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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable Grace Gilchrist Knie, Circuit Court Judge
Appellate Case No. 2021-000812

In the Matter of the Care and Treatment
of Jeffrey S. Owens,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Appellant's motion for a new trial after the jury verdict was not timely and not preserved for appeal, because Appellant's objection regarding the State's comments during closing argument was quickly sustained, and Appellant did not request a curative instruction or move for a mistrial. Even if the statements were improper, any prejudicial effect did not substantially outweigh the overwhelming evidence in the record amply supporting the jury's verdict that Appellant is a sexually violent predator who is likely to re-offend sexually if not confined for treatment.

STATEMENT OF THE CASE

Appellant concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In June 2006, Appellant Jeffrey S. Owens pled guilty to criminal sexual conduct in the second degree, which is a statutorily delineated sexually violent offense, and was sentenced to fifteen years incarceration. In January 2020, Respondent State of South Carolina initiated proceedings pursuant to the South Carolina Sexually Violent Predator Act (SVPA), S.C. Code Ann. §§44-48-10, *et seq.* (2018), seeking Appellant's civil commitment for long term control, care and treatment. The matter was called for a jury trial in July 2021 before the Honorable Grace Gilchrist Knie, Circuit Court Judge.

The State presented testimony from Marie Gehle, Psy.D., who was court-appointed to evaluate Appellant under the SVPA. She was qualified as an expert in forensic psychology and forensic sex offender evaluations. She testified she had completed 209 SVPA pre-commitment evaluations. (Trial Testimony [TT], pp.71-77; Record on Appeal [R.]., pp. 17-23).

Her evaluation protocol includes reviewing all available records, and requesting additional documentation if necessary. She also interviews the person, gathering information about their background and general history, which she compares against the records. When she has as much information as she can get from the records and interview, Dr. Gehle scores two risk assessment measures. She then prepares her report with her findings and opinions, and sends it to the State and the person's counsel. Dr. Gehle testified the information she receives and relies on is the type of information reasonably relied on by professionals in her field. (TT, pp. 77-82; R., pp. 23-28).

Dr. Gehle testified it is a longstanding principle in psychology that you look to what a person has done in the past if you want to know what he may do in the future. She further testified that when a person gets in trouble for a sexual act and suffers consequences like being put in prison,

and then upon release does it again, they're likely to have problems controlling their behavior and will continue to commit sex crimes. (TT, p. 83, R., p, 29).

Dr. Gehle also reviewed three mental health evaluations of Appellant performed by doctors under other circumstances. A 1993 evaluation found Appellant was impulsive, had problems handling emotions, stress, anger, and conflicts with others, and in conflict situations, he was inclined to attack rather than seek peaceful solutions. Dr. Gehle testified the report findings were consistent with Appellant's overall criminal history. (TT, pp. 84-85; R., pp. 30-31).

Dr. Gehle testified she looks at the individual's entire criminal history, in part to develop questions to ask during the interview, and stated this is the type of information reasonably relied on in her profession when rendering opinions in SVP type cases. In reviewing Appellant's criminal history, Dr. Gehle found a long history of sexual offending, beginning when he was sixteen years old, and including a thirteen year period (1992-2005) during which he was charged with twelve sexual offenses in eight separate incidents that resulted in eight convictions. She stated almost all of Appellant's criminal offenses were sexual in nature, repetitive, and continued despite being arrested and convicted. Appellant used considerable physical violence in the sexual offenses, offended against strangers, and repeatedly violated probation he was serving for prior sexual offenses. (TT, pp. 86-87; R., pp. 32-33).

Appellant's criminal history included two sexually violent convictions – criminal sexual conduct second degree and criminal sexual conduct third degree. In addition, he was convicted of other crimes that were sexual in nature, including assault and battery of a high and aggravated nature (ABHAN) (pled down from assault with intent to commit criminal sexual conduct) (1992), harassing phone calls of a sexual nature in North Carolina (1993), unlawful use of a telephone in South Carolina involving talk of a sexual nature (1993), and ABHAN related to a sexual assault

(1999). In addition, Appellant was charged with one count of criminal sexual conduct third degree in 2003, which was dismissed when he pled guilty to another offense. (TT, pp. 92-93; R., pp. 38-39).

Dr. Gehle testified the 1992 ABHAN conviction arose from an incident when Appellant knocked down a female stranger, laid down beside her and put his hand over her mouth. Appellant told Dr. Gehle he had an argument with his mother-in-law and his wife, got really angry, took his child and drove to a local high school. He left the child in the car, went down to the school track and saw a woman running around it. He then "knocked the hell out of her," and she fell down but then sprayed him with Mace. Dr. Gehle believed this was an interrupted sexual act involving a female stranger, and she found it significant because it was impulsive and irrational, it occurred while his daughter was in the car, and Appellant could have easily been caught. (TT, pp. 94-96; R., pp. 40-42).

Dr. Gehle also considered the 1999 and 2000 convictions involving sexual based telephone calls to women to be indicative of a paraphilic disorder called telephone scatologia, which is a deviant sexual interest involving calling strangers randomly and talking to them in a sexual manner. She testified a paraphilia can increase the person's risk to commit future sexually violent offenses. When Dr. Gehle talked to Appellant about those offenses, he said he did it as "a joke," and "it was kind of a funny thing and not sexual for him." (TT, pp. 96-97; R., pp. 42-43).

At the time Appellant committed the North Carolina telephone offenses, he was on probation from the ABHAN conviction, and he was charged with a probation violation. As to the South Carolina unlawful use of a telephone convictions, Dr. Gehle testified Appellant called up two women multiple times, saying very demeaning, derogatory, mean-spirited, sexual and threatening things, and indicated "he couldn't wait to basically sexually assault them." When

Appellant was identified as the person making the calls, it was determined he lived on the same street as one victim, and had gone to the same church as the other victim. (TT, pp. 97-100; R., pp. 43-46).

In 2001, Appellant was charged with criminal sexual conduct first degree, pled guilty to criminal sexual conduct third degree, and was sentenced to six years incarceration, suspended to one year incarceration and five years probation. The charge arose from an incident on March 2, 2001, during which the victim asked Appellant for a ride, but he drove her to a wooded area, telling her he wanted to talk. The victim asked him for $10 to buy food and cigarettes, and after he gave her the money, Appellant demanded that the victim perform oral sex on him. When she refused, Appellant made her get out of car, and sexually assaulted her (penile/vaginal intercourse). When questioned by law enforcement, Appellant denied doing anything. He told Dr. Gehle the victim was a prostitute who he agreed to pay for sex, but after the sex he refused to pay, so she filed charges against him. (TT, pp. 102-105, State's Exhibit 1[Sentencing Sheet and Indictment]; R., pp. 48-51; 260).

Appellant also told Dr. Gehle he went to the courthouse on his lunch break to pay a fine, and when he left there he felt like picking up a prostitute even though he was expected back at work. He knew he didn't have any money, but he picked up a prostitute anyway because he wanted to do it. He had no explanation for committing the offense other than his claim the victim retaliated against him because he did not pay her after sex. (TT, p. 105; R., p. 51).

Dr. Gehle found the incident significant because it was a sexually violent offense, and it involved another woman who was a stranger to Appellant. In addition, Appellant did not take responsibility for his behavior, called it a "minor" thing, and blamed the victim. (TT, pp. 105-106; R., pp. 51-52).

Dr. Gehle also testified Appellant was charged with criminal sexual conduct in November 2003, but the charge was dismissed the day after Appellant was convicted of the 2001 sexual assault. According to Appellant, the victim was his mother-in-law, who accused him just to get revenge on him because he would not allow her to live with him and his wife. (TT, pp. 106-107; R., pp. 52-53).

Dr. Gehle testified Appellant committed another sexual offense on May 13, 2005, and was indicted on one count of criminal sexual conduct first degree. He pled guilty to criminal sexual conduct second degree on June 27, 2006, and was sentenced to fifteen years incarceration. (TT, pp. 107-108, State's Exhibit 2 [Indictment & Sentencing Sheet]; R., pp.53-54; 263).

The offense involved a female Appellant did not know when he saw her walking and offered her a ride. He gave her a false name, and during the drive he punched her and knocked her unconscious. When she regained consciousness, Appellant's hand was on the back of her head and they were parked on a dirt road. Appellant told the victim to perform oral sex on him (along with other explicit details associated with it), and put his penis in her mouth. The oral sex did not last long because the victim was bleeding from a laceration on her lip, so Appellant pushed her out of the car, told her to undress, forced her to bend over and raped her from behind. (TT, p. 108; R., p. 54).

The victim saw an opportunity to escape so she ran away. She looked back over her shoulder and saw Appellant driving away, so she memorized the license plate on the car. After Appellant left, the victim ran back and retrieved her shorts and pocketbook Appellant had thrown from the car as he drove off. The victim then ran away until a woman stopped to help her and they called law enforcement. The license plate connected the car to Appellant's mother, who advised

law enforcement Appellant drove the car, and the victim identified Appellant in a photo line-up. (TT, pp. 108-109; R., pp. 54-55).

Dr. Gehle testified the underlying facts of the 2006 conviction were important because the offense involved another female stranger, and there was physical violence, including having her perform oral sex on him while she was bleeding. She stated that if a person's partner is not consenting or really into what is going on sexually, the person normally loses arousal. If somebody can force a person to perform oral sex on them while the person is bleeding, it means the person does not really care about the lack of consent since the lack of consent does not lessen the sexual arousal. (TT, p. 110; R., p. 56).

The version of events Appellant gave during the interview with Dr. Gehle was also important because he said he was the victim. He claimed he was driving around after work when a woman flagged him down and asked for a ride. After she got in his truck, she told him she was looking to earn some money, so they agreed she would perform oral sex and have intercourse with him for $20. According to Appellant, when they finished having sex, the woman pulled out two knives and demanded his money, so he punched her in the face, drove off and threw her stuff out the window. Dr. Gehle found Appellant's version significant because he again blamed the victim and took no responsibility. The incident also indicated Appellant was picking up random women for sex. (TT, pp. 110-111; R., pp. 56-57).

Dr. Gehle testified Appellant was on probation from his earlier offenses at the time he committed the sexual assault in 2005. He was charged with probation violations, and sentenced to serve six years incarceration, to run consecutive to the sentence on the 2005 conviction. (TT, pp, 111-112, State's Exhibit 3 [Probation Revocation]; R., pp. 57-58; 266).

Appellant told Dr. Gehle he did not need sex offender treatment, and the records she reviewed indicated that when he was ordered to attend treatment as part of his probation, he only attended two or three sessions. Dr. Gehle stated it is important if someone is ordered to take treatment and starts it but does not complete it, because not completing treatment actually increases the person's risk to commit another sexual offense. (TT, pp. 114-115; R., pp. 60-61).

Dr. Gehle diagnosed Appellant with Other Specified Paraphilic Disorder – Biastophilia. She testified biastophilia is a deviant sexual interest in coercive sexual acts with non-consenting persons, and the pattern of deviant arousal must cover at least six months. Dr. Gehle considered Appellant's offense history, virtually all of which was sexual in nature, and what happened in each offense; particularly Appellant hitting and pushing the victims, knocking one unconscious, forcing one victim to perform oral sex while she was bleeding from her mouth, and using physical force such as pulling the victims' hair and bodies. The records indicated Appellant was "definitely sexually aroused" in non-consensual situations, and that the deviant conduct spanned at least six months. (TT, pp. 128-135; R., pp. 74-81).

When she asked Appellant about his arousal, he denied being sexually aroused by the non-consent, which was contradicted by the fact he ejaculated or showed other clear signs of sexual arousal during the offenses. Further, Appellant had cooperative sexual partners throughout the entire time he was sexually offending, which Dr. Gehle indicated speaks to a preference for the non-consenting nature of his offenses. (TT, p. 135-137; R., pp. 81-83).

Dr. Gehle used two actuarial risk assessment tools in evaluating Appellant's risk to reoffend sexually – the Static-99R and the Static-2002R. These tools measure certain static factors that cannot be changed through treatment, such as number and gender of victims, etc. The Static-

99R scores range from negative three to twelve, and the Static-2002R scores range from negative two to thirteen. (TT, pp. 139-142, 144; R., pp. 85-88; 90).

Appellant's Static-99R score was seven, and his Static-2002R score was eight, both of which are in the well above average risk to reoffend category. According to the data, 27.7% of the people with a seven on the Static-99R reoffended within five years, and the score of seven is about 5.25 times higher than the expected recidivism rate. On the Static-2002R, 34.3% of people who scored an eight reoffended within five years. Dr. Gehle testified the research shows only 30% to 40% of sex crimes actually get reported, so the risk assessment tools possibly underestimate the risks. (TT, pp. 142-148; R., pp. 88-94).

In addition to the static risk factors considered in the risk assessment tools, Dr. Gehle testified the research has identified twelve dynamic risk factors that are associated with sexual recidivism. Dynamic risk factors are things that can be changed or targeted through treatment to reduce recidivism risk. Out of the twelve factors, Dr. Gehle found seven that applied to Appellant: 1) sexual preoccupation; 2) sexualized violence; 3) multiple paraphilias (biastophilia and telephone scatologia); 4) lack of emotionally intimate relationships; 5) lifestyle impulsiveness; 6) poor problem solving; 7) resistance to rules and supervision. (TT, pp. 148-158; R., pp. 94-104).

Based on all the information she obtained and reviewed, as well as the interview with Appellant, Dr. Gehle opined to a reasonable degree of psychological certainty that Appellant has a relevant mental abnormality that causes him serious difficulty controlling his behavior. She further opined Appellant meets the criteria of a sexually violent predator, and he is likely to commit future acts of sexual violence if not confined in a secure facility for long term control, care and treatment. (TT, pp. 158-160; R., pp. 104-106).

During Appellant's closing argument, he argued the risk assessment tools showed that only 27.7% to 34.3% of the people included in the underlying studies reoffended, which meant 72.3% to 65.7% did not reoffend. (TT, pp. 278-280; R., pp. 224-226). In response, the State argued:

> 60 percent of the people on the Static 99 don't go on the reoffend, 70 percent of the people on the Static 2002R, or maybe it's vice versa, don't go on to reoffend. But I think you understand the premise.
>
> What I want you to remember is 30 percent, 30 percent, basically 27.7 and 34.2 I think it was on the Static-2002R, I mean are you willing to take those risks?
>
> It's one thing to say 60 percent people don't reoffend. It's another thing to say, say would you put your loved one with someone who has a 30 percent chance at reoffending.
>
> You know, would you do that?
>
> Would you put your wife, or your daughter, or your spouse?

(TT, pp. 288-289; R., pp. 234-235).[1]

Appellant objected, and the court held a bench conference. Thereafter, the court sustained the objection and instructed the State to move on. The State then reminded the jury Dr. Gehle also said there was an underreporting risk with the actuarial tools because between 60% and 70% of sexual crimes go unreported, so when considering the percentages of the people in the study who do not reoffend, it must be considered others just do not get caught. (TT, pp. 289-290; R., pp. 235-236).

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[1]As part of his "Relevant Facts," Appellant states "the assistant attorney general knew he had to change tactics in his closing argument because defense counsel's adept cross-examination effectively used the state's expert witness as an expert witness for the defense on percentages of reoffending versus non-reoffending." (Brief of Appellant, p. 8). This statement is clearly pure speculation rather than "relevant facts." Appellant's speculation also overlooks the "fact" that the percentages on which Appellant's trial counsel "adeptly" cross-examined the expert were discussed at length during the State expert's direct testimony, including her testimony that studies show only 30% to 40% of sex crimes are reported, so the re-offense percentage rates are likely underestimated. (TT, pp. 137-148; R., pp. 83-94).

At the end of the jury charge, the court instructed the jury its verdict could not "be based on sympathy, passion, prejudice, or any other consideration not based upon the law and evidence in this case." Appellant did not object to any part of the charge, or ask for any additional instructions regarding the basis for the jury's verdict. (TT, pp. 301-302; R., pp. 247-248).

After the jury started deliberating, the court put on the record the substance of Appellant's objection during the State's closing argument:

> The Court: Mr. Thompson objected to Mr. Runyan's statement that the 30 percent would include your family members, your daughter, your wives. I sustained that objection on the basis of - - Mr. Thompson stated that it was prejudicial to the jury. I, I believe that it, it was eliciting passion and emotion from them as well - -
>
> Mr. Thompson: And that's what I meant.
>
> The Court: - - and, and, and, and resultingly prejudicial.
>
> Mr. Thompson: Right.

(TT, p. 304; R., p. 250). Appellant did not challenge the adequacy of the jury instruction that the verdict could not be based on passion, prejudice, or anything other than the law and evidence presented, or move for a mistrial based on the State's statement during closing argument.

The jury began deliberating at 3:43 p.m. At 4:00 p.m., the jury sent a question to the judge regarding the meaning of "long term." The jury returned to the courtroom at approximately 4:15 p.m. for the answer, started deliberating again at 4:18 p.m., and returned with a verdict at 4:48 p.m., finding beyond a reasonable doubt Appellant is a sexually violent predator. (TT, pp. 305-308, 310; R., pp. 251-254; 256).

After the jury was discharged, Appellant moved for a new trial based on his objection to statements during the State's closing argument that were improper, could have played to the emotions of the jury, and were prejudicial to Appellant. The court noted it had sustained Appellant's objection. The State argued that while the objection during closing argument was

timely, the statements at issue did not really prejudice the jury, and even if the statements were error, it was harmless because the objection was sustained and the State moved on in its argument. The court denied Appellant's motion for a new trial, and based on the jury's verdict, committed Appellant to DMH custody for long term control, care and treatment. (TT, p. 312, Order of Commitment dated July 20, 2021; R., pp. 258; 267). This appeal followed.

STANDARD OF REVIEW

The trial court has broad discretion in ruling on the appropriateness of a closing argument, and the trial court's ruling will only be reversed for abuse of discretion. State v. King, 349 S.C. 142, 561 S.E.2d 640, 659 (Ct. App. 2002). When reviewing the trial court's rulings regarding closing argument, the appellate court must review the argument in the context of the entire record. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982). In order to constitute reversible error, the argument must have so infected the trial with unfairness that the resulting verdict is a denial of due process. State v. Elkins, 312 S.C. 541, 436 S.E.2d 178, 180 (1993).

ARGUMENT

Appellant's motion for a new trial after the jury verdict was not timely and not preserved for appeal, because Appellant's objection regarding the State's comments during closing argument was quickly sustained, and Appellant did not request a curative instruction or move for a mistrial. Even if the statements were improper, any prejudicial effect did not substantially outweigh the overwhelming evidence in the record amply supporting the jury's verdict that Appellant is a sexually violent predator who is likely to re-offend sexually if not confined for treatment.

Appellant contends the circuit court erred in denying his motion for a new trial because the statements made by the Assistant Attorney General during his closing argument were "calculated to inflame the passions and prejudices of the jury as a means to secure Appellant's involuntary commitment on an improper basis." (Brief of Appellant, p. 9). He further asserts the issue was preserved for appellate review because trial counsel objected "after the state made an improper closing argument that was calculated to 'completely destroy and nullify all sense of impartiality' by insinuating Appellant might sexually assault the jury's daughters and wives." (Brief of Appellant, p. 9). The issue raised in the new trial motion was not preserved for appellate review. In addition, Appellant's rhetoric ignores the actual record and is unavailing.

A. Preservation

The new trial issue was not preserved by trial counsel's objection during the closing argument, which was sustained. Appellant did not contemporaneously request a curative instruction or move for a mistrial based on the Assistant Attorney General's statements, but waited until after receiving an adverse verdict to raise the issue in a new trial motion. A party may not preserve a perceived error until after an adverse decision, and then try to take advantage of the error on appeal. *See* State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, 766 (1997) (issue not preserved when trial judge ruled in party's favor and party did not move to strike or request a curative instruction); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (no issue is preserved if

objecting party accepts judge's ruling and does not contemporaneously objection to the sufficiency of the curative charge or move for a mistrial); State v. Penland, 275 S.C. 537, 273 S.E.2d 765, 766 (1981) (denial of new trial motion affirmed because defense counsel objected to the solicitor's alleged improper remarks during closing arguments, but failed to move for a mistrial until after the verdict was returned, and "[o]ne may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal"); State v. Burnett, 226 S.C. 421, 85 S.E.2d 744, 746 (1954) ("A defendant may not reserve vices in his trial, of which he has notice ..., taking his chances of a favorable verdict, and in case of disappointment, use the error to obtain another trial.");.

In this case, in the face of what Appellant now contends were incurably vicious and inflammatory statements during the State's closing argument, nothing in the record indicates Appellant requested a curative instruction at all, or even asked that the statements be stricken.[2] Thereafter, during the jury charge, the court did instruct the jury: "Your verdict can not be based on sympathy, passion, prejudice, emotion, or any other consideration not based upon the law and evidence in this case." Appellant did not object to the charges as given when afforded an opportunity to do so.[3] (TT, pp. 303-304; R., pp. 249-250). Where a curative instruction is given and the objecting party does not contemporaneously challenge the sufficiency of the corrective charge or move for mistrial, no issue is preserved for review. State v. Crosby, 348 S.C. 387, 559 S.E.2d 352, 358 (Ct. App. 2001), *reversed on other grounds,* 355 S.C. 47, 584 S.E.2d 110 (2003).

[2]Arguably, a curative instruction, or any statement by the court, at that point may have actually focused the jury on the statements.

[3]During the bench conference after Appellant's objection, the court may have indicated it intended to give that instruction, which Appellant accepted.

Appellant's reliance on Toyota of Florence, Inc., v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994), and South Carolina State Highway Dept. v. Nasim, 255 S.C. 406, 179 S.E.2d 211 (1971), for the proposition a contemporaneous objection or motion for a mistrial is misplaced. In Toyota, the offensive closing argument involved drawings and statements clearly intended to associate the plaintiff with racial and ethnic stereotypes. In reversing the jury verdict in the absence of a contemporaneous objection, the Supreme Court stated:

> We can hardly conceive of a more outrageous argument than that made here. While we do not condone S.E.T.'s failure to make a contemporaneous objection, we find it would be wholly unreasonable for any attorney to anticipate this type of abhorrent conduct.

442 S.E.2d at 615.

In Nasim, defense counsel made highly offensive and personal remarks about a plaintiff's witness, associating the witness with bad actors during World War II and stating the witness was trying to steal from the defendant, but there was no contemporaneous objection. In reversing the verdict, the Supreme Court characterized counsel's remarks as vicious and inflammatory, and found the likelihood of prejudice was so strong that the case was an exception to the general preservation rule. 179 S.E.2d at 211-213.

It cannot be seriously argued the very brief statements at issue in this case were "outrageous," the Assistant Attorney General engaged in "abhorrent conduct," or the statements were offensive, personal remarks about Appellant. Rather, they were brief, addressed percentages of recidivism in general, and did not disparage Appellant personally. In the absence of the conduct the court found abhorrent in Toyota and Nasim, the exception to the rule requiring contemporaneous objections from those cases simply does not apply, and the general rule requiring contemporaneous objections applies in this case. Therefore, the issue raised on appeal is not preserved for appellate review.

B. Closing Argument

Assuming for argument purposes only that the issue Appellant raises is preserved for appellate review, the circuit court did not err in denying the new trial motion. The propriety of closing argument is vested in the broad discretion of the trial judge. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990); State v. Brown, 333 S.C. 185, 508 S.E.2d 38, 41 (Ct. App. 1998). The propriety of each individual statement depends on the nature of the trial and the issue involved, and an appellant must show he did not receive a fair trial to merit reversal. State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991). The appellant must show that a particular comment "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process." State v. Elkins, 312 S.C. 541, 436 S.E.2d 178, 180 (1993). Finally, any alleged impropriety must be examined on appeal in light of the entire record. Johnson, 410 S.E.2d at 555.

The statements at issue did not so infect the trial with unfairness as to constitute a denial of due process. During the trial, both the State and Appellant questioned Dr. Gehle about the actuarial risk assessment tools she used, including the recidivism percentages. The State had Dr. Gehle explain the percentages, and testify about the impact of low percentage of reported offenses on the risk percentages, which put those percentages in perspective. (TT, pp. 138-148, 178-189; R., pp. 84-94, 124-135). During cross-examination, Appellant questioned Dr. Gehle about the recidivism percentages associated with Appellant's scores on the tools, specifically the percentage of offenders in the studies who had the same scores as Appellant and reoffended within five years, and she agreed that a high percentage of those offenders (72.3 % [Static99-R] and 63.7% [Static2002-R]) did not reoffend. (TT, pp. 179, 188-189; R., p. 125, 134-135).

The State did not address the actuarial tools' percentages in its initial closing argument. In his closing argument, however, Appellant stressed the percentages indicated most offenders in the

studies do not reoffend, and people should not be committed for treatment "simply because an actuarial table says well, they might [reoffend] and that's what the State's looking at now." (TT, pp. 278-280, 284; R., pp. 224-226; 230).

In reply, the State argued:

> What I want you to remember is 30 percent, 30 percent, basically 27.7 and 34.2 I think it was on the Static-2002R, I mean are you willing to take those risks?
>
> It's one thing to say 60 percent people don't reoffend. It's another thing to say, say would you put your loved one with someone who has a 30 percent chance at reoffending.
>
> You know, would you do that?
>
> Would you put your wife, or your daughter, or your spouse?

At that point, Appellant objected, there was a bench conference, the circuit court sustained the objection and instructed counsel to "move forward." (TT, p. 289; R., p. 235). The State then simply reminded the jury that Dr. Gehle testified only 30% to 40% of sex crimes get reported, which should be considered when looking at the percentage of offenders with the same score as Appellant who do not reoffend. (TT, pp. 289-290; R., pp.235-236).

At the end of the entire jury charge, the court instructed the jury its verdict could not be based on passion, prejudice, emotion or anything other than the law and evidence in the case, and that instruction was literally the last substantive thing the jury heard from the court before deliberations commenced. In the absence of any further objections or motions by Appellant prior to the verdict, there simply was no error.

Appellant contends the situation and brief statements in this case are "strikingly similar" to the situation and solicitor's closing argument in State v. White, 246 .C. 502, 144 S.E.2d 481 (1965). In White, the defendant was convicted of rape and the State was seeking the death penalty. During closing arguments, after comparing the defendant to a snake, the solicitor stated:

> How would you like to see him coming in your bedroom or your daughter's bedroom with this butcher knife?
>
> I don't know whether you have got daughters or not, I believe one or two of you are not married. But everybody has got a mother. Not everybody, but most everybody has got a sister, daughters. Let him go, let him come back to Williamsburg County. Let him come in your wife's bedroom or your mother or daughters, any of them, what would you do?
>
> How, if this young lady was your sister, how would you feel? How, if she was your wife, how would you feel? How, if she was your daughter, God only knows, how would you feel? Gentlemen, she is all of that to somebody. She is a daughter, she is a sister, she is a wife. And but for the grace of God that could be your sister, your daughter or your wife. And under those circumstances, gentlemen, what would you do under the testimony you heard from that stand? Mercy to him that shows mercy. Mercy turns her back on the unmerciful.
>
> Gentlemen, you heard the testimony. I feel in this case very, very strongly and deeply. I feel that each of you do. But when you go out and deliberate, when you get to thinking about the mercy they are asking, they don't want justice in this case. All they want is mercy. They got nothing to ask you for. Then if you give him justice, exactly what are you going to do? But when you get back there and consider giving him mercy like they are going to ask you for, think about your wife, think about your daughters, think about your sister or your mother, being in the same position as this young lady, with a knife at her throat and a brute on top of her.

Id. at 481-482.

The defendant timely objected to the statements as prejudicial because they were intended to have the jurors identify with the victim in the case, and inject the possibility the defendant would do the same thing to their wives, mothers, daughters and sisters. The defendant moved for a mistrial on the same ground after the objection was overruled. *Id.* The Supreme Court reversed, holding that in view of the absolute discretion afforded the jury with regard to the issue of mercy, it was possible the solicitor's statements injected extraneous considerations and were calculated to remove the necessary element of jury impartiality. *Id.* at 483.

A cursory comparison of the statements at issue in this case reveals a "starkly" different context and content. There was no identified victim(s) in this case, and unlike the extensive

statements in White, the State's very brief statements regarding the actuarial risk percentages did not ask the jury to imagine Appellant coming into their homes and molesting their wives, mothers or daughters like Appellant had molested his victims. Further, the White jury had multiple considerations, including mercy, in deciding whether to impose the ultimate penalty of death, and the Supreme Court's reversal was based on the possibility the statements were calculated to take away the jury's impartiality. The question before the jury in this case, however, was limited to whether Appellant has a mental abnormality or personality disorder that makes him likely to reoffend sexually if not confined for long term control, care and treatment, the State's brief statements were in response to Appellant's closing argument, and they did not inject any extraneous matter designed to remove the jury's impartiality in deciding that issue.

When the statements at issue, which the court ruled were improper, are viewed in light of the entire record, they did not so infect the trial with unfairness as to make the jury's verdict a denial of due process. See Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738, 746 (2004) (solicitor's comment, although improper, did not so infect the trial with unfairness as to make the resulting conviction a denial of due process). The evidence presented overwhelmingly established Appellant had two qualifying sexually violent offenses, he has a mental abnormality related to sexual offending (biastophilia), and he is likely to reoffend if not confined for long term, control care and treatment.

Finally, Appellant's contention there is "a reasonable likelihood" the statements at issue "undermined the outcome" of the trial is belied by the record. The jury started deliberating at 3:43 p.m., returned with a question at 4:15 p.m., began deliberations again at 4:18 p.m., and returned a verdict at 4:48 p.m.

Thus, the jury deliberated for approximately one hour before returning a verdict, which combined with the fact the jury asked a question during its deliberations, indicates the jury carefully reviewed and considered the evidence and the law as instructed in reaching its verdict. If, as Appellant asserts, the State's closing argument so prejudiced the jury as to render the verdict unfair, it is highly unlikely the jury would have deliberated for an hour and asked a question before deciding the case. Accordingly, even if preserved for review, the circuit court's denial of Appellant's post-verdict motion for a new trial based on the statements in the State's reply closing argument should be affirmed.

CONCLUSION

Based on the foregoing reasons, the State respectfully submits the Court should affirm the circuit court ruling and Appellant's civil commitment as a sexually violent predator pursuant to the SVPA.

Respectfully submitted,

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October 25, 2022

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable Grace Gilchrist Knie, Circuit Court Judge
Appellate Case No. 2021-000812

In the Matter of the Care and Treatment
of Jeffrey S. Owens,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and other Sensitive Information in Appellate Court Filings."

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