STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions
The Honorable William A. McKinnon, Circuit Court Judge

Appellate Case No. 2020-000533

THE STATE,

Respondent,

v.

JEFFREY JACK DAUER,

Petitioner.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

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

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

1675-1A York Highway
York, SC 29745
(803) 628-3020

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

ARGUMENT 3

I. The trial court properly refused Dauer's motion for directed verdict because the State produced evidence of the charged crime. 3

A. Standard of Review 3

B. Relevant facts 3

C. Discussion 3

II. The trial court did not abuse its discretion by admitting the victim's statement that Dauer "made sure [she] could see" his penis because it was based on her perception and relevant to prove Dauer intentionally exposed his private parts. 6

A. Standard of Review 6

B. Discussion 6

III. The trial court gave an accurate definition of indecent exposure and Dauer suffered no prejudice from the trial court's refusal to give his proposed jury charge based on a non-precedential definition of the word "indecent" where his defense was complete denial. 9

A. Standard of Review 9

B. Discussion 9

i. Dauer waived his objection by stating he had "no objection" at the conclusion of the charge. 10

ii. The charge accurately and adequately stated the law. 11

iii. Dauer suffered no prejudice from the court's refusal to give his proposed instruction. 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011) 13

First Savings Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) 7

Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc., 374 S.C. 171, 176, 648 S.E.2d 585, 588 (2007) 5

State v. Brandt, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011) 10

State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) 11

State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 477–78 (2004) 5

State v. Collins, 409 S.C. 524, 530, 763 S.E.2d 22, 25 (2014) 7

State v. Frasier, 431 S.C. 234, 252, 847 S.E.2d 274, 284 (Ct. App. 2020) 8

State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002) 4

State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013) 4

State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) 14

State v. Kerr, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct. App. 1998) 15

State v. Meggett, 398 S.C. 516, 527, 728 S.E.2d 492, 498 (Ct. App. 2012) 8

State v. Rouse, 262 S.C. 581, 584, 206 S.E.2d 873, 874 (1974) 13

State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) 13

State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002) 5

State v. Williams, 321 S.C. 455, 464, 469 S.E.2d 49, 54 (1996) 8

State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005) 12

Statutes

S.C. Code Ann. § 16-15-130 10

S.C. Code Ann. § 16-15-365 12

Rules

Rule 401, SCRE 8

Rule 701, SCRE 7

Rule 803, SCRE 7

ISSUE STATEMENT

I. A directed verdict should be granted when the State fails to produce any evidence of the charged crime. In this indecent exposure case, the State presented direct evidence that Dauer exposed his erect penis in view of a woman in a Walmart parking lot. Did the trial court err by refusing to direct a verdict of not guilty?

II. All relevant evidence should be admitted unless prohibited by the rules of evidence or some other law. Indecent exposure includes an element of willfulness. The victim testified Dauer "made sure" she could see his penis. Did the trial court err by admitting this testimony?

III. A jury instruction is sufficient if it correctly defines the charged offense and helps the jury arrive at a correct verdict. The trial court defined indecent exposure in the language of the statute, along with explanations of willfulness and malice. Did the trial court abuse its discretion by refusing Dauer's proposed jury instruction defining the word "indecent" when the instruction was not based on any precedent and Dauer's defense was complete denial?

STATEMENT OF THE CASE

A York County grand jury indicted Jeffrey Dauer for indecent exposure. On February 9–11, 2020, Dauer proceeded to jury trial before the Honorable William A. McKinnon. He was convicted and sentenced to three years' incarceration, suspended on the completion of three years of probation. This direct appeal follows.

ARGUMENT

I. The trial court properly refused Dauer's motion for directed verdict because the State produced evidence of the charged offense.

a. Standard of review.

On an appeal from the trial court's denial of a motion for a directed verdict, the appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). The appellate court must view the evidence and all reasonable inferences in the light most favorable to the state. State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013).

b. Relevant facts.

Stephanie Jarrett was shopping at a Walmart in York on the afternoon of April 21, 2017. (Tr.p.195). As she left the store and walked through the parking lot towards her car, Appellant Jeffrey Dauer pulled alongside her in his car. (Tr.p.199). She looked into his car and saw that he was holding his erect penis in his hand. (Tr.p.199). She testified Dauer "made sure" she could see his penis. (Tr.p.221). Jarret called the police, and officers initiated a traffic stop on Dauer's car in a nearby Lowe's parking lot. (Tr.p.92). The officer who made contact with Dauer testified he was wearing swimming trunks that were "pulled down and untied." (Tr.p.95). The State introduced surveillance video from Walmart showing Dauer circling the parking for approximately half an hour. (State's Exhibit #10). It shows

the moment Dauer pulled alongside her in the parking lot, corroborating her testimony. (State's Exhibit #10 at 21:20; Tr.p.187).

c. Discussion.

The trial court correctly denied Dauer's motion for directed verdict because the State produced direct evidence of the charged crime. Stephanie Jarret testified that as she walked out of Walmart, Dauer "pulled alongside" her so that she "saw into his vehicle." When she did, she saw his "erect penis with his hand at the base." (Tr.p.199). She testified Dauer "made sure [she] could see it." (Tr.p.221).

Dauer claims Jarrett's version of events was "impossible" based on surveillance footage from Walmart. Specifically, he asserts the video contradicts Jarrett's statement to police that Dauer "slowed down" as he pulled alongside her in the parking lot. Dauer also cites Jarrett's testimony that Dauer's passenger side window was down when she saw his penis, asserting the surveillance video shows the window was up. He argues these alleged inconsistencies required the trial court to direct a verdict of not guilty.

Dauer's directed verdict motion boiled down to an attempt to have the trial court determine the facts of the case. The trial court properly denied his motion because factual disputes are properly resolved by the jury, not the trial court. When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 477–78 (2004). A defendant is entitled to a directed verdict only when the state fails to produce evidence of the offense charged. Id. A directed verdict motion should be denied when the evidence yields more than one inference

or its inference is in doubt. Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc., 374 S.C. 171, 176, 648 S.E.2d 585, 588 (2007). The trial court must view the evidence in the light most favorable to the State. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002).

Jarrett maintained throughout her testimony that Dauer's front passenger window was down, and insisted she could "clearly" see his penis. (Tr.p.216; 219–21). When defense counsel challenged her statement to police that Dauer "slowed down" as he passed her, alleging the surveillance video showed Dauer's brake lights were activated only for "a second," she insisted that it "felt slow" to her. (Tr.p.214). Walmart surveillance video corroborated Jarret's account, showing Dauer's vehicle pull alongside her with its brake lights activated. (State's Exhibit #10 at 21:20). The passenger side window is not visible on the video at the time Dauer's vehicle passes Jarret.

Jarrett's testimony was direct evidence of indecent exposure, which is all that is required to survive a directed verdict motion. To the extent there were conflicting facts, it was the exclusive province of the jury to resolve these disputes. Furthermore, even if Jarrett's recollection was inaccurate in the ways Dauer alleges, it would hardly make it "impossible" for her to have seen Dauer's penis. Brief of Appellant at 8. Even if Dauer's passenger side window was not down, and even if Dauer did not "slow down," it would still have been entirely possible for Jarrett to see his penis through the car window. The alleged factual inconsistencies

cited by Dauer do nothing to disprove Jarrett's allegations, and fall far short of demonstrating an "impossibility" of the direct evidence offered by the State.

The State presented direct evidence that Dauer intentionally exposed his erect penis in a Walmart parking lot. Accordingly, the trial correctly refused to direct a verdict of not guilty. This Court should affirm.

II. The trial court did not abuse its discretion by admitting the victim's statement that Dauer "made sure [she] could see" his penis because it was based on her perception and relevant to prove Dauer intentionally exposed his private parts.

a. Standard of review.

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Collins, 409 S.C. 524, 530, 763 S.E.2d 22, 25 (2014).

b. Discussion.

The trial correct did not abuse its discretion by allowing Jarrett to testify that Dauer "made sure" she could she his penis. The testimony was based on her perception and was highly relevant as to whether Dauer "willfully and maliciously" exposed himself, as required by the indecent exposure statute. S.C. Code Ann. § 16-15-130. Dauer claims this testimony was erroneously admitted because it was "a statement of the appellant's state of mind" and "unresponsive to any question." He is wrong on both counts.

As a preliminary matter, Dauer does not cite any authority to support his argument. Accordingly, this court should deem it abandoned. First Savings Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating when an "[a]ppellant fails to provide arguments or supporting authority for his assertion," the issue is deemed abandoned on appeal).

Even if preserved, Dauer's argument is meritless. The testimony was not inadmissible as a comment on Dauer's "state of mind." The "state of mind"

exception to the hearsay rule is not implicated here because Jarrett did not repeat any out-of-court statements. See Rule 803(3), SCRE. Rather, Jarrett's testimony was about her direct observations of Dauer's conduct. Her comment that Dauer "made sure [she] could see it" conveys that Dauer positioned himself so that Jarrett could see his penis. See State v. Frasier, 431 S.C. 234, 252, 847 S.E.2d 274, 284 (Ct. App. 2020), reh'g denied (Sept. 21, 2020) (explaining a witness may testify that a suspect consented to search based on his "conduct"). This was merely her observation of events she directly perceived. To the extent her testimony can be said to be a comment on his "state of mind," it was at most a "natural inference" or "impression [from] observed facts." See State v. Williams, 321 S.C. 455, 464, 469 S.E.2d 49, 54 (1996); Rule 701, SCRE ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are **rationally based on the perception of the witness**, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.") (emphasis added).

Nor was the testimony unresponsive. In fact, it was responsive to the cross-examination of defense counsel, during which he repeatedly asserted that Jarrett could not have seen Dauer's penis in the "split second" in which he passed her. (Tr.p.221). Finally, the testimony was exceedingly relevant because it bore directly on the "willful and malicious" element of indecent exposure. See State v. Meggett, 398 S.C. 516, 527, 728 S.E.2d 492, 498 (Ct. App. 2012) (explaining "whether a

defendant possessed the requisite intent at the time the crime was committed is typically a question for jury determination because, without a statement of intent by the defendant, proof of intent must be determined by inferences from conduct"); Rule 402, SCRE (providing all relevant evidence is admissible unless excluded by some other rule or law).

Jarrett's testimony was proper fact testimony based on her perception. It was relevant to establish that Dauer "willfully and maliciously" exposed himself, as required by the indecent exposure statute. The trial court did not abuse its discretion by admitting it. This Court should affirm.

III. The trial court gave an accurate definition of indecent exposure and Dauer suffered no prejudice from the trial court's refusal to give his proposed jury charge based on a non-precedential definition of the word "indecent" where his defense was complete denial.

a. Standard of review.

An appellate court will not reverse the trial court's decision regarding a jury charge absent an abuse of discretion. To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. Failure to give requested jury instructions is not prejudicial error when the instructions given afford the proper test for determining the issues. State v. Brandt, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011).

b. Discussion.

Dauer argues the trial court erred by refusing his proposed jury charge defining the word "indecent." The South Carolina code defines the crime of indecent exposure as follows: "[i]t 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. Dauer requested an instruction defining indecent as "a state or condition of being outrageously offensive, especially in a vulgar or sexual way. . . offensive, immodest, obscene . . . ." (Tr.p.236–38). The State objected to the phrase "outrageously offensive," arguing this was not the meaning of the statute. (Tr.p.238). Defense counsel admitted that his requested charged was not based on any South Carolina precedent. (Tr.p.238–39).

The trial court agreed with the State that outrageousness was not an element of the crime of indecent exposure, and informed counsel that he did not believe the proposed charge would be helpful to the jury. (Tr.p.238–39). The court did agree to charge the definition of malice and willfulness, and expressed openness to giving part of Dauer's proposed instruction. (Tr.p.240). The court ultimately defined indecent exposure as follows:

> In order to be guilty of indecent exposure, the State must prove beyond a reasonable doubt that 1) the defendant exposed his private parts; 2) it was an indecent exposure; 3) the exposure was willful and malicious; 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. A willful act is one that is voluntary and intentional. A malicious act means the intentional and deliberate doing of a wrongful act intending it to be wrong in committing the act without any just cause or excuse.

(Tr.p.268).

i. Dauer waived his objection by stating he had "no objection" at the conclusion of the charge.

Dauer failed to preserve this argument for appeal. Though he did request the charge during the charge conference, he did not object at the conclusion of the court's charge. (Tr.p.270). Instead, he specifically stated he had no objection to the charge as given, despite being given a clear opportunity to object by the trial court. (Tr.p.270). He failed to object even though the trial court expressed openness to giving part of his charge, and made no definitive final ruling as to what would be included. Accordingly, Dauer waived his objection when he explicitly stated he had no objection. State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) (holding that objection to jury instruction was not preserved for appellate review where

Brown explicitly stated to the trial judge that he had no objection to the instruction). This Court should affirm.

ii. The charge accurately and adequately stated the law.

The trial court's charge was correct and adequate as given. State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005) (explaining a jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law). The indecent exposure statute provides "[i]t 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.

Dauer's definition would have added little to the jury's understanding of the crime. State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) (explaining jury instructions "should be designed to enlighten the jury and aid it in arriving at a correct verdict"). To say that the exposure must be "offensive in a sexual way" does little to clarify the definition; exposure of sexual organs can always be said to be in a sense sexual. Likewise, there is little to no distinction between the words "indecent" and "immodest." As the court stated, the word "indecent" is in common usage and within the understanding of an average juror.

Furthermore, the proposed charge was potentially inaccurate. The statute makes no mention of vulgar or sexual offensiveness. In fact, South Carolina has another statute which makes it illegal to "wilfully and knowingly expose[] the private parts of his person *in a lewd and lascivious manner* and in the presence of

any other person . . . ." S.C. Code Ann. § 16-15-365 (emphasis added). The existence of a similar offense which explicitly lists lewdness as an element suggests that the legislature did not intend to make it an element of indecent exposure. Surely, the legislature could have done so if it wished. Likewise, no South Carolina case has ever stated that indecent exposure carries an element of "offensiveness." See also Minor v. State, 232 Ga. App. 246, 246, 501 S.E.2d 576, 577 (1998) (explaining Georgia's public indecency statute "does not require that some person be embarrassed, offended or otherwise outraged").

Nor has this court ever interpreted the statute to include this element. Rather, the Supreme Court has held simply that "the offense of indecent exposure consists of the exposure of private parts of the person to the public view." State v. Rouse, 262 S.C. 581, 584, 206 S.E.2d 873, 874 (1974). This definition incorporates a broader class of conduct—inappropriate public nudity—that is not necessarily vulgar or overtly sexual in nature. This is essentially the definition defense counsel gave in his opening statement; that one commits indecent exposure by "exposing himself." (Tr.p.70).

Furthermore, the facts of this case are not conducive to a helpful analysis of the requirements of the statute. If Dauer did what Jarrett alleged—went out of his way to display his erect penis in a Walmart parking lot—surely his conduct meets the definition of indecent exposure under any rational interpretation. The fact that Dauer exposed his erect, rather than flaccid, penis removes any ambiguity and shows his conduct was unmistakably sexual in nature. Accordingly, the facts of this

case do not present a helpful framework for distinguishing between sexual and nonsexual conduct that Dauer's proposed charge may help illuminate in an appropriate case. See Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011) (explaining jury charges should be assessed for error "in light of the evidence and issues presented at trial"). This Court should affirm.

iii. Dauer suffered no prejudice from the court's refusal to give his proposed instruction.

Dauer suffered no prejudice from the court's refusal to give his proposed charge. If his conduct was ambiguously sexual, or subject to differing interpretations, then perhaps the proposed charge would have made a difference in the outcome. But Dauer's conduct clearly meets the definition for indecent exposure under any rational interpretation. Accordingly, the court's decision not to give Dauer's proposed charge was not prejudicial. State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) ("If the instructions given to the jury afford the proper test for determining the issues, the failure to give one side's requested instructions is not prejudicial.").

Dauer's defense was complete denial; he attacked the credibility of the witness's perception rather than arguing that his conduct was not "indecent." Defense counsel argued: "I have no idea what Ms. Jarrett saw, but it wasn't my client doing something with his penis out and erect or anything else. He didn't do it. He was driving through a parking lot. She assumed she saw something, and it went from there." (Tr.p.292).

A case may soon present itself that requires this Court to explicate the meaning of the indecent exposure statute to gauge its applicability to a particular set of facts. This is not that case. If the jury believed Jarrett's testimony, Dauer was clearly guilty of indecent exposure. Just as there was no need to define the phrase "public place" because there was no question the act occurred in public, the "indecent" element of the crime was not seriously in question. The court's decision not to give Dauer's proposed charge had no impact on the case. See State v. Kerr, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct. App. 1998) (explaining error is harmless where it does not affect the outcome of trial). Accordingly, Dauer suffered no prejudice from the court's refusal to give the charge. Brandt, 393 S.C. at 550, 713 S.E.2d at 603 ("To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant."). This Court should affirm.

CONCLUSION

For all the foregoing reasons, the State respectfully asks that this Court affirm the judgment and sentence of the lower court.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

BY: _____
Joshua A. Edwards
Bar # 101188

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

ATTORNEYS FOR RESPONDENT

February 26, 2020

RECEIVED
Feb 26 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions
The Honorable William A. McKinnon Circuit Court Judge

Appellate Case 2019-000533

THE STATE, Respondent,

v.

JEFFREY JACK DAUER, Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Initial Brief of Respondent and Designation of Matter on Daniel D'Agostino, Esquire, and Jaqueline N. Davis, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 26th day of February, 2021.

Anne A. Mueller
Legal Assistant

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

From:	Anne Mueller
To:	kaylee@ddllplaw.com; jackie@ddllplaw.com
Cc:	Victim Services; Josh Edwards; William Blitch (wblitch@scag.gov); Anne Mueller (amueller@scag.gov)
Subject:	State v. Jeffrey Jack Dauer
Date:	Friday, February 26, 2021 8:38:00 AM
Attachments:	Dauer Jeffrey - Initial Brief of Respondent and Designation of Matter (02500050xD2C78).pdf

Good morning, Mr. D'Agostino and Ms. Davis:
Attached to this email is a copy of the State's Initial Brief or Respondent and Designation of Matter in the above criminal appeal matter.
This brief will be filed with the Court electronically later today.
If you will, and as a courtesy, we would appreciate it if you would acknowledge receipt of this email and the attachment by return email.
Thank you.
Sincerely,
Anne Mueller, Legal Assistant to Joshua A. Edwards, Assistant Attorney General

Anne A. Mueller
Legal Assistant, Criminal Appeals Division
Office of the Attorney General
State of South Carolina
(803) 734-3922