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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of General Sessions
The Honorable Doyet A. Early, Circuit Court Judge

Appellate Case No. 2022-000557

MARKESE EAST, Petitioner,

v.

THE STATE, Respondent.

BRIEF OF RESPONDENT PURSUANT TO WHITE V. STATE

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

BILL WEEKS
Solicitor, Second Judicial Circuit

109 Park Avenue SE
Aiken, SC 29802
(803) 642-1557

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether East was denied a fair trial due to the solicitor's closing argument where the comments were restricted to reasonable inferences from the evidence and legitimately questioned the credibility of East's defense.

STATEMENT OF THE CASE

An Aiken County grand jury indicted Petitioner Markese East for armed robbery, first degree burglary, and murder. The indictments stemmed from a home invasion armed robbery committed by East and three others on May 28, 2013, which resulted in the death of Shane Jones. (App.252–57). East gave a confession to law enforcement admitting his role in the robbery and implicating his three co-defendants as the primary actors. (App.315–18). East's co-defendants all ultimately pled guilty and received 30-year sentences. (App.542, lines 10–13).

East proceeded to jury trial on January 5–7, 2016, before the Honorable Doyet A. Early, III, Circuit Court Judge. East was represented by Kevin Beck, Esquire, and Aaron Walsh, Esquire. East was prosecuted under an accomplice liability theory. East's defense was that Jones's death was not a natural and probable consequence of the armed robbery scheme because there was evidence his co-conspirators intended Jones's death from the outset without East's knowledge. East was convicted as charged and sentenced to 30 years' incarceration on each indictment, with the sentences to be served concurrently.

East did not appeal his conviction. He filed an application for post-conviction relief on January 24, 2017. (App.463–68). The State filed a return on March 20, 2017, and an amended return on April 3, 2019. (App.471–80). An evidentiary hearing was convened on May 14, 2019. At the hearing, the State indicated it received a letter from counsel Beck stating he failed to file an appeal as requested by East. (App.484). East also offered testimony to that effect. (App.486–87). The

PCR court granted East's motion for a belated direct appeal pursuant to White v. State, 348 S.C. 215, 559 S.E.2d 581 (2002), and agreed to toll the statute of limitations to allow East to pursue a PCR action. (App.493–94). Another hearing was convened on February 2, 2002, where East presented testimony in support of his claims of ineffective assistance of counsel. The PCR court denied relief on these claims on April 11, 2022. (App.567–82). East filed a White brief on March 8, 2023. This Brief of Respondent follows.

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. On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record. The appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624–25 (1996).

ARGUMENT

The solicitor's closing argument contained legitimate comments on the weight of the evidence and East was not prejudiced.

East alleges he did not receive a fair trial due to the solicitor's improper closing argument. None of his claims are preserved for review because he did not contemporaneously object. Even if preserved, East received a fair trial despite the solicitor's alleged improper comments and "mocking tone" because his closing argument legitimately focused on the strengths and witnesses of the case and his view of the evidence. This Court should affirm.

A. East's claims are not preserved for review.

East did not contemporaneously object to any of the comments he complains of in his brief. Rather, he waited until the solicitor concluded his argument. The solicitor's argument ended on page 395 of the transcript. (App.395). The alleged improper comments came on pages 382, 386, 390, and 393. Defense counsel's objection was not contemporaneous with these comments, and therefore East's claims are not preserved for review. See Varnadore v. Nationwide Mut. Ins. Co., 289 S.C. 155, 159, 345 S.E.2d 711, 714 (1986).

B. The solicitor's comments did not deprive East of a fair trial.

Even if preserved, East's claims are meritless. It is East's burden to show any alleged error in argument deprived him of a fair trial. State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). 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. Id.

East first complains of the prosecutor's comment referring to East and his confederates as a "little gang of people." Describing the police investigation, the prosecutor stated: "They find out the names of some people that have been together, a little gang of people, and they start putting two and two together." (App.382–83). East claims this was improper because a "gang is commonly thought of as an organized group that engages in illegal and often violent activities." Brief of Petitioner at 10. This is a fairly accurate description of what happened in this case, where a group of armed individuals carried out an organized home invasion, armed robbery, and murder. Another definition is a "group, such as a group of persons working to unlawful or antisocial ends." Gang, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/gang (last visited July 27, 2023). This is also an accurate description of East and his group of co-conspirators.

Even if the word "gang" carries negative connotations, its use was not unfairly prejudicial in this case. The prosecutor never alleged East and his friends belonged to sophisticated criminal organization, and the mere use of the phrase "little gang of people" did not allege any facts not in evidence. Furthermore, the prosecutor only said the word once. East was not prejudiced. See Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004) (holding solicitor's argument that drug dealers were "filthy just like cockroaches" did not deprive defendant of fair trial and noting the comments were isolated).

Next, East asserts the prosecutor denigrated defense counsel by calling his argument "ridiculous." The prosecutor's argument was in response to defense counsel's argument that East was not guilty of burglary because the "inside man" who conspired with East's group "unlocked or opened the door" to let the men into the house, meaning East had consent to enter. (App.367 line 14–App.368 line 8). 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).

The solicitor did not disparage defense counsel; he disparaged his legal argument. Closing argument is the attorney's opportunity to "argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions." Herring v. New York, 422 U.S. 853, 862 (1975). The solicitor made no comment about defense counsel personally, and did not allege any unethical conduct. The solicitor was allowed to vigorously assert that defense counsel's argument should be rejected. See State v. Rudd, 355 S.C. 543, 547, 586 S.E.2d 153, 155 (Ct. App. 2003) (holding solicitor's argument that defense counsel's argument was like cotton candy, "a lot of sugar spun up with hot air," was not improper); United States v. Bennett, 75 F.3d 40, 46 (1st Cir. 1996) (explaining "summations in litigation often have a rough and tumble quality" and rejecting claim that prosecutor's comments were improper where prosecutor called "a defense

argument a 'diversion' that does not 'pass the laugh test'"); United States v. Ollivierre, 378 F.3d 412, 421 (4th Cir. 2004), vacated on other grounds, 543 U.S. 1112 (2005) (explaining prosecutor's argument that defense counsel tried "to weave in distorted facts to try to make his argument" was not inappropriate).

United States v. McDonald, 620 F.2d 559 (5th Cir.1980), does not support East's claim that the solicitor's comments were "designed to impugn the credibility of defense counsel as a means of imputing guilt to Petitioner." Brief of Petitioner at 10. McDonald involved an improper comment on the defendant's Sixth Amendment right to counsel where the prosecutor commented on defense counsel's presence at the execution of a search warrant. The court explained the comments were suggestive of unethical behavior and sought to "penalize a defendant for the exercise of his right to counsel . . . ." Id. at 564. Neither the facts nor law of McDonald are applicable here. The trial court did not err by finding these comments were proper argument.

Next, East alleges the solicitor shifted the burden of proof by arguing East's claim that he carried an unloaded gun was not credible. The solicitor's argued: "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." App.390. lines 2–3). The solicitor did not argue East was required to prove the gun was unloaded; he argued there was no way to prove this fact in the affirmative or negative. In other words, it was impossible to corroborate East's claim and it was therefore dubious. He went on to further attack the believability of East's statement: "His gun is under a bush

behind Carver Terrace. 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 a 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." (App.390, lines 4–11).

A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony. See State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999) (finding no error where solicitor argued defendant's statement was not true). This argument was a legitimate comment on the believability of East's version of events. The solicitor previously argued, "I suggest to you and I wouldn't believe for a second that Mr. East's gun was unloaded." (App.385, lines 3–4). This was a legitimate comment on the evidence and did not shift the burden of proof. Cooper, 334 S.C. at 553, 514 S.E.2d at 591 (explaining comments are proper where they are "based upon evidence in the record and reasonable inferences therefrom"). The solicitor was entitled to characterize the evidence "from the State's perspective," as he told the jury he would. (App.380, line 24–25).

Finally, East alleges he was denied due process due to the solicitor's comment that the victim's two-year-old son was left without a father. While this comment did contain an emotional component, it was not so egregious so as to render the trial fundamentally unfair. Closing arguments traditionally have included appeals to emotion. Wayne LaFave et al., Criminal Procedure § 24.7(e) (4th ed. 2022). The isolated comment about the victim's son was not egregious, and did not render the

trial fundamentally unfair. Cf. State v. Davis, 239 S.C. 280, 284, 122 S.E.2d 633, 635 (1961) (reversing sexual assault conviction in a high profile case with racial undertones where, in closing argument, solicitor threatened to dismiss another similar case if the jury failed to convict); Darden v. Wainwright, 477 U.S. 168, 180-181 (1986) (concluding trial was not rendered fundamentally unfair by prosecutor's closing argument, which attempted to place some of blame on the Florida Department of Corrections for releasing Darden on weekend furlough prior to the incident, implied the death penalty was the only way to ensure Darden would not commit a future similar crime, employed the term "animal" to describe Darden, and expressed a personal desire for Darden to have been killed or be killed).

None of these comments affected the outcome of trial. See Rudd, 355 S.C. 543, at 586 S.E.2d at 157 (explaining improper comments do not require reversal if they are not prejudicial to the defendant). This was a strong case, where the facts were largely uncontested. East gave a confession admitting his participation in this crime. (App.528). Defense counsel admitted East's statement was very damaging, describing it as betraying "a certain lightness about undertaking this robbery." (App.378). He further admitted the doctrine of "the hand of one is the hand of all" applied to the case, and all but admitted East was guilty of armed robbery. (App.366; 368, lines 8–9). None of the solicitor's alleged improper comments—whether taken together or separately—reasonably affected the outcome of the trial. See Brown v. State, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009). This Court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

BILL WEEKS
Solicitor, Second Judicial Circuit

BY:_____
Joshua A. Edwards
Bar # 101188

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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