postage prepaid, on October 23, 2020, addressed to Amber Holt, Assistant Solicitor, 1675-1A York Highway, York, SC 29745.

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RE: The State v. Jeffrey Jack Dauer
Appellate Case No. 2020-000533

Dear Ms. Kitchings:

Enclosed please find an original and a copy of Appellant's Initial Brief and Designation of Matters to be Included in the Record on Appeal along with a Proof of Service in reference to the above matter.

Please return the filed copies to me in the enclosed self addressed envelope.

With kind regards, I am

Sincerely yours,

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