THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions

Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2021-001232

Trial Court Case No. 2015-GS-36-0083

The State of South Carolina, Respondent,

v.

Calvin Eugene Whitener, Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN REFUSING TO SUPRESS THE DRUGS FOUND INSIDE APPELLANT'S PANTS WHEN THE OFFICER DID NOT HAVE REASONABLE SUSPICION THAT APPELLANT WAS ARMED AND DANGEROUS PRIOR TO CONDUCTING THE PAT DOWN SEARCH?

II. DID TRIAL COURT ERR IN REFUSING TO SUPPRESS APPELLANT'S STATEMENT TO THE OFFICER IMMEDIATELY AFTER THE PAT DOWN SEARCH WHEN A REASONABLE PERSON WOULD HAVE BELIEVED HE WAS IN CUSTODY, AND THE OFFICER'S QUESTION WAS REASONABLY LIKELY TO EVOKE AN INCRIMINATING RESPONSE?

III. DID THE TRIAL COURT ERR IN REFUSING TO GRANT A MISTRIAL WHERE THE PROSECUTOR'S COMMENTS DURING OPENING STATEMENT WERE UNDULY PREJUDICIAL AND IMPROPERLY SHIFTED THE BURDEN OF PROOF?

STATEMENT OF THE CASE

On February 13, 2015, the Newberry County Grand Jury indicted Appellant, Calvin Eugene Whitener, for Trafficking Cocaine, 28 grams or more, but less than 100 grams, first offense (Indictment 2015-GS-36-0083). (R. 266-267)

On November 13, 2017, Appellant proceeded to trial *in absentia* before the Honorable Frank R. Addy and a jury. (R. 1). Ricky Harris represented Appellant at trial, and Deputy Solicitor Dale Scott and Assistant Solicitor Taylor Daniel prosecuted the case on behalf of the State. (R. 1). The jury returned a guilty verdict on November 15, 2017. (R. 250). The Trial Court sealed Appellant's sentence due to his absence at trial. (R. 255).

On October 20, 2021, Appellant appeared before the Trial Court to impose the sealed sentence. (R. 257; 261). The Trial Court sentenced Appellant to twenty-five (25) years imprisonment. (R. 261). Appellant timely filed a Notice of Appeal on October 22, 2021.

This appeal follows.

RELEVANT FACTS

On September 3, 2014, Deputy Michael Claytor of the Newberry County Sheriff's Department conducted a traffic stop on a white Nissan Altima for speeding. (R. 115). There were four occupants in the vehicle: (1) Jacques Mincey—driver; (2) Walker Camp—front passenger seat; (3) Bobby Charles Gregory—backseat; and (4) Appellant—back passenger seat. (R. 115 – 121). When Deputy Claytor approached the vehicle, an occupant notified him that the vehicle was a rental car and that they were on their way home from a funeral in Atlanta. (R. 116). Upon speaking with the driver of the vehicle, Deputy Claytor learned that he did not have a valid driver's license and arrested him for driving under suspension. (R. 116 – 117).

Deputy Claytor then asked all occupants of the vehicle for identification and was notified by dispatch that passenger Camp had an active warrant for his arrest in another county. (R. 117 – 119). Deputy Claytor then placed Camp in investigative detention. (R. 119).

At trial, Deputy Claytor testified that when Camp stepped out of the vehicle, he could see into the torn cargo pocket of Camp's shorts and observed a set of digital scales. (R. 119). Deputy Claytor confiscated the scales but did not find anything illegal during the pat down search of Camp. (R. 119 – 21; 138). Camp was ultimately released when Deputy Claytor did not receive a response regarding the active warrant. (R. 119 – 21; 138).

After finding the scale in Camp's pocket, Deputy Claytor instructed Appellant and Gregory to exit the vehicle and conducted a pat down search on them for weapons. (R. 121 – 22; 144). Deputy Claytor did not find any illegal evidence on Gregory, and he

was eventually released without arrest. (R. 155). When Deputy Claytor conducted the pat down search of Appellant, he felt a large ball at Appellant's inner thigh. (R. 124). Deputy Claytor testified that the ball did not feel like part of Appellant's anatomy, and when he asked Appellant about the object, Appellant told him it was a bag of powder. (R. 124 – 125). Deputy Claytor removed the bag from Appellant's pants and found cash totaling seven hundred and ninety dollars ($790.00) in Appellant's pocket. (R. 124 – 125).

Believing the powder to be illegal drugs, Deputy Claytor called narcotics investigator Michael Stribble to the scene. (R. 124 – 126). Investigator Stribble performed a presumptive test on the substance and weighed the bag. (R. 126 – 127; 172 – 175). The presumptive test was positive for cocaine. (R. 175). Deputy Claytor then arrested Appellant for trafficking cocaine. (R. 127; 175).

At trial, Defense Counsel moved to suppress all evidence against Appellant as the result of an unlawful search and seizure. (R. 25 – 28). Defense Counsel advanced three arguments for suppression of the cocaine and Appellant's statements to police. (R. 25 – 28). Defense Counsel did not argue that the traffic stop itself was inherently unlawful, but instead that the subsequent detention and search violated the Fourth Amendment to the United States Constitution. (R. 26 – 28)

First, Defense Counsel argued that, even if the initial traffic stop was lawful, the "scope … and length of the stop was not justified because "there was no justification [or] reasonable suspicion that other criminal activity [existed to justify] extend[ing] the traffic stop" to remove Appellant from the vehicle and search him. (R. 26 – 27). At the pre-trial suppression hearing, Deputy Claytor testified that after arresting Mincey for driving with

a suspended driver's license and detaining Camp for the outstanding warrant, he noticed the digital scale in Camp's pocket. (R. 30 – 33). Deputy Claytor testified that he believed the digital scale to be evidence of drug activity and that this, along with the "extremely nervous" behavior of Mincey and Camp, led him to believe he needed to remove the other passengers from the vehicle and search them. (R. 32 – 33). Deputy Claytor also noted the presence of the trainee that was with him and the rural location of the stop in support of his decision to detain and search Appellant and passenger Gregory. (R. 28 – 29; 31; 33 – 35; 65).

On cross-examination, Deputy Claytor admitted that all occupants of the vehicle, were cooperative with him during the entirety of the stop and that no one made any threats or "threatening gestures" or did anything suggestive of "an intention to flee." (R. 41; 46; 53). Upon further questioning by Defense Counsel, Deputy Claytor admitted that neither Mincey's suspended driver's license, the outstanding warrant for Camp, the remote location of the stop, nor the vehicle being a rental car gave him a reason to believe that Appellant was armed with a weapon. (R. 51 – 52). Deputy Claytor also testified that, prior to searching Appellant, he had found no weapons or drugs in the car or the other occupants. (R. 53).

When asked whether Appellant was free to leave prior to the search of his person, Deputy Claytor equivocated. (R. 54 – 59). However, after several rounds of questioning by both Defense Counsel and the Trial Court, Deputy Claytor confirmed that Appellant would not have been permitted to leave the scene before being searched and questioned but maintained that he would not have arrested him. (R. 54 – 59).

Initially Deputy Claytor said that it was about five minutes from the beginning of the stop until he removed Appellant from the vehicle and searched him. However, on cross-examination, he testified that it was "probably no more than ten to twelve minutes." (R. 39; 66). Deputy Claytor later claimed that it was "[a]bout five to eight" minutes from the time the vehicle was stopped until Appellant was ordered out of the car. (R. 86 – 87). Deputy Claytor also testified that he had not Mirandized Appellant before or during the search of his person. (R. 37; 59)

Defense Counsel argued that Deputy Claytor did not have "reasonable articulable suspicion to . . . lead a reasonable police officer in the circumstances to believe [Appellant] was armed and dangerous and should be frisked for weapons under *Terry*." (R. 37; 67). He argued that a "hunch" or "intuition" is insufficient. (R. 67). He further argued that the mere fact that an officer does not know whether a person is armed does not give rise to reasonable suspicion and is, instead, closer to an admission that reasonable suspicion did not exist. (R. 67).

Defense Counsel argued that Deputy Claytor's testimony did not establish reasonable, articulable suspicion that Appellant was armed or engaged in criminal activity; therefore, the drugs and Appellant's pre-*Miranda* statements must be suppressed under the Fourth Amendment and relevant case law. (R. 27; 67). The Trial Court ultimately denied Appellant's motion to suppress, citing *United States v. Sakyi*, 106 F.3d 164 (4th Cir. 1998) and holding that it had not been necessary for Deputy Claytor to provide Appellant the *Miranda* warnings before questioning him during and after the search. (R. 78; 81).

At the close of the State's opening, Defense Counsel objected to specific statements made by Assistant Solicitor Taylor Daniel. (R. 105 – 107; 200 – 202). During his opening, Assistant Solicitor Daniel told the jury that "this case is very straightforward. No matter how overwhelming the evidence is, you are still entitled to a jury trial. *It is not very efficient, is it, because you – it is your third day coming in here now. It is inconvenient for you, so it is not very efficient trying a case in front of a jury.*" (R. 101 – 102) (emphasis added). Solicitor Daniel went on to comment that "in other countries they are not afforded this right" and noted that in "[t]he Philippines for instance[,] they *have judicial ... executions.*" (R. 102) (emphasis added). He also stated, "*it seems kind of silly, maybe, [to] decide on something so straightforward.*" (R. 105) (emphasis added). Defense Counsel specifically argued that by making these statements, the State engaged in improper burden shifting. (R. 106 – 07; 200 – 202). The Trial Court gave a curative instruction, but Defense Counsel argued that the curative instruction was insufficient and moved for a mistrial. (R. 106 – 107; 200 – 202). The Trial Court found the comment to be a mere "passing comment," overruling the objection and denying Appellant's motion for a mistrial. (R. 202 – 204).

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE DRUGS FOUND INSIDE APPELLANT'S PANTS BECAUSE THE OFFICER DID NOT HAVE REASONABLE SUSPICION THAT APPELLANT WAS ARMED AND DANGEROUS PRIOR TO CONDUCTING THE PAT DOWN SEARCH.

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. "[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." *Wilson v. Arkansas,* 514 U.S. 927, 931 (1995). The Fourth Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *See Mapp v. Ohio,* 367 U.S. 643 (1961).

Temporary detention of individuals by the police during an automobile stop constitutes a "seizure" of an individual within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391 (1979). A traffic stop implicates the Fourth Amendment prohibition against unreasonable searches and seizures, imposing a standard of "reasonableness" upon the exercise of discretion by state law enforcement officials. *See Id.* at 654, 99 S.Ct. 1391. The decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. *Whren v. United States*, 517 U.S. 806, 809–810, 116 S.Ct. 1769 (1996). Therefore, evidence obtained by searches and seizures in violation of the Constitution is inadmissible in state court. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684 (1961).

Observing that traffic stops may be dangerous encounters for police officers, the United States Supreme Court has held that once a motor vehicle has been lawfully detained for a traffic violation, police officers may order the driver and passengers to get

out of the vehicle without violating the Fourth Amendment's proscription of unreasonable seizures. *Maryland v. Wilson*, 519 U.S. 408, 412–15, 117 S.Ct. 882, 885–86 (1997). However, a police officer must have a reasonable suspicion that an individual is armed and dangerous before conducting a pat down or frisk of the person. *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883 (1968); *Pennsylvania v. Mimms*, 434 U.S. 106, 111–112, 98 S.Ct. 330 (1977) (extending the *Terry* doctrine to frisks pursuant to valid automobile stops for traffic violations).

The question is whether "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 at 27, 88 S.Ct. 1868; *see also Minnesota v. Dickerson*, 508 U.S. 366, 373, 113 S.Ct. 2130, 2136 (1993) (holding when an officer is justified in believing the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others, the officer may conduct a pat-down search to determine whether the person is in fact carrying a weapon; purpose of limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence); *Maryland v. Buie*, 494 U.S. 325, 332, 110 S.Ct. 1093, 1097 (1990) (holding a limited pat-down for weapons is authorized where a reasonably prudent officer would be warranted in the belief, based on specific and articulable facts, and not on a mere inchoate and unparticularized suspicion or hunch, that he is dealing with an armed and dangerous individual); *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979) (holding "before the police may frisk a defendant, they must have a reasonable belief the defendant is armed and dangerous").

In other words, a reasonable person in the position of the officer must believe the frisk was necessary to preserve the officer's safety. *Terry*, 392 U.S. at 88 S.Ct. 1868. An officer must be able to specify the particular facts on which he or she based his or her belief the suspect was armed and dangerous. *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889 (1968) (holding an officer is not entitled to seize and search every person on the street; mere knowledge of the suspect being a known narcotics dealer who put his or her hand into a pocket as the police approached does not provide justification); *see also State v. Burton*, 349 S.C. 430, 439, 562 S.E.2d 668, 673 (Ct. App. 2002) (finding once a basis for a lawful investigatory stop exists, an officer may protect himself during the stop by conducting a frisk for weapons if he has reason to believe the suspect is armed and dangerous; in justifying the intrusion, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion); *see also State v. Rogers,* 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) (finding reasonable suspicion also requires "something more than an inchoate and unparticularized suspicion or hunch.").

Our Supreme "Court has recognized that because of the 'indisputable nexus between drugs and guns,' where an officer has reasonable suspicion that drugs are present in a vehicle[1] lawfully stopped, there is an appropriate level of suspicion of criminal activity and apprehension of danger to justify a frisk of both the driver and the passenger in the absence of other factors alleviating the officer's safety concerns." *State v. Banda*, 371 S.C. 245, 639 S.E.2d 36 (2006) (citing *State v. Butler*, 353 S.C. 383, 391, 577 S.E.2d

[1] "Reasonable suspicion" in this context requires an officer to have "a particularized and objective basis," based on the totality of the circumstances, that would lead one to suspect that drugs are present in the vehicle lawfully stopped. *U.S. v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690 (1981); *State v. Lesley*, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997).

498 (quotation citation omitted) (footnote in original)). Notably, generalized risk to officer safety is insufficient to justify a routine pat-down of all passengers as a matter of course. *See United States v. Sakyi*, 160 F.3d 164, 169–170 (4th Cir.1998); *State v. Burton*, 349 S.C. at 440, 562 S.E.2d at 673 (where only activity detective pointed to as "suspicious" was individual's refusal to answer questions and fact that individual kept his right hand in his coat pocket, detective failed to articulate valid reasonable suspicion for stop and search of individual, in spite of the detective's testimony that he feared for safety of those around him).

Exclusionary Rule

The United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. *United States v. Calandra*, 414 U.S. 338 (1974). The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *see also State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding evidence is not admissible under the "fruit of the poisonous tree" doctrine when the police exploit an unlawful search to seize evidence that would not have otherwise come to light). The Fourteenth Amendment incorporates the rule of excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

"The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980) (quoting *United States v. Martinez–*

Fuerte, 428 U.S. 543, 554 (1976)). The United States Supreme Court and our Supreme Court have recognized and applied the principle that police officers are not granted under *Terry*, "a general warrant to rummage and seize at will" and that any evidence seized from an unlawful detention must be excluded as "fruit of the poisonous tree." *State v. Woodruff*, 344 S.C. 537, 549, 544 S.E.2d 290, 296-97, n. 1 (citing *Texas v. Brown*, 460 U.S. 730, 748 (1983) (Stevens, J., concurring) (The United States Supreme Court "*has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will*") (emphasis added); *Wong Sun*, 371 U.S. 471 ("We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.") (citation and internal quotation marks omitted).

Discussion

In this case, the Trial Court erred in refusing to suppress the drugs founds inside Appellant's pants because Deputy Claytor did not have reasonable suspicion that Appellant was armed and dangerous prior to conducting the pat down search. *See Butler*, 353 S.C. 383, 577 S.E.2d 498. The facts presented here are distinct from our Supreme Court's holding in *Banda*, 371 S.C. 245, 639 S.E.2d 36. Specifically, the *Banda* Court noted the following articulable factors establishing reasonable suspicion that drugs were present:

> The police had observed the car ***leave the residence of a known drug dealer***. Furthermore, the car ***displayed stolen***

> ***Georgia license tags*** and the police ***knew from their confidential informant*** that the target's ***drug shipments came from Georgia***. Even though the police shortly realized that Banda was not their target, the fact that the activity observed at the target's house ***corroborated the informant's statements*** was enough to give the officers a reasonable suspicion that ***Banda was in some way involved with the target's drug activity*** and that drugs might therefore be in the vehicle [citation omitted] Given the frequent association between drugs and guns, Lawson's safety concerns were justified based on ***the vehicle's apparent connection to a known drug dealer***.

Banda, 371 S.C. at 253-54, 639 S.E.2d at 40-41 (emphasis added). The *Banda* Court distinguished its ruling from *State v. Butler* because "the frisk in that case occurred as a part of the officer's continuing investigation of a possible open-container violation." *Id.* (citing *Butler*, 353 at 392; 577 S.E.2d at 503).

Unlike in *Banda*, Deputy Claytor arrested the driver of the vehicle for driving with a suspended license and did not find any other evidence of drug activity after searching the other passengers except for a digital scale in one of the passenger's pockets. (R. pp. 30 – 33; 119 – 21). The digital scale and Deputy Claytor's claim that the occupants of the vehicle were nervous during the traffic stop was insufficient to establish reasonable suspicion without having additional corroborating evidence linked to drug activity. *See Delaware v. Prouse*, 440 U.S. 648 (1979) (holding although "extreme nervousness" is a factor to be considered in a reasonable suspicion analysis, courts must be skeptical of using nervousness as a factor because a traffic stop is an "unsettling show of authority" that may "create substantial anxiety").

Although the Trial Court referenced the digital scale in the passenger's pants and its connection to drugs, the Trial Court improperly focused on facts establishing a generalized risk to Deputy Claytor when making his decision while using the incorrect

totality of the circumstances analysis (instead of the reasonably prudent person standard):

> Under the totality of the circumstances and under the facts of this particular case, what we have is a stop taking place at 1:00 o'clock in the morning; driver is under suspension; one of the passenger's has an outstanding warrant[,] [t]he stop takes place on a very rural road . . . the statement of having been at a funeral, when the driver and the occupants are not in, what one would consider, minimally appropriate funeral attire.

(R. 78, line 14 – 79, line 25). *See generally United States v. Sakyi*, 160 F.3d at 169–170 (finding generalized risk to officer safety is insufficient to justify a routine pat-down of all passengers as a matter of course).

Furthermore, this case is significantly distinguishable from the following cases where this Court found reasonable suspicion existed for an officer to conduct a pat down search of an individual where the officer articulated sufficient facts to justify the search. In *State v. Blassingame*, 338 S.C. 240, 249, 525 S.E.2d 535, 540 (Ct. App. 1999), this Court found that the pat down search by the officer was proper under the circumstances because a reasonably prudent man, when faced with a man who met the description of an armed carjacker, kidnapper, and robber who could not satisfactorily explain why he was in the area, would be warranted in a belief that his safety was in danger.

In *State v. Lesley*, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997), this Court found that the officer could reasonably have believed the driver of a brown Honda would be armed and dangerous where the officer "understood the following from the information related to him by the dispatcher and his own observations: (1) a female complainant had two days earlier reported a shooting incident to the police; (2) the complainant saw two black males in two separate cars drive by her home; (3) she described one automobile as a brown-colored Honda bearing paper tags that advertised

Breakaway; (4) the driver in each car had made a gesture toward her; (5) she felt their actions were connected with the shooting incident; (6) there could be weapons on the drivers' persons or in their cars; and (7) a brown-colored Honda equipped with Breakaway paper tags and driven by a black male was in the area where the cars were reported as having been seen."

Based on the facts presented in the instant case, a reasonable person in Deputy Claytor's position would not have believed the frisk was necessary to preserve their safety in justifying the warrantless pat down search of Appellant. *See Dickerson*, 508 U.S. at 373, 113 S.Ct. at 2136 (noting purpose of limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence); *Maryland*, 494 U.S. at 332, 110 S.Ct. at 1097 (limited pat-down for weapons is authorized where a reasonably prudent officer would be warranted in the belief, based on specific and articulable facts, and not on a mere inchoate and unparticularized suspicion or hunch, that he is dealing with an armed and dangerous individual).

Therefore, the Trial Court erred in refusing to suppress the drugs founds inside Appellant's pants because Deputy Claytor did not have reasonable suspicion that Appellant was armed and dangerous prior to conducting the pat down search. *See Butler*, 353 S.C. 383, 577 S.E.2d 498. The evidence seized from this unlawful, warrantless search must be excluded as "fruit of the poisonous tree." *See* U.S. Const. amend. IV; *see generally Johnson v. United States,* 333 U.S. 10, 14-15 (1948) ("The point of the Fourth Amendment, which often is *not grasped by zealous officers*, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral

and detached magistrate *instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.*") (emphasis added)); *United States v. Foster*, 634 F.3d 243, 248-49 (4th Cir. 2011) ("[T]he exclusionary rule is our sole means of ensuring that police refrain from engaging in the unwarranted harassment or unlawful seizure of anyone" and "The Government cannot rely on post hoc rationalizations to validate those seizures that happen to turn up contraband.").

II. THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS APPELLANT'S STATEMENT TO THE OFFICER IMMEDIATELY AFTER THE PAT DOWN SEARCH BECAUSE A REASONABLE PERSON WOULD HAVE BELIEVED HE WAS IN CUSTODY, AND THE OFFICER'S QUESTION WAS REASONABLY LIKELY TO EVOKE AN INCRIMINATING RESPONSE.

The Fifth Amendment to the United States Constitution guarantees that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fifth Amendment privilege is violated by government coerced self-incrimination. *See United States v. Washington*, 431 U.S. 181 (1977). The Fifth Amendment's protections extend to statements or acts that are (1) compelled; (2) testimonial; and (3) incriminating of the person in a criminal proceeding. *United States v. Hubbell*, 530 U.S. 27 (2000).

Miranda v. Arizona and its progeny bar the admission of certain statements given by a suspect during "custodial interrogation" without a prior warning. *See Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the Court held that "[p]rior to any questioning, the person must be warned (1) that he has the right to remain silent, (2) that any statement he does make may be used as evidence against him, and (3) that he has the right to the presence of an attorney, either retained or (4) appointed." *Id.* The Court further found that *Miranda* warnings apply to "questioning initiated by law enforcement

after a person has been taken into custody or otherwise deprived of his freedom of action in any way." *Id.* Notably, all the circumstances surrounding the interrogation must be considered (including events that occurred before, during and after the interrogation).

In *Thompson v. Keohane*, 516 U.S. 99 (1995), the United States Supreme Court held that "[t]wo discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest."

The Court has further held that an interrogation occurs when the police engage either in express questioning or its functional equivalent. *See Rhode Island v. Innis*, 446 U.S. 291, 300-01(1980) (finding "the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent."). Police actions are the functional equivalent of an interrogation when the comments or actions were reasonably likely to result in an incriminating statement. *Innis*, 446 U.S. at 301 (finding "the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response."). The police officer's intent is relevant, but not determinative. *Innis*, 446 U.S. at 301 n.7 (finding the intent of police "may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response").

Discussion

In this case, the Trial Court erred in refusing to suppress Appellant's statement to the Officer immediately after the pat down search because a reasonable person would have believed he was in custody, and the Officer's question was reasonably likely to evoke an incriminating response. *See Miranda*, 384 U.S. 436; *Innis*, 446 U.S. at 301 (finding "the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.").

When asked whether Appellant was free to leave prior to the search of his person, Deputy Claytor equivocated. (R. 54 – 59). However, after several rounds of questioning by both Defense Counsel and the Trial Court, Deputy Claytor confirmed that Appellant would not have been permitted to leave the scene before being searched and questioned but maintained that he would not have arrested him. (R. 54 – 59). Despite Deputy Claytor's testimony, the circumstances illustrate that there was a formal restraint on his freedom of movement because him feeling the bag during the pat down search of Appellant's pants. *See Keohane*, 516 U.S. 99.

Accordingly, the statements made by Appellant to Deputy Claytor were involuntarily provided after custodial interrogation without prior *Miranda* warnings and should have been suppressed by the Trial Court.

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III. THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL BECAUSE THE PROSECUTOR'S COMMENTS DURING OPENING STATEMENT WERE UNDULY PREJUDICIAL AND IMPROPERLY SHIFTED THE BURDEN OF PROOF.

In determining whether to grant a mistrial, our Supreme Court has noted that "[t]he less than lucid test is . . . whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." *State v. Prince,* 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). Specifically, the trial court is to consider the following factors when ruling on a motion for mistrial: (1) the character of the testimony; (2) the circumstances under which it was offered; (3) the nature of the case; (4) other testimony in the case; and (5) "perhaps other matters." *State v. Craig*, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976). Therefore, although the decision to grant or deny a mistrial is within the trial court's discretion, such discretion is not unfettered. *See State v. Edwards*, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007).

"On appeal, an appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *Rudd* at 550, 586 S.E.2d at 157. "The appropriate determination is whether the solicitor's comment so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*

Our Supreme Court has explained:

> While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror

nor be calculated to arouse his passion or prejudice.

State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)); *State v. Rudd*, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct. App. 2003), (holding a solicitor's "argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it.") (citation omitted)).

"The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Humphries* v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (finding "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument."); *See State v. Hornsby*, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice."); *State v. Cockerham*, 294 S.C. 380, 365 S.E.2d 22 (1998) (finding reversible error where the solicitor's argument "was an indirect but unmistakenable reference to appellant's silence at trial").

In *State v. McGill*, 191 S.C. 1, 3 S.E.2d 257, 261 (1939), our Supreme Court held that a Solicitor "is a quasi judicial officer, and . . . that a solicitor must not, because of the high position he holds, say things, or do things, which would have any effect to prevent a citizen, however humble, from obtaining the fair and impartial trial he is entitled to under the law"). *See generally State v. Cannon*, 229 S.C. 614, 93 S.E.2d 889 (1956) (finding a prosecuting attorney has a duty to treat the defendant in an impartial manner); *State v. Craig*, 267 S.C. 262, 265, 227 S.E.2d 306, 308 (1976) (noting that "[a]s a general rule,

conduct of the prosecutor calculated to arouse prejudice against the accused, and to prevent him from having a fair trial will not be tolerated"); *see also State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000) (finding "[p]rosecutors are ministers of justice and not merely advocates . . . A prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics. . . . We will not tolerate deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice").

Discussion

In this case, the Trial Court erred in refusing to grant a mistrial because the Prosecutor's comments during the opening statement were unduly prejudicial and improperly shifted the burden of proof. *See Prince*, 279 S.C. at 33, 301 S.E.2d at 472. During his opening statement, Assistant Solicitor Daniel told the jury that "[this trial] *is not very efficient, is it, because you – it is your third day coming in here now. It is inconvenient for you, so it is not very efficient trying a case in front of a jury.*" (R. 101 – 102) (emphasis added). Solicitor Daniel went on to comment that "in other countries they are not afforded this right" and noted that in "[t]he Philippines for instance[,] *they have judicial ... executions.*" (R. 102) (emphasis added). He also stated, "*it seems kind of silly, maybe, [to] decide on something so straightforward.*" (R. 105) (emphasis added). Notably, Appellant argues that it is the cumulative effect of several comments that creates the prejudice and improperly shifts the burden. *See Humphries*, 351 S.C. at 373, 570 S.E.2d at 166 (finding the "solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.").

The Prosecutor's comments were calculated to convey that Appellant's trial is essentially a waste of time for the jury because of the alleged overwhelming evidence of

guilt and that the trial is only a procedural formality. Accordingly, the Trial Court erred in refusing to grant a mistrial because the Prosecutor's comments during the opening statement were unduly prejudicial and improperly shifted the burden of proof.

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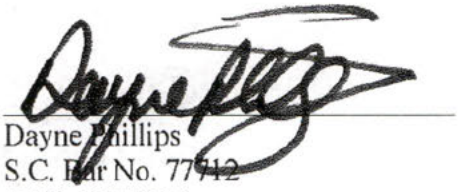
CONCLUSION

Based on the foregoing reasons, Appellant Calvin Whitener respectfully requests that this Court reverse the Trial Court and remand the to the Newberry County Court of General Sessions for a new trial.

Respectfully submitted,



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October 26, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions

Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2021-001232

Trial Court Case No. 2015-GS-36-0083

The State of South Carolina, Respondent,

v.

Calvin Eugene Whitener, Appellant.

CERTIFICATE OF COUNSEL

The undersigned Counsel certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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October 26, 2022