STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RODNEY S. KELLEY,

APPELLANT

APPELLATE CASE NO. 2022-000643

ANDERS BRIEF OF APPELLANT

TAYLOR D GILLIAM
Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in overruling Appellant's objection during the state's closing argument, where the state commented on Appellant's silence, where the trial judge failed to give a curative instruction or grant a mistrial?

STATEMENT OF THE CASE

In April 2019, a Lexington County grand jury indicted Petitioner for a violation of S.C. Code Ann. § 16-23-730, manufacturing, possession, transportation, or threatening to use a hoax bomb. R. 155-156. He proceeded to trial before the Honorable Clifton Newman and a jury on April 25, 2022. R. 1. Stephen R. Story, Jr. and Vanessa A. Horsley represented Appellant; Whitney Taylor and Ashley E. Wellman appeared on behalf of the state.

Following a multi-day trial, the jury found Appellant guilty as indicted. R. 130, ll. 9 – 15. Judge Newman sentenced him to one year of incarceration, the statutory maximum. R. 151, l. 22.

This appeal follows.

STANDARD OF REVIEW

The appropriateness of a solicitor's closing argument is a matter left to the trial court's sound discretion. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). The appellate tribunal will not disturb the trial court's ruling regarding closing argument unless there is an abuse of that discretion. State v. Penland, 275 S.C. 537, 273 S.E.2d 765 (1981).

ARGUMENT

The trial judge erred in overruling Appellant's objection during the state's closing argument, where the state commented on Appellant's silence, where the trial judge failed to give a curative instruction or grant a mistrial.

Relevant facts

On July 14, 2018, a newspaper deliverywoman named Tammy Donnan noticed a backpack on the side of the road along one of her routes. R. 34, l. 15 – R. 35, l. 23. Because she was curious, she inspected it. Id. She noticed wires hanging out of the backpack. Id. She testified that she then picked the backpack up, causing an alarm to go off. Id. She alerted the authorities. Id.

A member of the Lexington County Sheriff's Office, Brian Milhous, arrived shortly thereafter. R. 41, l. 22 – R. 43, l. 24. Over an objection under Rule 701(c), SCRE, Milhous testified that the backpack resembled an IED, or an improvised explosive device. R. 43, l. 25 – R. 44, l. 12.

Milhous testified that Appellant approached him and claimed ownership of the backpack. R. 45, l. 6 – R. 46, l. 16. Appellant advised Milhous that the backpack contained a battery, a car horn, and a sandbag. R. 46, ll. 3 – 5. He told law enforcement it was "a practical joke." Id.; R. 47, l. 15 – R. 48, l. 4. Appellant was then detained and handcuffed. R. 48, ll. 12 – 19. Another officer, Cameron Cain, was *sua sponte* qualified as an expert by Judge Newman. R. 64, ll. 14 – 25. It was unclear what exactly Cain's expertise was in, yet the trial judge allowed his "view of what an IED is." Id.

Thomas Hamilton, the Bomb Squad Commander with the Lexington County Sheriff's Department, used a device to pull the battery away from the backpack. R. 75, l. 21 – R. 83, l. 16.

He testified he was able to safely defuse the device. R. 84, ll. 22 – 23. Although Appellant intended to prank a friend with the backpack, Hamilton testified that the device "appear[ed] consistent with a possible explosive or destructive device." R. 85, ll. 6 – 10.

The state rested after putting up four witnesses, and the defense did not put up a case. During closing argument, the state impermissibly commented on Appellant's silence the day in question:

> What's also notable is that when Deputy Cain advised the Defendant this is pretty close to a homemade IED, what did he say? Did he say no, no, that wasn't my intention. No I didn't know that. He said nothing.

R. 100, l. 23 – R. 101, l. 1.

Defense counsel immediately interposed an objection, which the trial judge overruled. R. 101, ll. 2 – 4. No motion for mistrial was made.

Discussion

The state cannot, through evidence or argument, comment upon a defendant's exercise of a constitutional right. State v. Johnson, 293 S.C. 321, 323, 360 S.E.2d 317, 319 (1987) ("When an accused asserts a constitutional right, it is impermissible for the state to comment upon or argue in favor of guilt or punishment based upon his assertion of that right.")

"It is impermissible for the prosecution to comment, directly or indirectly, upon the defendant's failure to testify at trial." State v. Cooper, 334 S.C. 540, 544, 514 S.E.2d 584, 591 (1999). "However, improper comments on a defendant's failure to testify do not automatically require reversal if they are not prejudicial to the defendant." Id. The appropriateness of a solicitor's closing argument and the decision whether to grant a defendant's motion for a mistrial are matters within the trial judge's discretion that ordinarily will not be disturbed on appeal. State v. Sweet, 342 S.C. 342, 347, 536 S.E.2d 91, 93 (Ct. App. 2000). "Where the solicitor refers to

certain evidence as uncontradicted and the defendant is the only person who could contradict that particular evidence, the statement is viewed as a comment on the defendant's failure to testify." Id. at 348, 536 S.E.2d 91, 94.

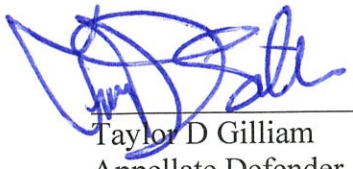
Negative inferences created by prosecutors can be cured if the trial judge gives an immediate curative instruction to the jury. Cooper, 334 S.C. at 554, 514 S.E.2d at 591. If the trial judge charges the jury during jury instructions that the burden of proof is fully on the State, and that the jury may not consider a defendant's failure to testify in its deliberations, any prejudicial effect can be cured. Id. The appellant has the burden of proving he did not receive a fair trial because of the improper argument. State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981).

The test of granting a new trial for alleged improper closing argument is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997); State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990); see also State v. Brisbon, 323 S.C. 324, 474 S.E.2d 433 (1996) (ruling test of granting new trial for alleged improper closing argument of counsel is whether defendant was prejudiced to extent that he was denied a fair trial).

The state's burden-shifting closing argument suggested to the jury that Appellant was under an obligation to speak with law enforcement and disprove their theory. The trial judge erred in overruling counsel's objection.

CONCLUSION

Based on the foregoing, Appellant respectfully requests for this Court to reverse his conviction and remand for a new trial.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of April, 2023.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Rodney S. Kelley states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Clifton Newman, which was held on April 28, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Rodney S. Kelley.

Respectfully Submitted,

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of April, 2023.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Entire trial transcript; and
(2) Indictment.

I certify that this designation contains no matter which is irrelevant to this appeal.

Taylor D Gilliam
Appellate Defender

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

Taylor D Gilliam
Appellate Defender

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This 3rd day of April, 2023.