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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County

Honorable Robert J. Bonds, Circuit Court Judge

MARKESE EAST,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2022-000557

BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Petitioner's request for a mistrial following his objection to the solicitor's improper closing argument which: (1) went beyond the facts and reasonable inferences from the facts; (2) implied that defense counsel was lying or making up facts; (3) impermissibly shifted the burden of proof to Petitioner; and (4) improperly appealed to the jury's passions?

STATEMENT OF THE CASE

During the November 2013 term of the Aiken County grand jury, Petitioner was indicted for one count of murder, one count of armed robbery, and one count of burglary first degree. App. 447-448, 453-454, 459-460. On January 5-7, 2016, the State, represented by Williams Weeks and Cassie Hall, called the case to trial before the Honorable Doyet A. Early, III, and a jury. Petitioner was represented by Kevin Beck and Aaron Walsh. App. 1. Petitioner was ultimately found guilty as indicted and sentenced to three concurrent terms of thirty-years' imprisonment for each charge. App. 424, l. 21-App. 425, l. 11; App. 438, ll. 7-14.

Counsel Beck failed to file a notice of appeal following Petitioner's convictions. Petitioner filed a *pro se* application for post-conviction relief on January 26, 2017. App. 463-469. The State filed a return and motion to dismiss dated March 20, 2017, alleging the PCR application was not timely filed. App. 471-474. Subsequently, the State received a letter from Counsel Beck admitting his failure in filing the appeal. The State then filed an amended return requesting a hearing on the issue of a belated appeal, requesting all other allegations be dismissed as untimely. App. 475-481.

A hearing was convened before the Honorable J. Cordell Maddox on May 14, 2019. The State was represented by Megan Jameson. Petitioner was represented by Nancy Fennell. App. 482. At the conclusion of the hearing, Judge Maddox granted[1] Petitioner's request for a belated appeal. Judge Maddox also determined that Petitioner was entitled to equitable tolling of the PCR statute and could have his other claims heard at a later hearing. App. 493, l. 15-App. 494, l. 14.

Counsel Fennell subsequently filed an amended PCR application. App. 496-498. A hearing on the amended application was held on February 2, 2022, before the Honorable Robert J.

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[1] Judge Maddox did not issue a written order in this matter. At Petitioner's subsequent PCR hearing the parties agreed that Judge Bond should give effect to Judge Maddox's ruling and include in the final PCR order that Petitioner was entitled to a belated appeal. App. 506, ll. 9-16.

Bonds. Megan Jameson appeared on behalf of the State and Counsel Fennell appeared on behalf of Petitioner. App. 499. At the start of the hearing, the State conceded that Petitioner was entitled to a belated appeal based on the testimony elicited during the hearing before Judge Maddox. App. 505, ll. 7-22. An order granting Petitioner a belated appeal pursuant *White v. State*[2] and denying his other claims was filed on April 18, 2022. App. 567-582.

This brief pursuant to *White v. State*, and a simultaneously filed petition for writ of certiorari, follow.

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2 263 S.C. 110, 108 S.E.2d 35 (1974)

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. 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." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (internal citations omitted). "On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

ARGUMENT

The trial court erred in denying Petitioner's request for a mistrial following his objection to the solicitor's improper closing argument which: (1) went beyond the facts and reasonable inferences from the facts; (2) implied that defense counsel was lying or making up facts; (3) impermissibly shifted the burden of proof to Petitioner; and (4) improperly appealed to the jury's passions.

Relevant Facts

On May 28, 2013, officers with the Aiken Department of Public Safety (ADPS) responded to a home invasion and shooting at the home of Shane Jones. App. 116, ll. 2-18. Upon arrival, officers observed Jones leaned against the counter being comforted by his girlfriend but could not tell if he was alive or dead. After clearing the scene, EMS entered the home and confirmed that Jones was deceased. App. 117, l. 22- 118, l. 15. A second individual, Raven Williams, sustained a non-life-threatening gunshot wound to the leg during the incident. App. 125, l. 24- 126, l. 6. The home intruders fled the scene after, stealing cellphones, a few dollars, and some Xanax bars. App. 107, ll. 20-23.

The following morning, Petitioner went with his uncle to ADPS and gave a statement about the incident. App. 45, l. 18- 46, l. 15. In the statement, Petitioner implicated himself and three of his co-defendants in the events of the prior evening. He admitted they "outfitted" themselves in dark clothing, concealed their faces, and armed themselves prior to committing the robbery. App. 54, l. 17- 55, l. 24. Petitioner maintained that while he had a gun, it was unloaded. App. 325, ll. 22- 326, l. 1. In 2015, Petitioner and Counsel Beck met with an investigator with the Aiken County Solicitors Office where Petitioner gave a second statement that was consistent with the statement he gave on May 29, 2013. App. 329, l. 24- 331, l. 2.

Prior to the start of trial, the parties held a hearing pursuant to *Jackson v. Denno*[3] to determine the admissibility of Petitioner's statements. App. 43, ll. 6-7. At the conclusion of the hearing, the trial court ruled Petitioner's statements admissible. App. 93, ll. 7-22. At trial, the State relied on Petitioner's statements to place him at the scene at the time of the incident. App. 320, ll. 15-16; App. 322, ll. 2. The only evidence entered by Counsel Beck was a series of text messages that appeared to show Petitioner's co-defendants planning to harm Jones. Petitioner was not party to those text messages. App. 303, l. 19- 308, l. 15.

During closing arguments, Counsel Walsh argued that the murder of Jones was not a natural and probable consequence of the plan to rob the victim that Petitioner entered into with his co-defendants. He argued it was an independent act of the co-defendants, a separate and distinct plot that Petitioner did not have knowledge of or involvement in. App. 368, ll. 18-24. While most of the closing argument focused on the murder charge, Counsel Walsh did touch on the burglary charge briefly. He argued that it was possible for the jury to find that the men who entered Jones's home the night of the incident did so with consent of a person who regularly stayed at the home. If the jury found consent, that would negate the burglary first charge. App. 367, l. 8- 368, l. 10. In support of the contention that Petitioner's co-defendants had a separate plan to murder Jones, Counsel Walsh focused on the communication between the other co-defendants that Petitioner was not party to. He also argued that, except for Petitioner, all the co-defendants brought something to the group to commit the crime, whether it was guns or the car or information, and that Petitioner was only added to the group as an afterthought once the co-defendants realized how many other people where in the home. App. 369, l. 25- 374, l. 10.

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[3] 378 U.S. 368 (1964)

In response, the solicitor argued that Jones's murder was a natural and probable consequence of the armed robbery. The solicitor began by stating that the police, following the cellphone evidence, identified a "little gang of people" involved in the murder of Jones. App. 382, l. 13- 383, l. 21. He stated that people did not arm themselves with guns to commit a robbery if they did not intend to use those guns to defend themselves, and he emphasized that the group of defendants planned the crimes. App. 384, l. 18- 385, 1. 17. In response to Counsel Walsh's argument regarding consent to enter the home, the solicitor argued

> But my best friend ain't got the right to ask three armed men into my house. So if **they're going to get up here with a straight face and argue that it was consent to go into that house, that's another indication of how ridiculous it is to be here**, because that's not consent, ladies and gentlemen. That's not consent.

App. 386, ll. 5-11 (emphasis added). A short time later, the solicitor argued that there was no way to prove that Petitioner's gun was unloaded and then asserted Counsel Walsh was lying stating:

> He says his gun is unloaded. **Well, there is absolutely no way to prove that, and he knows it. You can't prove his gun was loaded that night ...** He didn't say he unloaded the gun, he said the gun was unloaded and given to him. **But I've already mentioned what a ludicrous and what ridiculous statement that is. So I don't think that's the truth and I don't think you should think that's the truth.**
>
> Anyway, let's get it. He says pop, pop, boom, boom, boom, boom. The guy charges, boom, boom. That's not true. The guy has got three bullet holes in him. Enter and exit. I'm sure he's not kicking back with his friends with a bullet hole in him waiting on somebody to come put two more in him. The man is shot three times. And what they don't want to concede is it's not the truth from their client when he says he only heard two shots. **They want to get up there and say that the guy is over there discharging his gun and cleaning it and emptying it and trying to shoot him some more. But that ain't what their client says that they want you to say is the truth. That's just something they're making up trying to explain the extra shell.**

App. 389, l. 20 –391, l. 1 (emphasis added). At the end of his closing argument, the solicitor again said that Counsel Walsh was being misleading by calling his argument "malarkey" before telling

the jury that the "real reason while we're all up here" was Jones's "little-two-year-old that won't see his father ever, won't know his father ever, didn't have anything to do with this. But that's the reason that the State prosecutes these cases." App. 392, l. 12- 393, l. 11.

After the solicitor finished with his argument, Counsel Walsh requested to be heard on a matter outside of the presence of the jury. App. 395, ll. 20-25. Once the jury had been excused, Counsel Walsh raised objections to the solicitor's closing argument. He objected to the use of the word "gang" because there was no evidence of gang involvement in the case. He recognized that there is a "common dictionary version of that word, but it means something in cases like this and everybody knows that." App. 396, ll. 5-15. He strongly objected to the portion of the solicitor's argument wherein the solicitor maligned defense counsel and implied that he was making things up. Counsel Walsh also commented that the solicitor used a "mocking voice" when speaking about defense counsel which was improper. App. 396, ll. 16-21; App. 397, ll. 9-16. Counsel Walsh objected to the solicitor stating that there was no way to prove Petitioner's gun was unloaded as burden shifting, emphasizing that the defense did not have to prove anything. App. 396, ll. 22-397, l. 8. Lastly, he objected to the solicitor stating the reason the State prosecuted the case was because of the two-year-old left behind, arguing it appealed to their compassion. App. 397, ll. 17-23. Counsel Walsh asked for a curative instruction or a mistrial, based on the impropriety of the solicitor's argument. App. 379, ll. 22-23.

Solicitor Weeks responded that he used the term "gang" to mean a "group of guys" and agreed there was no evidence of gang activity in the case. The trial court stated it would issue an instruction that there was no evidence of gang activity. Regarding burden shifting, he stated he believed he said "we" and the court interjected it believed he had said "they" to which the solicitor responded that if he "said they, he was referring to the police, not the defense." Solicitor Weeks

maintained that remarks about the two-year-old were proper argument, and he did not address the improper comments about defense counsel. App. 398, ll. 2-24. The court denied Counsel Walsh's motion for a mistrial but agreed to give a curative instruction regarding the word "gang." However, because the court was not going to address any other portions of the solicitor's argument that Counsel Walsh objected to, he opted to withdraw his request for a curative instruction on that point. App. 399, ll. 1-22.

Discussion

Our appellate courts have repeatedly held that "[a] solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). *See Also Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). Additionally, both of our appellate courts and numerous federal courts have held it is improper for a prosecutor in their closing arguments to malign the character of defense counsel or to suggest that defense counsel is making up facts or misleading the jury. *See Fortune v. State*, 428 S.C. 454, 837 S.E.2d 37 (2019); *State v. Parker*, 391 S.C. 606, 614 n.3, 707 S.E.2d 799, 803 n.3 (2011) ("it is generally improper for the prosecutor to accuse defense counsel of fabricating a defense or otherwise denigrate defense counsel"); *United States v. Ollivierre*, 378 F.3d 412, 420 (4th Cir. 2004) *opinion vacated on other grounds by* 543 U.S. 1112 (2004) ("emphasiz[ing] the importance of ensuring that prosecutors refrain from impugning, directly or through implication, the integrity or institutional role of their brothers and sisters at the bar who serve as defense lawyers"); *United States v. Friedman* 909 F.2d 705, 709 (2d Cir. 1990) (improper for prosecutor to argue that defense counsel would "make any argument he can to get that guy off"). "The appellant has the burden of

proving he did not receive a fair trial because of the alleged improper argument. 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." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166-67 (1998) (internal citations omitted).

In Petitioner's case, numerous portions of the solicitor's closing argument were improper. The first improper comment occurred when the solicitor referred to Petitioner and his co-defendants a "little gang of people" who were responsible for the murder Jones. The word gang carries with it highly negative connotations. A gang is commonly thought of as an organized group that engages in illegal and often violent activities. While the solicitor tried to excuse his comment as unintentional, describing Petitioner and his co-defendants as a gang was improper and prejudicial as it cast them in a derogatory light. Further, as the solicitor conceded and the trial court agreed, there was no evidence supporting gang activity, thus the comment went outside of the facts presented during trial.

Second, and likely most egregious, was the solicitor's repeated denigration of defense counsel. The solicitor expressed disbelief that defense counsel made his argument "with a straight face" and called it "ridiculous." The solicitor also explicitly stated that defense counsel was making up facts to explain the extra shell casing. According to Counsel Walsh, the solicitor also used a mocking voice when discussing defense counsel's argument. These were clearly improper remarks designed to impugn the credibility of defense counsel as a means of imputing guilt to Petitioner. *See United States v. McDonald,* 620 F.2d 559 (5th Cir.1980). Furthermore, the accusations were made, and the mocking tone was used, on multiple occasions. Thus, they were not the result of a statement that comes "in the heat of a closing argument," but were deliberate

character attacks on defense counsel designed to undermine the defense theory of the case. *See United States v. Frascone*, 747 F.2d 958 (5th Cir. 1984).

Third, the solicitor argued that there was no way to prove Petitioner's gun was not loaded and that Petitioner knew that fact could not be proven. This was a highly improper comment, as any argument that implies a defendant has something to prove has no place before a jury. The burden of proof is wholly on the State, and Petitioner was presumed innocent at trial. Shifting the burden to Petitioner in any manner risks depriving him of his right to a fair trial in which the State must prove every element of the offense beyond a reasonable doubt.

Fourth and finally, the solicitor improperly appealed to the jurors' passions by telling the jury the reason they were all there was because a two-year-old child would never know his father. This argument was wholly emotional and entirely untrue. The case was tried not because a child was left behind, but because the State believed Petitioner and his co-defendants were guilty of murder, armed robbery, and burglary first degree. The existence of the child had no bearing on why the State proceeded in charging Petitioner, and arguing otherwise was merely an attempt to pull on the collective heartstrings of the jury.

The solicitor's closing statement was rife with inexcusable arguments. While one comment by itself may not have been prejudicial, all the improper comments taken together created reversable error. The crux of the defense was that Petitioner was not involved in the planning or execution of the murder of Jones but was merely present. While Petitioner was involved in the robbery, the defense emphasized that the murder was planned between the other co-defendants and therefore was not a natural and probable consequence of the robbery, but a distinct and separate plot executed by the other co-defendants. The solicitor mocked this argument, accused defense counsel of making things up, preyed on the emotions of the jury, interjected facts outside of the

evidence into the case, and improperly implied that Petitioner had some burden to prove himself innocent. The totality of these improper statements to the jury during closing argument infected Petitioner's trial with such a high degree of unfairness that his convictions were a denial of due process.

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests this Court reverse his convictions and remanded the case to the Aiken County Court of General Sessions for a new trial.

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of March, 2023.