STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Jasper County

The Honorable Perry M. Buckner, III, Trial Judge
Honorable D. Craig Brown, Post-Conviction Relief Judge

Appellate Case No. 2011-192933

SYLVESTER TOOMER,

Appellant,

v.

STATE OF SOUTH CAROLILNA,

Respondent.

Brief of Respondent

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I. Appellant's claim that the trial judge erred in allowing the Solicitor to make improper and prejudicial comments in his closing argument is not preserved for appellate review because Appellant failed to make a contemporaneous objection to those comments, and to the extent this Court finds the claim is nonetheless preserved, the comment comparing Appellant's culpability for grabbing the wheel from the driver and causing the vehicle to flip to the culpability of the pilots who flew the planes into the Twin Towers on September 11, 2001 is distinguishable from Vasquez v. Smith, was not improper for closing argument, and did not infect the Appellant's trial with unfairness or violate his due process rights.

II. Appellant's claim that the trial court erred in denying the Appellant's motion for directed verdicts of acquittal on the Appellant's two assault charges is abandoned and waived by the Appellant because the issue was not addressed in the Brief of the Appellant.

STATEMENT OF THE CASE

The Appellant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Jasper County. The Appellant was indicted at the February 2007 term of the Jasper County Grand Jury for two counts of assault and battery with intent to kill (ABWIK) (2007-GS-27-045, -046). John D. Bryan, Esquire, represented the Appellant. The Appellant proceeded to trial August 6-8, 2007, after which a jury found him guilty as indicted. The Honorable Perry M. Buckner, III, sentenced the Appellant to confinement for twenty (20) years, suspended upon the service of ten (10) years plus five (5) years probation. The sentences were to run concurrently. The Appellant did not appeal his conviction or sentence.

On June 5, 2008, the Appellant filed an application for post-conviction relief which was amended on February 9, 2010. The Respondent made its Return on March 18, 2009. An evidentiary hearing was convened on April 20, 2011 at the Beaufort County Courthouse. The Appellant was represented by Brian D. McDaniel, Esquire. The Respondent was represented by Matthew J. Friedman, Esquire. By Order dated May 9, 2011, the Honorable D. Craig Brown denied and dismissed with prejudice the Appellant's application for post-conviction relief.

The Appellant filed a timely Notice of Appeal. The Appellant alleged in his Petition for Writ of Certiorari the lower court erred in denying the Petitioner's allegation that he did not voluntarily and intelligently waive his right to a direct appeal of his convictions and sentences. The Respondent filed its Return. This Court granted the Appellant's Petition for Writ of Certiorari as to whether the Appellant voluntarily waived his right to direct appeal and ordered the parties to brief the direct appeal issues raised by the Appellant in his Petition. The Appellant filed his brief on June 14, 2013. This Brief of Respondent follows.

ARGUMENT

I. <u>The trial court did not err by allowing the Solicitor's closing argument where he made an isolated reference to the pilots who flew the planes into the Twin Towers on September 11, 2001 when this issue is not preserved for appellate review, the Solicitor's comments were not improper, and the comments did not infect the trial with unfairness or violate the Appellant's due process rights.</u>

The Appellant proceeded to trial for two counts of assault and battery with intent to kill. He was accused of sporadically jerking the steering wheel of a vehicle being driven by one of the victims while riding at approximately 70 mph and causing the vehicle to flip multiple times. At the conclusion of trial, the Solicitor made the following comments in closing to the jury:

> I expect that you will, first of all, hear Mr. Toomer surely couldn't have done this because he was in the car, he could have hurt himself. Well, ladies and gentlemen, I don't know how much of court y'all have watched in the past, or this week. One of the by-products of the bad-old days when the jury just came and sat is that they got to watch- whether they wanted to or not- the routine, boring details of the system grind out, which was primarily people pleading guilty. But I think if you watched any court or listened to any of the bystanders, I bet not one time have you observed a criminal defendant in this courthouse and thought, gosh that was smart; gosh, that was good judgment; you know, that accused that defendant, really showed good judgment in getting himself in that predicament or herself in that predicament.
>
> Ladies and gentleman, good judgment and committing a crime generally are the opposite of each other, so to argue this person must be in—must be innocent because to be guilty would be poor judgment should not persuade you at all. The other thing about that is—and I can't conceive of why somebody would have done this. But the fact that he was willing to hurt himself in order to hurt others is not a defense. You won't hear that from the Court.
>
> It seems like to me one September morning I heard about some fellows that drove some airplanes into a building up around New York somewhere and hurt and killed a bunch of people. Does that make them innocent? Does that make the people, drivers, steering that airplane innocent? Or course not. They're just not around to prosecute. But if they were, they would certainly be guilty of a crime. So the poor judgment and the fact that he suffered or could have suffered along with them is simply not a defense. (App. 183:1-184:12).

As an initial matter, the Respondent submits this issue is not preserved for appellate review by this Court. The portion of the Solicitor's closing argument that the Appellant challenges were not contemporaneously objected to by counsel. "An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review." State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005); State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999); State v. Thomason, 355 S.C. 278, 584 S.E.2d 143 (Ct. App. 2003); State v. Greene, 330 S.C. 551, 499 S.E.2d 817 (Ct. App. 1997). A contemporaneous objection is required to properly preserve an issue for appellate review. See State v. Owens, 378 S.C. 636, 638, 664 S.E.2d 80, 81 (2008) (noting that without an objection, a claim that the solicitor's closing argument was improper is not preserved for appellate review); State v. Hill, 394 S.C. 280, 299-300, 715 S.E.2d 368, 379 (Ct. App. 2011) (finding a challenge to the State's closing argument was not preserved for review where the defendant failed to make a contemporaneous objection at trial).

The Appellant asserts the Solicitor's closing comments were so inflammatory that they warrant the grant of a new trial despite the absence of a contemporaneous objection. The Respondent submits the comments made by the Solicitor in this case were not as flagrant and prejudicial as the statements made in Toyota of Florence v. Lynch[1] and S.C. State Highway Dep't v. Nasim[2] as cited by the Appellant.

In Toyota, this Court held the closing argument of one of the defendant's warranted reversal of the jury's verdict. During closing argument, counsel for one of the defendant's requested damages despite having been warned by the court not to do so and illustrated his argument in support of damages with hand drawn posters. The posters depicted the men

[1] 314 S.C. 257, 442 S.E.2d 611 (1994).
[2] 255 S.C. 406, 179 S.E.2d 211 (1971).

identified with the other party paying off a witness, offering money to a blindfolded man, and feeding documents to a shredder. The posters also depicted the men identified with the other party as having dark hair and oriental features and as a mushroom cloud of explosions on a map of the southeast. No contemporaneous objection was made to counsel's argument; however, the Appellant requested a mistrial during its post-trial motions. This Court held that even in the absence of a contemporaneous objection, a new trial motion should be granted in fragrant cases where a vicious, inflammatory argument resulted in clear prejudice. The Court also found prejudice clear because the trial judge found it necessary to remit the actual damages awarded to the defendant whose closing was improper.

The present case is distinguishable from Toyota and this Court should find a contemporaneous objection was required to preserve this issue for appellate review. In contrast to the defendant's argument in Toyota, the Solicitor's closing argument in this case was not expressly precluded by the court, did not infuse race or ethnicity into the trial, and did not include visual depictions of the Appellant. Counsel also did not motion for a mistrial. The Solicitor's closing argument in the present case was not so flagrant and inflammatory that prejudice should be presumed.

In Nasim, this Court also held the argument of the landowner was so flagrant and the likelihood of prejudice was so clear that a new trial is required even though an objection was not interposed until after the verdict. Counsel for the landowner called the witness for the Appellant a "quizzling quivaler" and compared him to quizzlers in World War II who sided with Nazi Germany. Counsel also called the witness a "statewide highway department jockey" and a "great highway robber". During post-trial motions, counsel for the State moved for a new trial. This

Court held that personal abuse of a witness by counsel is objectionable and warranted reversal in this case.

The present case is also distinguishable from Nasim and this Court should find a contemporaneous objection was required to preserve this issue for appellate review. In contrast to Nasim, the Solicitor's closing argument in this case was not personal abuse of a witness and the Appellant did not move for a new trial. The Respondent submits this issue is not preserved for appellate review since the Appellant failed to contemporaneously object to the comments at trial. The Appellant has failed to prove that the Solicitor's comments were so flagrant and clearly prejudicial that a contemporaneous objection is not required for this Court to reverse the Appellant's convictions.

If this Court is inclined to find this issue was preserved for appellate review, the Respondent submits the Solicitor's comments in this case were not improper and did not infect the Appellant's trial with unfairness as to make the Appellant's conviction a denial of due process.

As explained by the South Carolina Supreme Court, the closing argument merely serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case after all the evidence has been presented. See State v. Mouzon, 321 S.C. 27, 31, 467 S.E.2d 122, 124-25 (1995) (quoting Herring v. New York, 422 U.S. 853, 862 (1975)). Indeed, it is well established both in South Carolina and other jurisdictions that closing arguments are not evidence. See Gilchrist v. State, 350 S.C. 221, 226, 565 S.E.2d 281, 284 (2002) (acknowledging the PCR court's finding that closing arguments are not evidence); Ohio v. Frazier, 652 N.E.2d 1000 (1995); Kansas v. Overman, 277 P.3d 447 (Ct. App. 2012).

In reviewing the propriety of the solicitor's remarks to the jury, it is a well-settled principle that the trial court has wide discretion in ruling on the appropriateness of a closing argument. State v. Raffaldt, 318 S.C. 110, 114-115, 456 S.E.2d 390, 393 (1995); see State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) ("The trial court has broad discretion when dealing with the propriety of the solicitor's argument."). Appellate courts will not disturb the trial court's ruling regarding a closing argument unless there is a clear abuse of discretion. State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003). Appellate courts will review the alleged impropriety of an opening or closing argument in the context of the entire record and must determine whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of the defendant's due process rights. Rudd, 355 S.C. at 550, 586 S.E.2d at 157. The appellant has the burden of proving the allegedly improper argument rendered the trial fundamentally unfair. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

"It is sometimes difficult to draw the line between proper and improper argument, but counsel's remarks must be confined within the record. However, some latitude must necessarily be allowed and it must, to a large extent, be left to the wide discretion of the Circuit Judge." State v. Edgeworth, 239 S.C. 10, 14, 121 S.E.2d 248, 250 (1961). Unquestionably, the solicitor is permitted to comment on the evidence adduced during trial and the inferences to be drawn from it. See State v. Pitts, 256 S.C. 420, 428, 182 S.E.2d 738, 742 (1971) ("The solicitor had a perfect right to state his version of the testimony and to comment on the weight that should be given to such."). "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." State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). Appellate courts should be "careful and critical" in

finding allegedly improper statements of counsel to be reversible error, and "[e]very case must necessarily depend upon its own particular circumstances." State v. Gilstrap, 205 S.C. 412, 415, 32 S.E.2d 163, 164 (1944).

The Respondent submits the Solicitor's comments were proper and were confined to the facts presented in the record. The facts presented at trial supported the Solicitor's argument that the fact that the Appellant could and was injured in the accident did not provide a defense for his actions. The jury was aware of the Appellant's actions and knew that he had also been injured in the accident. (App. 114:11-22). The September 11, 2001 pilot reference was simply an analogy in support of the State's argument. The reference was used to give an example of an event in which the actors would have been held liable for their actions despite the fact that their actions resulted in their own harm. The analogy was an isolated reference and did not include any racial or religious inferences which could have inflamed the passions or prejudices of the jury.

The Appellant asserts the Solicitor's comments in this case are identical to the Solicitor's comments in Vasquez v. State[3]. The Respondent submits the Solicitor's comments in the present case are distinguishable from those made in Vasquez. In Vasquez, the defendant, after being fired, returned to the Burger King where he used to work with his cousin, locked two employees in the freezer, stole several hundred dollars from the cash register, and shot and killed the restaurant manager and another employee. The defendant was convicted of two counts of murder, four counts of kidnapping, armed robbery, and criminal conspiracy. During the sentencing portion of the defendant's trial, trial counsel offered testimony in mitigation about the defendant's Muslim faith. During his closing, the solicitor characterized the defendant as a "domestic terrorist". The solicitor also drew a correlation between the events of September 11, 2001 and those for which the defendant was charged. The solicitor also compared Rudy

[3] 388 S.C. 447, 698 S.E.2d 561 (2010).

Guiliani's life before and after September 11th to the lives of the victims' families before and after the victims were murdered. The defendant's trial also occurred during the second anniversary of September 11th. This Court found that the solicitor's statements were improper. The defendant was granted a new sentencing hearing.

The Respondent submits that the present case can be distinguished from Vasquez. In Vasquez, the solicitor referred to the defendant as a "domestic terrorist" and mentioned defendant's Muslim faith on multiple occasions. In contrast, the Solicitor in this case did not make any reference to "terrorism or terrorist" and the defendant's religion was not mentioned. There was no implication from the record that the defendant was Muslim. Unlike the solicitor's repetitive references to September 11th and the defendant's religion, the Solicitor in the present case made one isolated reference to September 11th to support his argument that the Petitioner's potential defense that he would not have intentionally wrecked a car in which he was a passenger was not a valid defense. Undoubtedly, it was the combination of the defendant's religion and the cumulative September 11th references, neither of which are present in this case, which made the solicitor's comments in Vasquez so egregious warranting resentencing. This Court should not find the facts in this case comparable to those in Vasquez.

The Respondent submits the Appellant has failed to carry his burden of proving the allegedly improper argument rendered the trial fundamentally unfair. The proper inquiry is not whether the Solicitor's remark was undesirable or condemnable, but whether the comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Bennett, 369 S.C. 219, 232, 632 S.E.2d 281, 288 (2006) (quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986)). The Solicitor's comments did not mention race, ethnicity, or religion. The Solicitor's comments also were such an isolated portion of the Solicitor's overall argument

that it is unlikely it infected the Appellant's trial with unfairness. If any unfairness resulted from the Solicitor's comments, it was cured by the Court instruction to the jury prior to the start of trial. The jury was instructed by the Court at the beginning of trial "that what the attorneys tell you in opening statement or what they tell you in their closing argument at the end of the case is not evidence in the case. The attorneys are advocates for the parties they represent—the assistant solicitor for the State of South Carolina; and the assistant public defense for the defendant—and what they tell you is not evidence." (App. 93:10-19).

It is also unlikely the Appellant's trial was infected with unfairness when guilt was clearly established at trial. See Bennett. At trial, both passengers riding in the Ford Explorer with the Petitioner testified that Petitioner, while sitting in the back seat, snatched the steering wheel from the driver and caused the truck to flip, injuring both passengers. (App. 125: 18-22 and App. 142:1-13). One of the victims testified further the Appellant before snatching the steering wheel said "you know I can kill all of us now". (App. 142:1-2). The trial judge also stated at the conclusion of trial "I agree with the jury's verdict. I believe the evidence clearly was there, sufficient beyond a reasonable doubt, to convict you of the crime of assault and battery with intent to kill." (App. 230:19-22). In light of the evidence presented at trial, it is unlikely the Solicitor's closing comments infected the trial with unfairness and resulted in a violation of the Appellant's due process rights.

The Respondent asks this Court to find this issue was not properly preserved for appellate review because counsel failed to make a contemporaneous objection to the Solicitor's closing statement. If this Court is inclined to decide this issue, the Respondent submits the Solicitor's closing argument was proper and the Appellant has failed to carry his burden of proving the

Solicitor's comments infected his trial with unfairness. The Respondent asks this Court to affirm the Appellant's convictions and sentences.

I. The lower court did not err in denying the Appellant's motion for directed verdict of acquittal on the Appellant's two assault charges when this issue was not addressed in the Brief of the Appellant and should be considered abandoned and waived by the Appellant.

The Respondent submits this Court should dismiss the Appellant's second issue listed as a Statement of Direct Appeal Issues in his Petition for Writ of Certiorari. The Appellant asserts the lower court erred in denying Appellant's motion for directed verdicts of acquittal on the State's assault charges against him because there was insufficient proof that Appellant intended to kill in the case. However, after this Court ordered the parties to brief the issues presented in the Appellant's Petition for Writ of Certiorari, the Appellant has failed to present this issue in his Brief of Appellant.

An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court. Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006). The Respondent submits the second issue on appeal should be dismissed because the Brief of Appellant is void of any argument in support of the issue. The Appellant's argument with regard to this issue also is not reasonably clear from the Appellant's argument on the other issue on appeal. Upon further direction from this Court, the Respondent will fully brief the second issue on appeal.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgments, convictions, and sentences of the lower court be affirmed.

[Signature on the following page.]

Respectfully submitted,

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July 11, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM JASPER OUNTY
In The Court of Common Pleas

The Honorable Perry M. Buckner, III, Trial Judge
Honorable D. Craig Brown, Post-Conviction Relief Judge

Appellate Case No. 2011-192933

SYLVESTER TOOMER, Appellant,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Respondent has been served upon opposing counsel, Wanda Carter, by mailing two (2) copies in an envelope properly addressed with postage prepaid this 11th day of July, 2013.

Anne R. Henley
Legal Assistant for Respondent

SWORN to before me this
11th day of July, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: 10/29/2017

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUL 11 2013
S.C. Supreme Court

July 11, 2013

Via Hand Delivery
The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia SC 29211

RE: Sylvester Toomer, #323392 v. State of South Carolina
2008-CP-27-0331
Appellate Case No. 2011-192933

Dear Mr. Shearouse:

Enclosed please find the original and fourteen (14) copies of the Brief of Respondent in the above-referenced matter for filing in your office. By copy of this letter we are serving opposing counsel, Wanda Carter with two copies of this brief today.

With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh

Enclosures

cc: Wanda Carter, Esquire