THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

Appellate Case No. 2020-000533

The Honorable William A. McKinnon

The State, Respondent,

v.

Jeffrey Jack Dauer, Appellant.

REPLY BRIEF OF APPELLANT

April 6, 2021

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The Appellant submits this reply brief and submits this court should reverse the trial court's decision.

ARGUMENT

I. THE DIRECTED VERDICT SHOULD HAVE BEEN GRANTED AS THERE WAS NO COMPETENT EVIDENCE TO SUPPORT A CONVICTION.

Although the law is clear that a directed verdict should be denied if there is direct evidence to support a conviction, the analysis must go deeper in every case. As it relates to evidence, the evidence must be competent. In this case, it is not a matter of whether there is direct evidence but the question is whether there is realistic direct evidence. For example, an individual can insist and testify that a car is blue and the window was open while passing. If the car is actually red and the window is closed and there is a video showing the car is red and the window is closed, then the trial court cannot assert that there is good direct evidence upon which a jury can base a decision. Appellant understands that would seem like an argument on the weight of the evidence but at some point the court, as the overseer of the trial, has to look at the evidence itself. It does the system no good for the court to ignore the fact that what a witness testifies to is incompetent and contrary to the evidence that can be seen on a video, especially in the light of a sexual crime such as indecent exposure. In this case, Ms. Jarrett believed that she saw an open window and a car slow down but when the video shows it is not accurate, then that evidence cannot be seen as direct evidence and the court should have granted a directed verdict.

Appellant submits that the court must view the evidence and all reasonable inferences from the evidence. In doing so, the court cannot just rely on the blanket statement of the witness but must view the reasonable inferences of all the evidence. As the court set forth in **State v. Hepburn**, 406 S.C. 416, 753 S.E.2d 402, 408-409 (2013):

> In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict. **State v.**

> **Cherry**, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004). During trial, "[w]hen ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." **Id.** at 593, 606 S.E.2d at 477–78 (citing **State v. Gaster**, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002)); *see* also Rule 19(a), SCRCrP. The trial court should "grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty, as '[s]uspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." **Cherry**, 361 S.C. at 594, 606 S.E.2d at 478 (citations omitted). 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.* (emphasis removed).
>
> On appeal, "[w]hen reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the state." *Id.* (citing **State v. Burdette**, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)); see also **State v. Mitchell,** 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000) (finding that when ruling on cases in which the state has relied exclusively on circumstantial evidence, appellate courts are likewise only concerned with the existence of the evidence and not its weight). If the state has presented "any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," this Court must affirm the trial court's decision to submit the case to the jury. **Cherry**, 361 S.C. at 593–94, 606 S.E.2d at 478; cf. **Mitchell,** 341 S.C. at 409, 535 S.E.2d at 127 ("The trial judge is required to submit the case to the jury 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.'")

Appellant set forth in his initial brief the fact that Ms. Jarrett's testimony was entirely consistent with the physical evidence which existed. As such, this case should be analyzed as it relates to a directed verdict as to whether there was any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the Appellant. Since Ms. Jarrett's testimony was at odds with the direct evidence, the court should have granted a directed verdict because there is no substantial circumstantial evidence.

Respondent all but acknowledges the factual inconsistency of the testimony with the physical evidence when it refers to Ms. Jarrett being challenged with the fact that the video is contrary to her testimony and she says it felt that it was longer. Respondent, in his brief, asserts that even if

Jarrett's recollection was inaccurate as Dauer sets forth, it is not impossible, which is not accurate. If Jarrett's testimony is inaccurate and inconsistent with the evidence as to those crucial facts, then there is no direct evidence, in fact there is no evidence that Appellant is guilty of a crime.

Ms. Jarrett says Dauer slowed down and the video shows that he did not. Ms. Jarrett says it felt that way. As it relates to the passenger side window, a review of the evidence and the videos clearly demonstrates that the passenger side window is closed, not open, contrary to Ms. Jarrett's testimony. In fact, when Dauer is actually stopped in the Lowe's parking lot, the passenger side window was closed. Also, the reflection of the sun against the passenger side window as the vehicle passes Ms. Jarrett and immediately before it passes her demonstrates that the window was closed. If the evidence which can be seen by the trial judge is contrary to the witness's testimony, that cannot be considered direct evidence. Therefore, there is no basis for the trial court to have submitted this case to the jury. As set forth above in **Hepburn**, if the evidence raises a suspicion of guilt the trial court should grant a directed verdict because suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. In this case, in reviewing the record, appellant submits that all that existed was suspicion because there was no proof of the appellant violating the law.

II. APPELLANT DID NOT WAIVE THE ISSUE OF INADMISSIBLE TESTIMONY AND THE WITNESS'S TESTIMONY AS TO APPELLANT'S STATE OF MIND WAS INADMISSIBLE.

Appellant set forth the evidentiary basis for a reversal based upon inadmissible evidence. Appellant set forth that the wrongful admission of evidence must amount to prejudice and prejudice occurs when there is reasonable probability that the wrongly admitted evidence influenced the verdict. As set forth in Appellant's initial brief, the evidence was prejudicial. The State argues that this is not a state of mind statement. When Ms. Jarrett testified "He made sure I

could see it," she is testifying as to Appellant's state of mind not his conduct. She is testifying on what Appellant was thinking, which is not an observation of events. The statement "he made sure" is testimony which is conjecture. The witness was not describing events but testified as to Appellant's thought process, an opinion of what he was thinking. As the Respondent properly points out, Ms. Jarrett's testimony is analyzed in light of Rule 701 of the Rules of Evidence. The opinion is limited to those opinions of inferences which are rationally based on the perception of the witness. In this case since Ms. Jarrett's testimony is inconsistent as to what the physical evidence is as shown on the video, her testimony cannot be said to be rational based on perception. Even based on her testimony, she saw the Appellant for but a split second. She cannot have an opinion that is rationally based on perception.

In addition, contrary to Respondent's assertion, the witness's statement was not a proper response to a question posed to the witness. A review of the cross examination and the record demonstrates that the questions were "you didn't see the water bottle?", "you didn't see the bag of clothes?" A response referencing the Appellant's state of mind is not responsive to a question about physical contents in the car.

Finally, Respondent's argument that the statement was exceedingly relevant because it bore directly to the willful and malicious elements of the charge further demonstrates the prejudicial nature of this wrongfully admitted evidence both for this argument and the argument about the request to charge. The Respondent properly set forth that without a statement of intent by a Defendant, proof must be determined by inferences from conduct. In this case, to have allowed this testimony when there was no foundation laid for inferences from conduct demonstrates the prejudicial nature of the wrongly admitted evidence. The Respondent's argument that the evidence is necessary demonstrates the true prejudicial effect of the testimony. The Respondent does not support its argument that the testimony has any basis for an inference from observation

because there was none. The testimony was an unsolicited statement in response to a question about contents of the vehicle and what the witness did not see that was in the vehicle between her and the Appellant.

As such, Appellant submits that the witness's testimony of Appellant's state of mind was wrongfully admitted, should have been stricken and was prejudicial in this case.

III. THE TRIAL JUDGE ERRED IN NOT CHARGING THE JURY AS REQUESTED AND THIS ISSUE IS PRESERVED.

Appellant requested, during the charge conference, prior to closing arguments, for the trial judge to charge the definition of indecent. Appellant set forth in his initial brief the requested specific charge on indecent. (Transcript pages 240 to 243). The trial judge declined. Appellant noted this for the record and after closing argument again referenced this for the record when he stated "I've noted my objection to the charge earlier." (Transcript p. 296) The Respondent's reference to "No objection," at page 270 of the transcript was while the jury was present and the objection had already been noted outside of the presence of the jury. The court had held the charge conference on the record, had questioned the Appellant about his right to testify and the State and the Appellant had set forth that the court would bring the jury in, that the Defendant would rest without presenting any evidence and the jury charge would proceed and then we were to do closing arguments. As such, Appellant did preserve the objection to the charge the court did not give to the jury. The court gave a request to charge that did not include the definition of indecent (Transcript p. 268).

Although the court's charge was the law, it was not adequate as given. The trial judge did read the statute as written, South Carolina Code Section 16-15-130 (Tr. P. 268). The trial court went onto define willful and malicious which are not specifically defined in the statute. Including those definitions was appropriate. Appellant requested the court to define indecent as

"Indecent refers to the state or condition of being offensive, especially in a vulgar or sexual way. Indecent means offensive, immodest, obscene and unseemly." The trial court declined to add this to the charge. Adding this definition surely would have added to the jury's understanding of the crime. Respondent sets forth the exposure of sexual organs can always be said to be in a sense sexual. Respondent's argument and statement supports Appellant's position that indecent should have been further defined. In fact, there is an exception in the statute as to women breast-feeding in public as not constituting a violation of the law. Therefore, the fact that the statute takes out the exposure of a sexual organ in some instances supports the fact that not all exposure of sexual organs can always be said to be in a sense sexual. Since the crime requires an indecent exposure that is willful and malicious, the jury should have been instructed on the term indecent.

The fact that there is a separate statute that deals with and criminalizes lewd and lascivious conduct does not change the fact that the Appellant was charged with a violation of S.C. Code Section 16-15-130 which requires an indecent exposure, not just any exposure. In addition, it is not an issue of any South Carolina case stating that the statute carries an element of offensiveness. It is what the statute states. The statute could have easily been written as prohibiting the willful and malicious exposure without the indecent element in which case it would be the act of exposing in a willful and malicious manner. The legislators included the term indecently and that word therefore has meaning and should have been defined as the other terms of art were defined. Respondent references the case of **State v. Rouse**, 262 S.C. 581, 584, 206 S.E.2d 873, 874 (1974) in its brief when it refers to the court defining the offense of indecent exposure as consisting of the exposure of private parts of the person to the public view. That case dealt with the prior statute. In addition, the issues in that case dealt with the requirements of the State to elect between assault and battery and indecent exposure. The trial court in the case decided that the two charges had different elements and therefore, were two distinct offenses.

The case did not deal with the issues presented in the case at hand, the specific terminology and definition of the words used in the statute and more precisely the term indecent. What is clear is that the legislature included the word indecent which must have some meaning. As such, the statute cannot and does not criminalize the mere exposure but criminalizes in decently exposing. For the jury to fully understand indecently, it needed to be defined.

Finally, Respondent's argument that if Appellant did what the witness alleged, went out of his way to display his erect penis in the parking lot, his conduct meets the definition of exposure is presuming facts and also relying upon wrongfully admitted testimony as set forth above. Appellant refers to the above arguments as it relates to the issue of state of mind and competent evidence, all which culminate in this argument as well. In light of the evidence, lack of evidence and speculation, the trial judge should have defined indecent.

Therefore, because of the inconsistencies and the lack of competent evidence as well as the speculation and demonstrated implausibility of the witness's testimony, the term indecent should have been provided to the jury for them to assess whether, if Appellant's penis was exposed, it was indecent, because he was in his car with his windows rolled up.

CONCLUSION

For all of the above reasons, as well as the argument set forth in Appellant's initial brief, Appellant submits that this court should reverse his conviction.

Respectfully submitted.

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