STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Robert J. Bonds, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHEENA ALSTON,

APPELLANT

APPELLATE CASE NO. 2022-001305

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court reversibly erred by trying Appellant's case in absentia when evidence was submitted that Appellant's absence was not voluntary, but due to admission at a local emergency room?

II. The trial court reversibly erred by denying Appellant's motion for continuance and trying Appellant in her absence when evidence was submitted that Appellant's absence was due to her being in the emergency room, where Counsel indicated his case was stronger before the jury when his client is seated beside him, and where Appellant could have testified in her own defense to rebut accusations at trial had the matter been continued?

III. Whether the trial court reversibly erred by denying Appellant's motion for mistrial where, in its closing argument of the burglary trial, the State told the jury that "all of this could have been cleared up if [Appellant] was allowed to be in that house, and the officers rolled up, that she could tell the officers, Hey, I know this person. I'm allowed to be here," where the trial court sustained Counsel's objection, yet where the court's subsequent instruction neither ordered the jury to disregard the State's language nor consider them in deliberations?

STATEMENT OF THE CASE

Appellant Sheena Alston was indicted for first degree burglary by the Charleston County Grand Jury on May 7, 2019. R. 6, ll. 10-18; R. 284-285. Her case proceeded to trail from August 1st through 2nd, 2022, before the Honorable Robert J. Bonds and a jury, whereupon Appellant was tried in her absence. R. 1; R. 69, ll. 3-12; R. 275, ll. 5-6. Appellant was represented by James Kristian Falk, while the State was represented by Phillip Noble Abshire, II, and Timothy Finch. R. 1. The jury found Appellant guilty, and the trial court sentenced her to sixteen (16) years incarceration with credit for time served, but not for time spent on monitored house arrest. R. 277, ll. 9-16; R. 286-287.

STATEMENT OF THE FACTS

Appellant Sheena Alston's arrest stemmed from allegations by Eric Zipfel (Zipfel), who was himself arrested regarding the burglary of a duplex apartment on Ward Avenue in North Charleston on September 14, 2018. R. 121, ln. 11—R. 122, ln. 8; R. 139, ll. 11-18; R. 174, ln. 9-19.

On September 14, 2018, police arrived at approximately 4:35 a.m. in response to a call from a nearby trailer park regarding a burglary in progress. R. 57, ll. 10—16. R. 58, ln. 10; R. 70, ln. 24—R. 71, ln. 19. As soon as officers arrived on foot, two flashlights were seen inside through a window. A door was heard slam shut, and police announced themselves after taking positions around the apartment.[1] R. 58, ln. 23—R. 60, ln. 24. As more officers arrived, Police had also entered the duplex home and found no one inside. The air conditioning window-unit was found on the ground below the back window, as was a cell phone between the home and a back parking space. R. 63, ll. 1-23; R. 116, ln. 23—R. 117, ln. 19; R. 120, ll. 4-12; R. 131, ll. 17-22. No fingerprints were recovered from the air conditioner, the window, or the recovered cell phone.[2] R. 75, ll. 4-25; R. 131, ll. 9-14; R. 133, ll. 12-17.

Zipfel was noticed by law enforcement sitting in his parked car in front of the apartments; after initially telling police he was an Uber driver, he was eventually taken into custody and then to headquarters for questioning. R. 64, ln. 20—R. 65, ln. 11; R. 71, ln. 20—R. 72, ln. 5; R. 114, ll. 3-25; R. 156, ln. 13—R. 158, ln. 12. During interrogation, Zipfel again told law enforcement that he was driving people around to make money, that he was getting paid to wait, and when

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[1] Despite being dark and no lights on, Zipfel stated he saw Appellant use her cell phone flashlight in the house. He also claimed he saw her in the front doorway with her flashlight and slam the door closed after police announced themselves. R. 153, ll. 9—R. 155, ln. 19.

[2] No evidence of DNA testing was submitted before the jury at trial either.

police arrived that he saw a woman take off. R. 157, ln. 10—R. 158, ln. 15. Soon after, Zipfel changed his story, implicated Appellant, and claimed the phone police took from the scene was Appellant's as well. R. 158, ln. 15—R. 160, ln. 23.

According to Zipfel, he was engaged to Appellant for approximately six (6) years, had come to Charleston, South Carolina at her request, and the two lived together in the Twin Oaks Apartments.[3] R. 138, ln. 22—R. 139, ln. 7; R. 146, ln. 6—R. 147, ln. 2. However, he claimed that on the night of the incident, he and Appellant were splitting up and he needed money to go back to Tennessee. Specifically, Zipfel indicated that, while driving around at about 4:00 a.m. on September 14th during a hurricane evacuation period, they got into an argument after Appellant bought scratch-off tickets and Zipfel said he was going to leave. R. 58, ll. 14-16; R. 65, ll. 13-14; R. 84, ln. 16; R. 149, ll. 17-24. Interestingly, Zipfel also said his mother already sent him money through Western Union, but that he could not get to an open location to access it; as such, he needed money "to try to get on the other side of the state" to access the Western Union wire. R. 150, ll. 8-19.

It is at this point Zipfel claimed Appellant told him to stop at a single level brick duplex apartment on Ward Avenue, and that she would get gas money for him. R. 116, ll. 7-9; R. 150, ln. 20—R. 151, ln. 10. He alleged Appellant told him to knock on the door of the apartment, and when no one answered to remove the air conditioning unit from the window at the back of the home. Appellant purportedly went inside, Zipfel put the air conditioner back into the window, and then he returned to his car alone.[4] R. 151, ll. 10—R. 153, ln. 20.

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[3] Zipfel further alleged they purportedly lived together in the apartment with Appellant's ex-husband, and claimed Appellant divorced her ex-husband in Atlantic City in 1994. R. 165, ll. 9-20. As of Appellant's trial date, Appellant was approximately 42 years of age. R. 286-287.

[4] Zipfel stated it was around 4:30 am and dark outside at this time. R. 152, ll. 19-23.

Police obtained an arrest warrant for Appellant, and later received a tip from a Spinx gas station attendant on September 20, 2018, that Appellant was leaving on her moped. She was followed to her apartment by officers in North Charleston, who then spoke with another resident outside the apartment. After waiting for an officer to return with the arrest warrant; police searched her apartment; Appellant was located[5] and taken into custody. R. 126, ln. 2—R. 128, ln. 9.

Appellant's case was called for trial on Monday, August 1, 2022. R. 1. Counsel for Appellant (Counsel) informed the trial court that Appellant was in the emergency room the night before due to an accident on her moped from having to stop short of hitting a car, and that the morning of trial Appellant collapsed when she tried to put weight on her ankle. As a result, Appellant was once again taken to the emergency room for treatment of her injury. R. 14, ln. 7—R. 15, ln. 24; R. 16, ll. 20-24. The trial court indicated it needed reports or "a photo of some bruising" from the emergency room, otherwise it was "not inclined to continue this case based on, I sprained my ankle last night in an auto accident." R. 16, ll. 1-17. In response, the government claimed there were limitations on times it had interpreters available, and that there was no "proof that what the defendant is claiming is actually going on." R. 17, ll. 1-25.

The trial court broke for approximately 20 minutes to allow Counsel to obtain some proof of Appellant's situation. R. 18, ll. 1-8; R. 19, ll. 1-2. After the short break, Counsel provided the court with photographs sent by Appellant showing that she was indeed at the "Emergency Care Roper Facility on Rivers Avenue." R. 19, ll. 6-8. The trial court acknowledged it was in possession of (1) "an Estimated Patient Financial Obligation Summary from an emergency department visit at Roper St. Francis Healthcare," and that it showed Appellant is "in an

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[5] Appellant was apparently found under the sink. R. 128, ll. 6-9.

emergency room visit;" and (2) a photograph of "a Roper Hospital wristband dated 8/1/22 at 11. . . . It's got her name, Sheena Alston. And it appears to show perhaps what is an ankle that's wrapped with some type of ACE or compression bandage." R. 19, ln. 16—R. 20, ln. 23; Ct. Ex. #1, Photo of Wrap and Bracelet; R. 279; R. 280; R. 281.

Counsel then made a motion to continue Appellant's case, and placed the entire posture of Appellant's situation on the record. R. 21, ln. 22—R. 23, ln. 23. The State opposed the motion, claiming Appellant was just discharged,[6] the case was four years old, and it did not believe Appellant's ability to assist Counsel or sit through trial would be impacted. R. 23, ln.

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6 This was apparently a reference to Counsel's argument to the trial court, the full context of which is as follows:

> She could not put weight the ankle, she tried to take a step on the ankle, she fell, and they took her to the emergency room. And that's why I was at the emergency—*that's why she was at the emergency room and it's my understanding she's there right now.*
>
> She has sent me some paperwork showing that—sort of documenting that there was an emergency hospital room visit today. She showed me a photograph of her ankle wrapped in an ACE bandage and also a possible bracelet, which then would sort of verify that she was there today.
>
> Then *she sent some other documents* that—I mean, I knew what she was trying to send me, but I'm not sure it's good proof. I mean, as I was telling the Court earlier, she sent me—when they were taking her X-rays, she took a picture of those UPCs that you get at when you're in the hospital, the stickers that they put on everything. And *it looks like she sent me the discharge summary and financial obligation for this visit.*
>
> So I believe that my client is unable to start this trial this afternoon and we would ask for a continuance at this time.

R. 23, ll. 2-23 (emphasis added).

25—R. 24, ln. 17. While Counsel asserted the medication for Appellant was indeed a controlled substance, the trial court nonetheless denied the motion for continuance as follows:

> I just don't think that's enough at this point to grant continuing a four-year-old case. The matter's also – I'll just put on the record, it's further complicated by the fact that an interpreter is here, the State's ready to go with their interpreter today and there's going to be problems with having the interpreter here throughout the rest of the week.
>
> So I'm going to deny your motion. I just don't see that good cause has been presented to justify continuing a four-year-old case based on the evidence that's been provided to me.

R. 27, ln. 22—R. 28, ln. 7. The court also did not send anyone to pick-up Appellant and bring her to court for her trial, [7] and stated, "I think that if [Appellant] wants to come and participate, I think that she's fine to come and participate. In other words . . . if she is finished with whatever treatment she supposedly needs and she can get down here, great." R. 28, ll. 8-9. Further, after a brief pause, the trial court indicated it did not have additional evidence that EMS or law enforcement showed-up to Appellant's accident. As a result, the court denied Counsel's motion for continuance, and in opening remarks to the jury informed them that Appellant was not present but instructed that they are not to take that into consideration. R. 29, ln. 4—R. 30, ln. 14; R. 36, ln. 3-12. The jury was sworn, opening statements made, and several witnesses testified for the State before the first day of trial was complete. R. 32, ln. 34; R. 42, ln. 25; R. 52, ln. 11; R. 55, ll. 16-24; R. 79, ll. 1-2; R. 88, ll. 7-15.

The following morning, Appellant was again absent, and Appellant's notice of trial was made a court's exhibit. R. 106, ln. 18—R. 107, ln. 13; R. 137, ll. 6-15. However, over the lunch break, Counsel received a call from Appellant regarding her health status, which he relayed to

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[7] However, the trial court did offer Counsel the option to send someone to get Appellant. R. 28, ll. 13-25.

the court. Specifically, Appellant indicated she was back in the hospital since 6:00 a.m. that day regarding a reaction to medication, and that "her face is all swollen up and her eyes are closed." R. 171, ll. 3-6; R. 172, ll. 2-4. The trial court immediately ruled as follows: "All right. Well, that's fine. We're going to move forward and I appreciate you letting me know that, sir." R. 172, ll. 5-7.

Counsel reraised the motion for continuance both at the close of the State's case, and again after the jury returned its verdict,[8] which was again denied. R. 195, ll. 19-22; R. 197, ll. 1-7; R. 253, ll. 21-24; R. 259, ln. 6—R. 261, ln. 24.

During closing arguments, the assistant solicitor told the jury, "I submit to you that all of this could have been cleared up if [Appellant] was allowed to be in that house, and the officers rolled up, that she could tell the officers, Hey, I know this person. I'm allowed to be here." R. 203, ln, 15—R. 204, ln. 3. Counsel immediately objected, and a bench conference was held.

The court sustained Counsel's objection, and gave the following instruction to the jury:

> All right. Ladies and gentlemen, I'm going to sustain the objection. Ladies and gentlemen, the State has the burden of proof. The defendant doesn't have to prove anything. And it's not proper—it's not proper for the State to make the argument that the defendant was under the duty or owed some duty to respond or answer questions. All right. So that's going to be my ruling.

R. 203, ln. 22—R. 204, l. 3. Counsel later indicated his objection on the record out of the jury's presence that the State's closing argument became "a burden shifting argument where he was suggesting [Appellant] could have come in here today and say she wasn't there." R. 254, ll. 2-6.

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[8] Counsel moved two pages of Appellant's "Trident Health Form" document from her visit on August 2, 2022, as a court's exhibit as well. R. 256, ln. 12—R. 258, ln. 5; R. 282-283.

Appellant was convicted of first-degree burglary, and her sentence was placed under seal. R. 247, ll. 11-17; R. 270, ll. 1-5. On September 7, 2022, Appellant was sentenced to sixteen (16) years incarceration with credit for time served. R. 277, ll. 9-16.

This appeal follows.

ARGUMENT

I. The trial court reversibly erred by trying Appellant's case in absentia when evidence was submitted that Appellant's absence was not voluntary, but due to admission at a local emergency room.

The trial court reversibly erred by trying Appellant's case in absentia when her absence was not due to a willing, voluntary choice. Rather, Appellant's absence was due to multiple visits to the emergency room: the first day of trial Appellant was in the emergency room over complications from an accident that occurred the day before trial; and again the second day of trial she was in the emergency room due to facial and eye swelling. Accordingly, the court reversibly erred by forcing the trial of Appellant to go forward in her absence.

First and foremost, "[t]he right of a criminal defendant to be present at his own trial is beyond dispute." United States v. Lawrence, 161 F.3d 250, 255 (4th Cir. 1998). "He has a right to be present at every part of the trial proper, to hear the evidence, to hear the judge's charge, to see, know, and hear what the judge says when he communicates to the jury, in answering their questions or further instructing them, unless he absents himself . . . ." State v. James, 116 S.C. 243, 107 S.E. 907, 908 (1921) (granting a new trial where the defendant's absence from a portion of his trial was involuntary). Succinctly stated, "[t]he right to be present at trial implicates a panoply of rights and vindicates two primary interests: enabling the defendant to assist in the presentation of his defense, and ensuring the appearance of fairness in the execution of justice." Pinckney v. State, 711 A.2d 205, 209 (Md. Ct. App. 1998).

The right to be present at one's own trial is safeguarded by the Sixth and Fourteenth Amendments of the United States Constitution, as well as Article I, section 14 of the South Carolina Constitution. See United States v. Camacho, 955 F.2d 950, 952-52 (4th Cir. 1992); Ellis v.State, 267 S.C. 257, 260 n.1, 227 S.E.2d 304, 305 n.1 (1976) (citing State v. Faries, 125 S.C. 281, 118 S.E.

620 (1923)). As stated by the United States Supreme Court in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), these fundamental rights are part of the due process of law:

> Because these [Sixth Amendment] rights are basic to our adversary system of criminal justice, they are part of the "due process of law" that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States. The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice . . . . In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.

Id. 422 U.S. at 818, 95 S.Ct. at 2532-33. Included among these due process rights, the defendant has a right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge," even under circumstances "where the defendant is not actually confronting witnesses or evidence against him." State v. Shuler, 344 S.C. 604, 624, 545 S.E.2d 805, 815 (2001) (quoting Kentucky v. Stincer, 482 U.S. 730, 745, 107 S.Ct. 2658, 2667, 96 L.Ed.2d 631 (1987)). Accordingly, the right of a criminal defendant to be present at every stage of trial is "scarcely less important to the accused than the right of trial itself." Diaz v. United States, 223 U.S. 442, 455, 32 S.Ct. 250, 254, 56 L.Ed. 500 (1912).

Although a defendant's essential right to be present can be waived by her voluntary absence upon a finding that she received notice of her right as well as a warning that the trial would proceed without her,[9] the right is *not* waived if her absence is involuntary. An example of this principle is

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[9] See Rule 16, SCRCrimP, providing as follows:

> Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.

State v. James. There, "the defendant was carried to jail against his will" after the jury retired, "and was there when the judge charged the jury at their request." Id. 115 S.C. at 243, 107 S.E.2d at 908. The James Court ruled that the defendant had the right to be present because he "was not absent voluntarily, at his request, and of his own volition . . . ." The Court further held that "[t]he presence of the attorney of the defendant was not a waiver on his part." Id. Accordingly, the manslaughter conviction was reversed, and a new trial was granted. Id.

In the present case, although Counsel acknowledged that Appellant had notice and warning regarding her trial, her absence was nonetheless involuntary. R. 106, ln. 18—R. 107, ln. 4; R. 137, ll. 4015. The trial court was aware of Appellant's moped accident the day prior to trial, as Counsel explained that Appellant was back in the emergency room the morning her trial began due to a complication from the accident: she collapsed under her own weight before she could to get to court. Instead of going to court, she was taken to the emergency room. R. 23, ll. 2-5. While the trial court was not provided Appellant's full medical jacket or a conference with the treating physician, the court was nonetheless provided evidence of her return to the emergency room. Specifically, at the behest of the trial court for "some reports and maybe some objective findings," Counsel was able to show the court photographs depicting Appellant's patient-wristband at the emergency room and a compression bandage wrapped around her ankle, as well as the bill incurred from her hospital visit the day of trial. R. 19, ln. 6—R. 20, ln. 23; Ct. Ex #1; R. 279; R. 280; R. 281. While acknowledging Appellant was indeed at the emergency room, the trial court was unpersuaded that she Appellant could not be in court instead. The court's rationale was premised on to three driving factors: (1) the age of the case; (2) the potential scheduling challenges for interpreter services; and

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Id.; see also State v. Ravenell, 387 S.C. 449,456, 692 S.E.2d 554 558 (Ct. App. 2010) ("The judge must make findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned he would be tried in his absence should he fail to attend.").

(3) that there was no official accident report from police or EMS regarding Appellant's moped accident. R. 27, ln. 22—R. 28, ln.7; R. 29, ln. 17—R. 30, ln. 4.

Moreover, the following day Appellant was again taken to the emergency room since 6:00 a.m.[10] Counsel was notified about the matter by lunchtime, and in-turn notified the court. R. 171, ll. 3-6; R. 172, ll. 2-4. Again, although information was provided to the trial court regarding Appellant's emergency whereupon she was treated by medical personnel, the court nonetheless continued Appellant's trial without her. R. 171, 7-21; R. 172, ll. 5-22; R. 173, ll. 3-21.

In other words, the trial court refused to acknowledge the reality that Appellant was unavailable to attend trial due to medical reasons. Regardless of the severity of Appellant's ankle injury, reaction to medications, facial swelling, or other medical matters, she was still admitted into the emergency room for medical services for which she was treated by medical professionals. Although Appellant was aware of the need to go to the courthouse, she was not available despite her efforts to do so as indicated by Counsel: on Monday, she was getting ready for court when her ankle gave out and she collapsed; and on Tuesday, her face had swollen-up to the point where her eye had closed. If Appellant had collapsed in court, or if her face had swollen-up in court to the point her eye was shut, then the trial would likely have had to stop—and not continue—while she received medical treatment due to her absence for an involuntary matter; to hold otherwise would have violated her constitutional rights. The fact that Appellant was taken to the emergency room beforehand should be treated no differently, and to hold otherwise is likewise a violation of her

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[10] Although Counsel did not initially have documentation regarding Appellant's emergency room visit on August 2nd, 2022, until later in the afternoon, he ultimately provided two pages of Appellant's paperwork from Trident Health emergency room visit and made them an exhibit at the end of trial the same day. Based upon the documents produced, Appellant indeed suffered from facial swelling, swelling over the right eyelid, dental abscess, and conjunctivitis in her right eye. R. 172, ll. 18-22; R. 256, ln. 12—R. 258, ln. 5; R. 282-283.

constitutional rights to be present at her own trial. Accordingly, the trial court reversibly erred by forcing Appellant to be tried in absentia.

Appellant was prejudiced by being tried in her absence as well. First, she was not able to be present with her attorney and assist him in her defense. At trial, such assistance often comes in the form of utilizing a client's knowledge of the witness or factual situations to help formulate questions for cross-examination of critical witnesses. This is, at least in part, why the right "to be present in [her] own person whenever [her] presence has a relation, reasonably substantial, to the fullness of [her] opportunity to defend against the charge" is so crucial to a fair trial even under circumstances "where the defendant is not actually confronting witnesses or evidence against him." Shuler, 344 S.C. at 624, 545 S.E.2d at 815 (2001) (quoting Stincer, 482 U.S. at 745, 107 S.Ct. at 2667, 96 L.Ed.2d 631). Furthermore, Appellant's right to testify in her own defense was likewise implicated and abridged when the trial court ordered her to be tried in absentia: "In sum, decades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused, *who above all others may be in a position to meet the prosecution's case*." Rock v. Arkansas, 483 U.S. 44, 50, 107 S.Ct. 2704, 2708, 97 L.Ed.2d 37 (1987) (quoting Ferguson v. Georgia, 365 U.S. 570, 582, 81 S.Ct. 756, 763, 5 L.Ed.2d 783 (1961) (emphasis added)).

In the present case, an example where such assistance would have been critical was to the cross-examination of, and rebuttal to, Zipfel. Zipfel was the sole witness placing Appellant at the incident location, going into the duplex apartment through the rear window, identifying the cell phone found outside the apartment as Appellant's, and providing an intent of questionable plausibility. There was no fingerprint or DNA evidence even placing Appellant at the scene, let alone inside the duplex apartment. Even the ownership and possession of the cell phone discovered

outside the duplex was identified through Zipfel's testimony. In other words, the State had no case identifying Appellant as the alleged burglar whatsoever without Zipfel. And yet, if Zipfel was truthful in that he and Appellant were together for approximately six years, engaged, and living together (along with Appellant's ex-husband), then the best person to identify inconsistencies in Zipfel's story to the police and the jury would have been Appellant. Furthermore, Appellant would have been in the best position to testify in her defense to answer the allegations made by Zipfel as well. However, because the trial court tried Appellant in her absence regardless of the fact that she was in an emergency room rather than the courtroom, she was denied her ability to assist in her own defense or testify at her own trial to counter the State's evidence. Accordingly, the trial court reversibly erred in trying Appellant's case in absentia.

II. The trial court reversibly erred by denying Appellant's motion for continuance and trying Appellant in her absence when evidence was submitted that Appellant's absence was due to her being in the emergency room, where Counsel indicated his case was stronger before the jury when his client is seated beside him, and where Appellant could have testified in her own defense to rebut accusations at trial had the matter been continued.

The trial court reversibly erred by denying Counsel's motion to continue the casewhen Appellant received medical treatment in an emergency room, and instead trying Appellant's case in her absence. As Counsel indicated to the trial court, his case is always stronger when his client is by his side before the jury. Moreover, had Appellant been present at her trial, then she could have testified in her own defense to rebut accusations at trial.

In State v. Tanner, 299 S.C. 459, 462, 385 S.E.2d 832, 834 (1989), our Supreme Court not only reiterated the standard of review governing motions for continuance,[11] but also restated the two primary factors considered when determining whether a motion for continuance is proper: (1) whether there was a showing of any other evidence on behalf of the defendant that could have been produced; and (2) whether any other points on his behalf could have been raised had more time been granted for the purpose of preparing the case for trial. Id. (quoting State v. Squires, 248 S.C. 239, 244, 149 S.E.2d 601, 603 (1966)). Therefore, if the defendant shows that any other evidence or points could have been produced or raised on her behalf if she had more time to prepare her case for trial, then a motion for continuance should be granted.

Appellant met the first prong of analysis. First, as Counsel indicated, his case before the jury is always stronger when his client is with him. As previously indicated, the defendant has a right "to be present in [her] own person whenever [her] presence has a relation, reasonably

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11 See Tanner, 299 S.C. at 462, 385 S.E.2d at 834 ("A motion for continuance is addressed to the sound discretion of the trial court and its ruling on such motion will not be reversed without a clear showing of abuse of discretion.").

substantial, to the fullness of his opportunity to defend against the charge," even under circumstances "where the defendant is not actually confronting witnesses or evidence against [her]." Shuler, 344 S.C. at 624, 545 S.E.2d at 815 (quoting Stincer, 482 U.S. at 745, 107 S.Ct. at 2667, 96 L.Ed.2d 631).

Additionally, "[e]very criminal defendant is privileged to testify in his own defense . . . ." Harris v. New York, 401 U.S. 222, 230, 91 S.Ct. 643, 648, 28 L.Ed.2d 1 (1971) (citing United States v. Knox, 396 U.S. 77, 90 S.Ct. 363, 24 L.Ed.2d 275 (1969). As the United States Supreme Court stated, "In sum, decades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused, *who above all others may be in a position to meet the prosecution's case.*" Rock, 483 U.S. at 50, 107 S.Ct. at 2708, 97 L.Ed. 2d 37 (1987) (quoting Ferguson, 365 U.S. at 582, 81 S.Ct. at 763, 5 L.Ed.2d 783 (emphasis added)). This principle is especially true in the case at bar where the bulk of evidence placing Appellant inside the apartment that she allegedly burglarized was from Zipfel, her co-defendant in the case. Although Counsel was present at the trial, Appellant was not there to assist Counsel in her own defense. Her presence would be essential to helping Counsel identify issues and facts for cross-examination of Zipfel, and to testify in her own defense. Under such circumstances, Appellant's involuntary absence from her own trial was acutely felt: she was not only *unable* to assist in her own defense, but also *unable* to push back against the State's primary witness with her own testimony. By denying Appellant's continuance and forcing the trial forward, the court effectively stripped Appellant of her fundamental due process rights critical to a fair trial.

Appellant also met the second prong of analysis in that more points could have been raised on her behalf if more time was granted for the purpose of preparing the case for trial. As indicated above, Appellant could have testified in her own defense had the case been continued

to protect her constitutional rights and allow her to be present. See, e.g., Rock, 483 U.S. at 50, 107 S.Ct. at 2708, 97 L.Ed.2d 37. Thus, crucial arguments could have been raised on Appellant's behalf if more time was granted for the purpose of allowing Appellant to exercise her Fifth Amendment right to testify at trial, and thereby produce testimonial evidence in her own defense counter to that of Zipfel. Accordingly, the trial court erred by denying Appellant's continuance.

Finally, Appellant was prejudiced by the trial court's failure to grant a continuance. As indicated above, the trial court effectively stripped Appellant of her constitutional rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, as well as Article I, section 14 of the South Carolina Constitution. See United States v. Camacho, 955 F.2d 950, 952-52 (4th Cir. 1992); Ellis v.State, 267 S.C. 257, 260 n.1, 227, S.E.2d 304, 305 n.1 (1976) (citing State v. Faries, 125 S.C. 281, 118 S.E. 620 (1923)). Moreover, the State took full advantage of Appellant's case being forced forward without her in its closing arguments. Specifically, the State repeatedly referred to Zipfel's testimony placing Appellant inside the apartment, with the intent to get money from the apartment, and with the cell phone recovered outside the home. R. 202, ll. 21-24; R. 204, ll. 23-25; R. 205, ln. 12—R. 206, ln. 17; R. 207, ll. 10-13; R. 210, ll. 3-6. Moreover, although the trial court sustained Counsel's objection during the State's closing argument, the jury nonetheless heard the State's proposition that "all of this could have been cleared up if [Appellant] was allowed to be in that house, and the officers rolled up, that she could tell the officers, Hey, I know this person. I'm allowed to be here." R. 203, ln, 15—R. 204, ln. 3. Further, after asserting that this was "[Appellant]'s day in court" and not Zipfel's, the State later highlighted that Appellant was "was not found that night" of the incident, and when found in her own apartment that "[t]he person hiding from the police officers [was] the defendant. *It is reasonable to infer that this is*

another example of her wanting to get away from the police, of not wanting to get caught." R. 201, ll. 4-7; R. 208, ll. 17-18; R. 209, ll. 5-11 (emphasis added). In essence, the State posited to the jury that Appellant ran and hid from the scene of the offense, and again ran and hid from police and arrest. Thus, having the trial proceed with Appellant in an emergency room rather than the courtroom improperly amplified the State's argument to its furthest extent for the jury "to infer that this is another example of her wanting to get away from the police, of not wanting to get caught." R. 209, ll. 5-11. Accordingly, Appellant was prejudiced by the trial court's erroneous denial of her motion for continuance.

III. The trial court reversibly erred by denying Appellant's motion for mistrial where, in its closing argument of the burglary trial, the State told the jury that "all of this could have been cleared up if [Appellant] was allowed to be in that house, and the officers rolled up, that she could tell the officers, Hey, I know this person. I'm allowed to be here," where the trial court sustained Counsel's objection, yet where the court's subsequent instruction neither ordered the jury to disregard the State's language nor consider them in deliberations.

The trial court erred by denying Appellant's motion for mistrial after sustaining Counsel's objection during the State's closing argument for what amounted to burden shifting by the prosecutor. Although the trial court sustained Counsel's objection and a bench conference held, the trial court gave a curative instruction to the jury that neither ordered the jury to disregard the offending argument nor consider it in deliberations.

"The appropriateness of a solicitor's closing argument is left largely to the trial court's sound discretion, including the decision of whether to grant a defendant's motion for mistrial." State v. Sweet, 342 S.C. 342, 347, 536 S.E.2d 91, 93 (Ct. App. 2000) (citing State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996)). However, such discretion is not unfettered: "[t]he 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." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 167 (1998) (reversing PCR court and remanding for new trial due solicitor's inappropriate comments in closing argument). To determine whether an improper argument merits a new trial, the litigant must typically satisfy four requirements: (1) a timely objection was interposed to the argument; (2) the substance of the objectionable language; (3) the failure of the trial court to sufficiently warn the jury not to consider the improper argument; and (4) that the result was materially prejudicial to the right of the defendant to obtain a fair and impartial trial. See State v. Cannon, 229 S.C. 614, 618, 93 S.E.2d 889, 891 (1956) (reversing and remanding case where Solicitor's remarks to the jury were improper and prejudicial).

In the present case, the State's impermissible comments during closing argument and the trial court's failure to provide an adequate curative instruction necessitated a new trial. First, a timely objection was interposed by Counsel to the State's argument; immediately after the assistant solicitor made his comments, Counsel objected. R. 203, ll. 15-19. Second, at a minimum the substance of the objectionable language utilized by the State constituted an impermissible burden shift: the assistant solicitor told the jury, "I submit to you that all of this could have been cleared up if [Appellant] was allowed to be in that house, and the officers rolled up, that she could tell the officers, Hey, I know this person. I'm allowed to be here." R. 203, ln, 15—R. 204, ln. 3. As Counsel later indicated on the record out of the jury's presence, the State's closing argument became "a burden shifting argument where he was suggesting [Appellant] could have come in here today and say she wasn't there." R. 254, ll. 2-6. The trial court agreed the argument was impermissible.

However, the trial court failed to warn the jury not to consider the impermissible argument through an adequate curative instruction. A curative instruction is generally deemed to cure an alleged error of testimony or arguments, "unless on the facts of the particular case it is probable that notwithstanding such instruction or withdrawal the accused was prejudiced." Craig, 267 S.C. at 269, 227 S.E.2d at 309. "Great care should be exercised in the 'delicate, difficult, and important matter' of instructing the jury to disregard incompetent evidence. The jury should be specifically instructed to disregard the evidence, and not to consider it for any purpose during deliberations." State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) (citing 75

Am.Jur.2d, Trial, Section 748). Here, rather than granting a mistrial,[12] the court gave an instruction to the jury that failed to warn them *not* to consider the State's impermissible argument:

> All right. Ladies and gentlemen, I'm going to sustain the objection. Ladies and gentlemen, the State has the burden of proof. The defendant doesn't have to prove anything. And it's not proper—it's not proper for the State to make the argument that the defendant was under the duty or owed some duty to respond or answer questions. All right. So that's going to be my ruling.

R. 203, ln. 22—R. 204, l. 3. Noticeably absent from the trial court's instruction was any mention for the jury to disregard the State's comments, and to not consider them for any purpose during deliberations. See, e.g., Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) (citing 75 Am.Jur.2d, Trial, Section 748). Accordingly, the trial court's instruction to the jury failed to cure the taint wrought by the State's impermissible comments as it essentially left them both intact and available for the jury's consideration in deliberations. Id. ("The error, and the trial judge's failure to take adequate steps to cure the error, require reversal and a new trial.")

Finally, the result was materially prejudicial to the right of Appellant to obtain a fair and impartial trial. As previously indicated, the jury heard—and due to an insufficient instruction, was allowed to consider—the State's proposition that "all of this could have been cleared up if [Appellant] was allowed to be in that house, and the officers rolled up, that she could tell the officers, Hey, I know this person. I'm allowed to be here." R. 203, ln, 15—R. 204, ln. 3. Additionally, after asserting that this was "[Appellant]'s day in court" and not Zipfel's, the State later highlighted that Appellant was "was not found that night" of the incident, and when found in her own apartment that "[t]he person hiding from the police officers [was] the defendant. *It is*

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12 Counsel sought a renewal of his motions for mistrial at the end of trial, including his motion based upon the State's impermissible comments made in closing argument. R. 253, ln. 25—R. 254, ln. 14. The trial court acknowledged Counsel's arguments and again denied his motions, including Counsel's argument regarding the State's impermissible closing argument. R. 255, ln. 19—R. 256, ln. 10.

reasonable to infer that this is another example of her wanting to get away from the police, of not wanting to get caught." R. 201, ll. 4-7; R. 208, ll. 17-18; R. 209, ll. 5-11 (emphasis added). In essence, the State posited to the jury that Appellant ran and hid from the scene of the offense, and again ran and hid from police and arrest. Thus, having the trial proceed with Appellant in an emergency room rather than the courtroom improperly amplified the State's argument to its furthest extent for the jury "to infer that this is another example of her wanting to get away from the police, of not wanting to get caught." R. 209, ll. 5-11.

Additionally, Appellant was further prejudiced as the State's arguments likely constituted an indirect comment on Appellant's right to remain silent, and upon her right—or failure—to present a defense. "An accused has the right to remain silent and the exercise of that right cannot be used against him. The State cannot, through evidence or the solicitor's argument, comment on the accused's exercise of his right to remain silent." State v. Smith, 290 S.C. 393, 394–95, 350 S.E.2d 923, 924 (1986) (citing State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984)); See also Griffin v California, 380 U.S. 609, 614, 85 S.Ct. 1229, 1232, 14 L.Ed.2d 106 (1965) ("[C]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws") (internal citations omitted); McFadden v. State, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000) (citing Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (holding an accused's exercise of his right to remain silent cannot be used against him)). Generally, "the State may not comment on a defendant's exercise of a constitutional right." McFadden v. State, 342 S.C. at 640, 539 S.E.2d at 393 (citing Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000)). Doyle violations in particular extend not only to direct comments by the State on a defendant's exercise of her right to remain silent, but also to other indirect comments touching upon the same right. "Specifically, the solicitor *must not* comment, either directly *or indirectly*, on a

defendant's silence, failure to testify, or failure to present a defense." Id. (emphasis added) (citing State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999)). Here, although not asserted as a basis for the objection itself, the State's indirect comment to the jury regarding Appellant's silence or even failure to present a defense to the burglary charge nonetheless constituted additional prejudice against Appellant's right to obtain a fair and impartial trial. Accordingly, the trial court reversibly erred by denying Appellant's motion for mistrial.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests reversal of her conviction and sentence, and remand for a new trial.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of September, 2023.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

September 27, 2023

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Robert J. Bonds, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHEENA ALSTON,

APPELLANT

APPELLATE CASE NO. 2022-001305

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Ambree M. Muller, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 27th day of September, 2023.

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