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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES TOATLEY,

APPELLANT

APPELLATE CASE NO. 2023-001059

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by overruling Defendant's objection and refusing to grant a mistrial where, during its closing argument, the State was permitted to make an argument indirectly impugning Defendant's right to remain silent by urging jurors to consider "those who chose to speak to the police that night, . . . who chose not to slip away in silence. . . . They went to the police. They gave statements."?

STATEMENT OF THE CASE

Appellant James Toatley was indicted for two counts of murder, two counts of attempted murder, and one count of possession of a weapon during the commission of a violent offense by the Richland County grand jury on November 17, 2021. The charges stemmed from an incident at the Motor City Market on December 19, 2020. Tr. * (Indictments).

Appellant's case proceeded to trial from June 20th through 26th, 2023, before the Honorable Jocelyn J. Newman and a jury. Appellant was represented by Aimee J. Zmroczek, while the State was represented by Melanie Darko. Tr. 1-2. Appellant was found guilty of both counts of murder, one count of attempted murder, one count of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN), and possession of a weapon during the commission of a violent offense. Tr. 796, ln. 9–Tr. 797, ln. 7. The trial court imposed an aggregate sentence of fifty-seven (57) years. Tr. 822, ll. 1-19.

STANDARD OF REVIEW

"The trial court has broad discretion when dealing with the propriety of the solicitor's argument, including the question of whether to grant a defendant's mistrial motion." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "The trial court's discretion will not be overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant." Id. "On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record." Id. at 324, 468 S.E.2d at 625. "The appellant has the burden of proving she did not receive a fair trial because of the alleged improper argument." Id. at 324, 468 S.E.2d at 625.

STATEMENT OF THE FACTS

Appellant James Toatley and Chamel Burgess (Burgess) were at the Motor City Market during the early morning of December 12, 2020. They arrived in their black Ford Crown Victoria, went inside, and then back out to their car. Tr. 16, ll. 23-24; Tr. 325, ll. 13-24; Tr. 616, ll. 6-21; Tr. * (State's Ex. #10 Channel 1 @ 00:20 to 05:12).[1] A Toyota Camry arrived driven by Corey Smith (Smith) and parked in front as well. Pope Hope (Hope) was in the front passenger seat next to Smith, while Curtis Dinkins (Dinkins) and Jamica Bethel (Bethel) were in the back seat. Dinkins and Hope went inside the Motor City Market, followed by Defendant and Burgess. Tr. 226, ln. 15—Tr. 227, ln. 12; Tr 284, ln. 11—Tr. 287, ln. 11; Tr. * (State's Ex. #10 Channel 1 @ 05:59 to 07:38).

Inside the store, Dinkins and Hope waited in line before the register, and Defendant and Burgess waited behind them. At one point, Hope's hand touches Defendant's while standing in line. The parties argued as Dinkins and Hope exited, which continued in the parking lot by Smith's car. Hope got into the front passenger seat, while Dinkins remained outside the back door of the car still heatedly engaged with Defendant. Tr. 227, ln. 19—Tr. 231, ln. 8; Tr. 287, ln. 23--Tr. 291, ln. 16; Tr. 328, ll. 16-22. A gun was drawn, and Dinkins was shot. Several more shots were fired into Smith's car, missing Hope but striking Smith. As Defendant went to the other side of the Camry, Bethel ran out of the vehicle and ultimately inside the Motor City Market. Meanwhile, Smith was shot again. Hope then jumped out of the Camry and ran down Fairfield Road. Both Appellant and Burgess ultimately left the scene without their Crown

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[1] Time citation is to the counter of the video length rather than the time stamp due to the possible discrepancy between the time stamp on the surveillance video and actual time. Compare Tr. 201, ln. 14—Tr. 203, ln. 1; Tr. 204, ll. 20-21; with Tr. * (State's Ex. # 10 Channel 1).

Victoria. Tr. 231, ln. 8—Tr. 234, ln. 2; Tr. 291, ln. 17—Tr. 293, ln. 10; Tr. * (St. Ex.# 10 Channel 1 @ 10:23 to 11:36).

After Bethel came inside the store, the clerk locked the door and called 911 at approximately 2:39 a.m. Tr. 201, ln. 14—Tr. 203, ln. 1; Tr. 293, ln. 20—Tr. 294, ln. 3; Tr. 435, ln. 21—Tr. 436, ln. 7. Police arrived shortly thereafter and collected evidence, including video footage from inside and outside the Motor City Market, as well as numerous shell casings and projectiles from around and inside the Camry driven by Smith. Tr. 202, ll. 24-25; Tr. 270, ln. 15—271, ln. 8; Tr. 414, ln. 4—Tr. 416, ln. 23; Tr.* (Defense Ex.# 4, crime scene sketch). Appellant was arrested January 26, 2021. Tr. 819, ln. 16.

Appellant's case proceeded to trial on June 20, 2023. Tr. 1. Appellant did not testify at his trial. In its closing argument, the State asked the jury to weigh and "consider those people that got on the stand," and then commented as follows:

> [T]hose who chose to speak to the police that night, those who chose not to slip away in silence. Because again, our lives begin to matter or begin to end the day that we become silent about the things that matter and they weren't. They went to the police. They gave statements.

Tr. 762, ll. 16-24. Counsel objected, and the trial court permitted the State to proceed. Tr. 762, ln. 25—Tr. 763, ln. 2. After closing arguments, Counsel renewed her objection to the State's closing argument. Specifically, Counsel asserted the following:

> [I]n conjunction with showing the video and seeing Mr. Toatley walk off the video, [the State] said, and you can see him just [s]linking away without any . . . or just going away or—I can't remember the word exactly. But . . . what concerned me, Your Honor, was that the State kept saying that there were witnesses that didn't just slip away, that did give statements. And I at that point had a concern about an inference of Mr. Toatley not giving a statement. I know that the judge—I know that you charged that they are not to consider that, but I think I do need to move for a mistrial just to—to protect the record.

Tr. 791, ll. 13-24. The State indicated it focused its closing argument "on those witnesses that were willing to speak to the police and who came into this courtroom and testified." However, the State claimed it was "surprised that it was construed as commenting on the—the defendant's silence because it was really this testimony that was elicited in terms of Mr. Burgess and why that had not been followed up on." Tr. 792, ll. 7-18. The trial court ruled as follows:

> The motion for a mistrial is respectfully denied. I did not, at the time, and still do not see it as a burden shifting to the extent that that could be argued or somehow construed. I think that any attempt to do that by the State, not—not that it was intentional, but it would have been cured by the jury charges and my instructions, the repetitive nature of the instruction that he's not ever required to prove himself innocent, that they should not discuss his failure to testify. He has no burden whatsoever, et cetera, et cetera. So motion is respectfully denied.

Tr. 792, ln. 20—Tr. 793, ln. 5.

The jury found Appellant guilty of both murder counts, one count of attempted murder, one count of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN), and of possession of a weapon during the commission of a violent offense. Tr. 796, ln. 9–Tr. 797, ln. 7. The trial court sentenced Appellant to serve an aggregate of fifty-seven (57) years. Tr. 822, ll. 1-19. This appeal follows.

ARGUMENT

The trial court reversibly erred by overruling Defendant's objection and refusing to grant a mistrial where, during its closing argument, the State was permitted to make an argument indirectly impugning Defendant's right to remain silent by urging jurors to consider "those who chose to speak to the police that night, . . . who chose not to slip away in silence. . . . They went to the police. They gave statements."

The trial court erred by denying Appellant's motion for mistrial after objecting during the State's closing argument for an impermissible comment on Appellant's silence. The State's argument encouraged the jury to consider those who spoke with police on the night of the incident, who did not "slip away in silence," and instead went to police and "gave statements" amounted to an unconstitutional comment on Appellant's right to remain silent. Yet the trial court overruled the objection when contemporaneously made, and again when placed upon the record more fully after closing arguments were complete. As such, no curative instruction was given to the jury to disregard the offending argument or to not consider it in deliberations. Accordingly, Appellant was likewise prejudiced by the trial court's erroneous ruling.

"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 language was objectionable; (3) the trial court failed 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 any 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. Tr. 762, ln. 25—Tr. 763, ln. 2. Additionally, Counsel placed her argument on the record afterward as well:

> [I]n conjunction with showing the video and seeing Mr. Toatley walk off the video, [the State] said, and you can see him just [s]linking away without any . . . or just going away or—I can't remember the word exactly. But . . . what concerned me, Your Honor, was that the State kept saying that there were witnesses that didn't just slip away, that did give statements. And I at that point had a concern about an inference of Mr. Toatley not giving a statement. I know that the judge—I know that you charged that they are not to consider that, but I think I do need to move for a mistrial just to—to protect the record.

Tr. 791, ll. 13-24. The State readily understood Counsel's argument as a comment upon the defendant's silence: it acknowledged that the focus of its closing argument was "on those witnesses that were willing to speak to the police and who came into this courtroom and testified," yet claimed it was "surprised that it was construed as commenting on the—the defendant's silence because it was really this testimony that was elicited in terms of Mr. Burgess and why that had not been followed up on." Tr. 792, ll. 7-18. In other words, the basis of the objection was clear: the State's argument amounted to a comment on Appellant's right to remain silent, and therefore a burden shift as well.

Second, the substance of the State's objectionable language was an impermissible comment on Appellant's right to remain silent. "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, 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 to direct and indirect comments by the State on a defendant's exercise of his right to remain silent. "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, the State made an indirect comment upon Appellant's right to remain silent when, in closing argument, it urged the jury to weigh and "consider those people that got on the stand," and then made the following comments:

> [*T*]*hose who chose to speak to the police that night, those who chose not to slip away in silence.* Because again, our lives begin to matter or begin to end the day that we become silent about the things that matter and they weren't. *They went to the police. They gave statements.*

Tr. 762, ll. 16-24 (emphasis added). When viewed in light of the facts that the State introduced video and testimonial evidence showing Appellant and Burgess leaving the parking lot of Motor City Market on foot prior to the arrival of police, and where Appellant neither gave a statement to police nor testified at his trial, it is clear that these comments amounted to an indirect comment on Appellant's right to remain silent. McFadden, 342 S.C. at 640, 539 S.E.2d at 393 (citing Cooper, 334 S.C. 540, 514 S.E.2d 584) ("the solicitor *must not* comment, either directly *or indirectly*, on a defendant's silence, failure to testify, or failure to present a defense.") (emphasis added)); Tr. 183, ln. 5—Tr. 187, ln. 11; Tr.* (St. Ex.# 10, Andrea Ch 5 Clip 1; Andrea Ch 5 Clip 2); Tr.* St. Ex.# 10 Channel 1 @ 11:34 through 11:37).

However, the trial court failed to even acknowledge the State's comments amounted to a comment on Appellant's right to remain silent. Specifically, the trial court ruled as follows:

> The motion for a mistrial is respectfully denied. I did not, at the time, and still do not see it as a burden shifting to the extent that that could be argued or somehow construed. I think that any attempt to do that by the State, not—not that it was intentional, but it would have been cured by the jury charges and my instructions, the repetitive nature of the instruction that he's not ever required to prove himself innocent, that they should not discuss his failure to testify. He has no burden whatsoever, et cetera, et cetera. So motion is respectfully denied.

Tr. 792, ln. 20—Tr. 793, ln. 5. As such, it denied Appellant's motion for mistrial, and failed to warn the jury not to consider the State's argument through a curative instruction. See, e.g., State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) (citing 75 Am.Jur.2d, Trial, Section 748) ("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.").

Rather, the court instead relied solely upon its generic instructions to the jury regarding burden of proof. Noticeably absent from the trial court's instruction was any mention for the jury to disregard the State's comments on Appellant's right to silence, 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); see also State v. Pickens, 320 S.C. 528, 530, 466 S.E.2d 364, 366 (1996) (reversing where a curative instruction was not given, and the general jury charge did not cure the error). Accordingly, the trial court's generic jury 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.").

Fourth and finally, the result was materially prejudicial to the right of Appellant to obtain a fair and impartial trial. Although the State referred to Appellant's silence once, it was more than a simple word or phrase. Rather, as the State admitted, it focused its closing argument "on those witnesses that were willing to speak to the police and who came into this courtroom and testified." Tr. 792, ll. 7-9. Also, instead of tying Appellant's silence to an exculpatory story, the State's argument instead tied his silence to his conduct on video. When coupled with the fact that Appellant neither testified nor provided a statement used in his trial, the comments by the State amount to an attack upon Appellant's presumption of innocence and the standard of proof beyond a reasonable doubt. Thus, the State's comments prejudiced 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 James Toatley respectfully requests reversal of his convictions, and remand for a new trial.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of April, 2024.