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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Laurens County
The Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

Respondent,

v.

TIMOTHY P. SPENCER,

Appellant.

Appellate Case No. 2024-000685

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Rules

Others

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I.

Did the trial court err in refusing to allow appellant to cross-examine the crime scene investigator about taking eight-to-ten Tramadol a day when the integrity of the crime scene was a key issue in the case?

II.

Did the trial court err in refusing to grant a mistrial because of the solicitor's improper disparaging comments about defense counsel?

RESPONDENT'S COUNTER-STATEMENT OF ISSUES ON APPEAL

I.

Did the trial court err in excluding unfairly prejudicial cross-examination about the drug use of one investigator when the evidence was not probative as to the officer's credibility and did not enhance the jury's understanding of investigatory mistakes?

II.

Did the trial court err in declining to grant a mistrial under Fortune v. State when the objection was not properly preserved the trial court remedied the issue with an appropriate curative instruction?

STATEMENT OF THE CASE

Respondent accepts Appellant's statement of the case for the purposes of this appeal.

STATEMENT OF FACTS

When Barbara McCoy talked to Billie Jean Cross,[1] her daughter, on December 9, 2021, the younger woman was waiting for someone to repair her heater. (Tr. 1, p. 133, l. 20–p. 134, l. 20). Cross was disabled, but before that she had served in the Army, worked at a bank, and at one point worked as a paralegal. (Tr. 1, p. 143, ll. 11–21). The next day, McCoy and Kathy Warren, Billie Jean's cousin, could not get in touch with her. (Tr. 1, p. 144, ll. 9 – 22). So they decided to go to Billie Jean's home. (Tr. 1, p. 144, ll. 14–17).

Billie Jean's car was outside. (Tr. 1, p. 144, ll. 23–24). But something was off. Billie Jean rarely locked her door, particularly if she expected visitors—it was difficult for her to get to the door to let people in—but it was locked now. (Tr. 1, p. 144, l. 25–p. 145, l. 6). At the invitation of McCoy and Warren, a sheriff's deputy broke into the house. (Tr. 1, p. 145, ll. 7–8; p. 158, ll. 6–9). Officer Kelly Rivera later testified that McCoy lifted a blue quilt off the living room floor, revealing a dark spot on the carpet. (Tr. 1, p. 159, ll. 9–13; p. 160, ll. 10–15). "Drag marks" were found in the home; they led to the back entrance. (Tr. 1, p. 163, l. 21–p. 164, l. 2; p. 165, ll. 15–16). Among the law enforcement officials who responded to the scene was Robbie Haupfear, then a crime scene investigator for the Laurens County Sheriff's Office. (Tr. 1, p. 186, ll. 6– 22).

On December 14, Brian Holley and his uncle were visiting a property in Starr that the uncle intended to buy. (Tr. 1, p. 254, ll. 9–17). The men came upon what Brian Holley originally thought was a mannequin; it turned out be a body. (Tr. 1, p. 255, ll. 11–21). They called 911. (Tr. 1, p. 255, ll. 17–18). The body was eventually identified as Billie Jean Cross. (Tr. 1, p. 294, ll. 17–20). Her trash can, which investigators believe was used to transport the body, was found in Anderson

[1] The victim's name is spelled both "Billie" and "Billy" in the record. This brief will use the first spelling but will retain the spelling used in the record when quoting from it.

County. (Tr. 1, p. 329, ll. 3–9). It was located near the home of Timothy Spencer (Appellant). (Tr. 1, p. 329, ll. 16 – 24; p. 341, ll. 8 – 17).

Dr. Kyle Shaw performed the autopsy on Billie Jean Cross on December 16. (Tr. 1, p. 474, ll. 15–23). She had head and facial injuries, and what appeared to be a scarf was wrapped so tightly around her neck that Dr. Shaw could not get his fingers behind it. (Tr. 1, p. 476, ll. 13 – 22). Scissors also could not be used. (Tr. 1, p. 479, ll. 7–10). Eventually, Dr. Shaw used a scalpel to begin removing the scarf from her body. (Tr. 1, p. 479, ll. 11–16). Dr. Shaw's expert opinion was that Billie Jean Cross' death was caused by ligature asphyxia and blunt head trauma. (Tr. 1, p. 489, l. 2; p. 491, ll. 15–18). On cross-examination, Dr. Shaw said she could theoretically have survived the head trauma. (Tr. 1, p. 507, ll. 7–12).

Investigators eventually obtained Billie Jean Cross' bank records and found a debit transaction on December 9 for $2,500 to Spencer's HVAC, a company owned by Appellant. (Tr. 2, p. 22, ll. 7–24). Appellant told investigators that while he spoke to the victim over the phone December 9 about some potential repairs, it had been a few weeks since he had last been at her home. (Tr. 2, p. 28, l. 23–p. 29, l. 16). Appellant said the victim owed him $2,500 for the part that he was supposed to order for her and some other work. (Tr. 2, p. 31, l. 21 – p. 32, l. 2). He said she had paid over the phone through an app. (Tr. 2, p. 32, ll. 3–4). It was the only time the victim had ever used the program. (Tr. 2, p. 89, l. 21–p. 90, l. 1).

But investigators would find out that there were multiple attempts to charge her card to pay Appellant. At 1:04 p.m. on December 9, a charge for $4,500 was submitted; the security code was incorrect, so payment was rejected. (Tr. 2, p. 90, ll. 20–23; p. 91, ll. 8–12). A charge for $4,500 was then attempted again at 1:06 p.m.; this one was rejected for insufficient funds. (Tr. 2, p. 90, ll. 13–18). Finally, at 1:07 p.m., the card was charged for $2,500; this time, the transaction cleared.

(Tr. 2, p. 91, ll. 19–22). It appeared that the job invoice related to the charge was later altered. (Tr. 2, p. 92, ll. 8–19).

Other evidence also implicated Appellant. Video from a neighbor's home appeared to show a black truck—similar to one owned by Appellant—at the victim's home around the time investigators believe she disappeared. (Tr. 2, p. 64, ll. 1–16). About an hour before that, the GPS on Appellant's truck showed him arriving at the victim's home. (Tr. 2, p. 74, ll. 22–23). About an hour later, he left. (Tr. 2, p. 75, ll. 1–8). Data from the victim's phone also indicates that around the same time, her phone went from "the area consistent with her home" to "an area near" Appellant's home. (Tr. 2, p. 217, ll. 16–20; *see also* Tr. 1, p. 316, ll. 18–22).

At trial, Appellant's defense was built in part around a theory that investigators had not conducted a proper investigation. As part of that, the defense wanted to introduce evidence that Officer Haupfear had been abusing pain medication at the time of the investigation. (Tr. 1, p. 207, l. 13–p. 208, l. 4). Trial counsel questioned Officer Haupfear about the issue *in camera*. (Tr. 1, p. 209, l. 18–p. 214, l. 16). After argument, the trial court declined to allow the defense to cross-examine Officer Haupfear on the issue, finding that—based on the testimony—the jury could only speculate about how Officer Haupfear would have been affected. (Tr. 1, p. 216, l. 20–p. 217, l. 10).

During closing arguments, the deputy solicitor presented the argument for the state. As part of that, the deputy solicitor said:

> Ladies and gentlemen, Judge Hocker is going to explain the law to you later on, when he does his charge to you, and that's what his job is. Everybody in this courtroom has a job, right? Judge Hocker's job is -- he bestowed to give you the law to explain to you what the elements of these charges are, what the law means. He's got to be, you know, call the balls and strikes sort of down the middle, make sure that this trial is fair.
>
> The Defense attorneys: the Defense team, they've got a job too, and their job is to represent Mr. Spencer's interest. Mr.

> Spencer's interest in this case is not for you to understand what really happened to Billy Jean Cross. Mr. Spencer's interest is counter to that, and they have done a very good job of representing him this -- these last couple weeks. If a witness took this stand and they did something wrong or they made a mistake, they heard about it. You heard about it. The Defense's job is to poke holes in the case, to poke holes in the evidence, to try and distract you, to try and get you confused about what really happened. Make no mistake about it. They're trying to muddy the waters, but that's their job, and that's fine.
>
> As Mr. Simmons told you before we started my job, our job as the State, our job is to bring you the evidence that you need to reach a verdict in this case. . . .

(Tr. 2, p. 336, l. 3–p. 337, l. 4).

After the deputy solicitor finished his argument, trial counsel for Appellant indicated that there was an issue that needed to be taken up outside of the presence of the jury. (Tr. 2, p. 363, l. 23). The defense then moved for a mistrial under *Fortune v. State*, 428 S.C. 545, 837 S.E.2d 37 (2019). (Tr. 2, p. 364, ll. 4–13). The trial court indicated that while the deputy solicitor was giving his closing argument, the defense had emailed him a copy of the opinion in that case. (Tr. 2, p. 364, ll. 14–22). After hearing argument, the trial court decided to give a curative instruction. (Tr. 2, p. 368, ll. 7–10). Trial counsel made clear that Appellant would still call for a mistrial. (Tr. 2, p. 368, ll. 11–15).

When the jury returned, the trial court told them: "Ladies and gentlemen, one comment to you, any reference to 'muddying the waters' or questions assigned to mislead the jury, those statements are not to be considered by you in your deliberations. Agree to [a] unanimous verdict in this case." (Tr. p. 370, ll. 13–16).

After deliberations, the jury found Appellant guilty of murder. (Tr. 2, p. 410, l. 24–p. 411, l. 3). The trial court sentenced Appellant to life imprisonment. (Tr. p. 420, ll. 16–19). This appeal follows.

STANDARD OF REVIEW

This Court reviews the trial court's decisions for an abuse of discretion. "The trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion." *State v. Aleksey*, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000). "The decision to grant or deny a mistrial is within the sound discretion of the trial court." *State v. Makins*, 433 S.C. 494, 500, 860 S.E.2d 666, 670 (2021). "The appropriateness of a solicitor's closing argument is a matter left to the trial court's sound discretion. An appellate court will not disturb a trial court's ruling regarding closing argument unless there is an abuse of that discretion." *State v. Rudd*, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003). "To find whether the assistant solicitor's comments in closing argument violated the defendant's due process rights, we must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial." *Fortune v. State*, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019).

ARGUMENT

I. The trial court did not err in excluding unfairly prejudicial cross-examination about the drug use of one of the investigators because the evidence was not probative as to the officer's credibility and did not enhance the jury's understanding of investigatory mistakes.

Appellant argues that the trial court erred in declining to allow Appellant to cross-examine Officer Haupfear about his dependency on Tramadol. Appellant is incorrect; the trial court properly limited the scope of cross-examination when it would have served no purpose other than to inject unfairly prejudicial evidence into the trial.

Not all relevant evidence is admissible under South Carolina's evidentiary rules. Instead, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. The rules also limit the ability of counsel to probe the character or conduct of witnesses on cross-examination. For example, Rule 608(a) makes it clear that opinion or reputation evidence can be used against a witness—or for a witness in certain circumstances—but that, in attacking a witness, "the evidence may refer only to character for truthfulness or untruthfulness." Rule 608, SCRE. The rules do allow for a witness to be cross-examined about specific incidents of previous conduct, but again, the questions have to relate to truthfulness. *See* Rule 608(b); *see also State v. Aleksey*, 343 S.C. 20, 34, 538 S.E.2d 248, 255 (2000) ("Prior bad acts which are not the subject of conviction, such as the dismissed indictments here, may only be inquired into, 'in the discretion of the court, if probative of truthfulness or untruthfulness.'" (quoting Rule 608(b), SCRE)). And our supreme court has held that "[n]arcotics offenses are generally not considered probative of truthfulness." *Aleksey*, 343 S.C. at 34, 538 S.E.2d at 255.

And while defendants certainly have the right to a vigorous cross-examination of the case against them—and the witnesses making that case—the right is not unlimited, as our courts have noted. Circuit courts do not "lose their usual discretion to limit the scope of cross-examination" because of the nature of the trial. *Id.* at 33–34, 538 S.E.2d at 255; *see also State v. Mizzell*, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002) ("The trial judge retains discretion to impose reasonable limits on the scope of cross-examination."). Not surprisingly, the defendant's right to cross examination largely echoes Rule 403. "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant." *Aleksey*, 343 S.C. at 34, 538 S.E.2d at 255 (quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

It's also important to focus on what Appellant is requesting—not the right to ask Officer Haupfear about his errors in crime scene investigation and preservation, but about what Appellant speculates is the reason for those errors. In fact, as part of an extensive cross-examination, Appellant's trial counsel had Officer Haupfear read from the Laurens County Sheriff's Department's police and procedures (Tr. 1, p. 221, ll. 10–18); confirmed the victim's mother and cousin were allowed to remain in the victim's home after it seemed likely that the home was a crime scene (Tr. 1, p. 225, ll. 12–23); challenged the officers' failure to seal or tape the doors to the home when they left (as conceded by Officer Haupfear) (Tr. 1, p. 229, ll. 21–25); and pointed out that the door's lock alone might have been ineffective because of a broken window (as conceded by Officer Haupfear) (Tr. 1, p. 230, ll. 1–11)—among other things. The trial court did not restrict the defense from a robust cross-examination of Officer Haupfear about his mistakes,

which was unquestionably relevant to the trial; the trial court did prohibit the defense from bringing up speculation as to the cause of those mistakes, which was not relevant.

In fact, Appellant tried to prove that the officer's drug issues were relevant—and couldn't. Officer Haupfear pointed out that one reason he was taking too much Tramadol[2] was that lower doses were not effective. (Tr. 1, p. 211, l. 19–p. 212, l. 8). As the trial court correctly observed, Appellant did not bring in an expert witness to testify about the potential effects of Tramadol. (Tr. 1, p. 215, ll. 4–14).

None of appellant's case law—largely drawn from other jurisdictions—helps him. No doubt, courts have found that the drug use of a witness can be relevant on cross-examination to cast doubt on the witness' perception, recall, or testimony. *See United States v. Sampol*, 636 F.2d 621, 666 (D.C. Cir. 1980) ("We have recognized that it is proper to explore the drug addiction of a witness in order to attack his credibility and capacity to observe the events in question."); *State v. Williams*, 412 S.E.2d 359, 364 (N.C. 1992) ("While specific instances of drug use or mental instability are not directly probative of truthfulness, they may bear upon credibility in other ways, such as to 'cast doubt upon the capacity of a witness to observe, recollect, and recount, and if so they are properly the subject not only of cross-examination but of extrinsic evidence . . . .'" (quoting 3 David Louisell & Christoper B. Muller, *Federal Evidence* § 305, at 236 (1979))).[3]

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[2] According to the Mayo Clinic, Tramadol is a pain reliever for "moderate to moderately severe pain," including "pain severe enough to require opioid treatment and when other pain medicines did not work well enough or cannot be tolerated." *See Tramadol (Oral Route)*, MAYO CLINIC, https://www.mayoclinic.org/drugs-supplements/tramadol-oral-route/description/drg-20068050 (last visited Sept. 22, 2025). The clinic further explains that "[t]he extended-release capsules or tablets are used for chronic ongoing pain." *Id.*

[3] In the spirit of candor to the Court, Respondent would note that the Supreme Court of North Carolina held in *Williams* that North Carolina's Rule 611, rather than Rule 608, was the controlling rule in that case. *Id.* The *Williams* Court found that Rule 611 allowed the information in because it was relevant to the witness' credibility. *Id.* at 364–65. But for reasons Respondent will explain, that is not the issue that Appellant is raising. In any event, our supreme court has referenced Rule

But Appellant's target in this case was not Officer Haupfear's credibility. The defense was not trying to show that Officer Haupfear was lying about his actions at the crime scene; if anything, Appellant was relying on jurors to believe Officer Haupfear's testimony about the investigation missteps or mistakes he made at the crime scene. The defense was instead trying to show, as Appellant argues in his brief to this court, that "the crime scene investigator was drug-addled" because it would "have significantly bolstered the defense's theme and the power of this argument." Init. Br. App. 10.

Rule 403 does not, of course, prevent litigants from introducing evidence that makes their arguments more powerful, but it does prevent litigants from introducing unfairly prejudicial evidence to do so. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *State v. Huckabee*, 419 S.C. 414, 423, 798 S.E.2d 584, 589 (Ct. App. 2017) (quoting *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)); *cf. State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) ("Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions."). The only power that would have been added to the argument by eliciting testimony of Officer Haupfear's use of Tramadol was precisely what Appellant says—the fact that someone misusing pain relievers was on the investigation meant the jury should disregard the substantial evidence pointing to Appellant's guilt because those who are dependent on drugs are inherently incompetent.[4]

608 in deciding whether narcotics use is an appropriate area for cross-examination. *See Aleksey*, *supra*.

[4] Because of that substantial evidence, the State would argue that any limitation on Appellant's cross-examination of Officer Haufpear is harmless. *See State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) ("A violation of the defendant's Sixth Amendment right to

The trial court split the difference here in a way that allowed in the truly probative evidence—the mistakes made by Officer Haupfear, among others, during the investigation—while keeping out the unfairly prejudicial (and not particularly probative) evidence that would have merely allowed the jury to speculate about why those mistakes happened, or whether other unmentioned mistakes might also have occurred.

Appellant has not shown any error by the trial court on this ground. His conviction should be affirmed.

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confront the witness is not *per se* reversible error if the error was harmless beyond a reasonable doubt." (cleaned up)). The factors for this determination include

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case.

Id., at 333, 563 S.E.2d at 318–19 (quoting *Van Arsdall,* 475 U.S. at 684, 106 S.Ct. at 1438, 89 L.Ed.2d at 686. The State's strongest evidence—as even Appellant seems to concede—came from other sources. *See* Init. Br. App. 8. Additionally, the trial court allowed thorough cross-examination outside of the limitation on questions about drug use.

II. Any violation of *Fortune* by the deputy solicitor—assuming it is properly before this Court—was properly addressed by the trial court's curative instruction.

Appellant also contends that his conviction should be reversed because the deputy solicitor's closing argument violated our supreme court's ruling in *Fortune v. State*. Appellant did not properly preserve this argument, and even if he did, he ignores significant differences between *Fortune* and this case.

A. Appellant cannot raise the issue before this Court because he did not contemporaneously object at trial and does not qualify for the limited exception to that requirement on closing arguments.

As a preliminary matter, Appellant cannot raise this issue before this Court because he did not contemporaneously object below. Because of that, and because Appellant does not qualify for the narrow exception to the contemporaneous objection rule that our courts have carved out for closing arguments, this Court should not consider this issue.

"A contemporaneous objection is required to preserve issues for appellate review. 'Ordinarily, if an appellant fails to object the first time a statement is made, he or she waives the right to raise the issue on appeal.'" *Turner v. Med. Univ. of S.C.*, 430 S.C. 569, 590, 846 S.E.2d 1, 12 (Ct. App. 2020) (quoting *Scott v. Porter*, 340 S.C. 158, 167, 530 S.E.2d 389, 393 (Ct. App. 2000)).

Appellant seems to realize that he has a procedural hurdle here. He highlights a part of the record that suggests that his trial counsel emailed the judge a copy of *Fortune* while the deputy solicitor's arguments were underway. But an email is not an objection, and Appellant's came too late.

The statement that Appellant objects to took place early in the deputy solicitor's closing argument. But trial counsel for Appellant did not object immediately. Instead, counsel waited for the deputy solicitor to complete his closing argument, which runs for roughly 25 more pages of

transcript after that. Only after the court turned to the defense for its closing statement did counsel notify the trial court that there was an issue. Our state's preservation rules are meant to avoid that kind of late-breaking objection.

The State recognizes, of course, that litigants sometimes do not need a contemporaneous objection to preserve an alleged error on closing arguments. *See Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) ("[E]ven in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice."); *see also State v. Bennett*, 369 S.C. 219, 233 n.3, 632 S.E.2d 281, 289 n.3 (2006) (finding in a criminal case that it was not necessary to reach the contemporaneous objection issue).

But our supreme court has also held that this exception is limited. *See Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 256, 509 S.E.2d 269, 271 (1998) (finding that the exception is "narrow"); *id.* at 259, 509 S.E.2d at 272 ("[W]e now clarify that our holding in *Toyota* excuses the failure to make a contemporaneous objection only where the challenged argument constitutes abuse of a party or witness."). Not just any improper argument allows a party to bypass the rule; it is reserved for "flagrant cases where a vicious, inflammatory argument results in clear prejudice." *Toyota, supra*. That is not the case here.

More on this shortly, but it is not clear that the deputy solicitor's argument was an open-and-shut violation of *Fortune*, and the late objection was followed by a curative instruction from the trial court. Further, one of the concerns in *Toyota* was that some arguments are so outrageous that "it would be wholly unreasonable for any attorney to anticipate this type of abhorrent conduct." *Toyota*, 314 S.C. at 263, 442 S.E.2d at 615. That isn't the case here, not only because the deputy solicitor went on for some time after the alleged prejudicial comments—defense

counsel apparently had time to draft an email—but also because the deputy solicitor made comments somewhat resembling part of the comments he made before a second time.[5]

Appellant also notes that the trial court said that the Appellant was "protected on the record." But that came *after* the failure to contemporaneously object. Even if the trial court could decide on its own that the record is preserved, it cannot change whether the objection was contemporaneous or not after the fact.

As a result, this Court should find that Appellant's argument is not preserved for its review. But even if it finds otherwise, Appellant's argument has no merit.

B. There was no prejudice in this case because the deputy solicitor's comments here were not as problematic as those in *Fortune*, and the trial court gave a proper curative instruction.

Appellant asks for this Court to invoke *Fortune* and grant him a mistrial. But there's a problem: This case is not *Fortune*, and the trial court did in this case what our supreme court criticized the court in Fortune for failing to do.

In *Fortune*, the assistant solicitor contended in closing arguments that his job was "to present the truth." *Fortune*, 428 S.C. at 550, 837 S.E.2d at 40. After defense counsel's first objection, the assistant solicitor then proceeded to explain his responsibility to dismiss the charge if he thought it was unfounded and the obligation (so he said) to proceed with a case if he believed the defendant was guilty. *Id.* at 551, 837 S.E.2d at 40. The assistant solicitor added: "On the other hand, the defense attorneys' jobs are to manipulate the truth. Their job is to shroud the truth. Their

[5] The deputy solicitor later said: "Every question that Mr. Spencer asks, that his team asks, is designed not to get you to what really happened to Billy Jean Cross. It's designed to get you sidetracked. Keep that in mind as you're reviewing this evidence." (Tr. 2, p. 347). The State is not suggesting this argument is error, but it represents a second opportunity to object. Appellant's trial counsel apparently failed to anticipate the argument not once, but twice.

job is [to] confuse jurors. Their job is to do whatever they have to—without regard for the truth—to get a not guilty verdict." *Id.* (alteration in original).

That is not what the deputy solicitor said here. For one thing, the deputy solicitor did not explain to the jury that he had an obligation to dismiss the case if he thought it was unwarranted, something that troubled the *Fortune* Court. *See id.* at 553, 837 S.E.2d at 41 ("Courts have also condemned the specific misconduct in this case, when the prosecutor invokes his duty to dismiss unfounded cases and boasts of his responsibility to prosecute defendants the prosecutor knows to be guilty."). The deputy solicitor here described his job differently—"to bring you the evidence that you need to reach a verdict in this case." This is, in fact, what solicitors are supposed to do; it is essentially what all litigants (depending on the burden of proof) are supposed to do. It was not personally vouching for the State's case or arguing that if there was nothing to it, the deputy solicitor would have thrown it out.

True, the deputy solicitor did say that the defense team's job was "to represent [Appellant's] interest." Again, this happens to be true. The defense's job was also "to poke holes in the case, to poke holes in the evidence"—or create reasonable doubt. The arguments that the defense's goal was "not for you to understand what really happened to Billy Jean Cross" and that the defense was trying to "distract you, to try and get you confused about what really happened" come closer to the line set up in *Fortune*. But the deputy solicitor here did not outright state that the defense was trafficking in deceit. *Id.* at 554–55, 837 S.E.2d at 42 ("The assistant solicitor in this case also improperly characterized the role of defense counsel. We find this misconduct is also inexcusable.").

Appellant focuses on the deputy solicitor's remark that the defense was "trying to muddy the waters," invoking *United States v. Vaccaro*—a case that was cited by our supreme court in

Fortune. *See Vacarro*, 115 F.3d 1211, 1218 (5th Cir. 1997). And as our supreme court noted, the *Vacarro* Court found that "[t]he prosecutor's statement that defense lawyers 'muddle the issues' was clearly improper." *Vaccaro*, 115 F.3d at 1218. But again, look at the full context provided by the *Vacarro* Court:

> Referring to the defendant's arguments about the absent defendant Grittini and the use of Carroll as a witness, the prosecutor referred to an "empty chair defense," and told the jury that "[t]hat's what defense lawyers do. . . . They earn their living trying to muddle the issues. Trying to make it as fuzzy as possible. That's their job—I try to make it—"

Id.

If this Court does review this argument, there is a key distinction between this case and *Fortune*: In this case, the trial court gave a strong curative instruction. The *Fortune* Court found in that case was that the trial court's attempt at a curative instruction made things worse.

> The trial court stated, "I think what he was referring to was *there is* also *an obligation* on the Solicitor's Office beyond simply that of presentation." (emphasis added). The assistant solicitor had just told the jury he had an obligation "to present the truth," and the trial court responded by telling the jury yes, in fact, the solicitor does have "an obligation . . . beyond simply that of presentation." Then, immediately after the trial court's validation of the solicitor's "obligation" to be truthful, the assistant solicitor proceeded to inform the jury that, in fulfilling that obligation, if "I know the person has done something that I think the facts show they're guilty of, then I can't [dismiss the case]. I have to go forward with it."
>
> Then, when the assistant solicitor represented to the jury that defense lawyers "manipulate" and "shroud" the truth, and "do whatever they have to -- without regard for the truth," the trial court stated only, "*I don't think* that their job is to defraud the court or the jury."

Fortune, 428 S.C. at 560, 837 S.E.2d at 45. The trial court's curative instruction here was less qualified and more straightforward, telling the jury in simple terms to ignore what the deputy solicitor had said. "Ladies and gentlemen, one comment to you, any reference to 'muddying the

waters' or questions assigned to mislead the jury, those statements are not to be considered by you in your deliberations. Agree to [a] unanimous verdict in this case."

Look back at *Vaccaro*. There, after the defense attorney's objections, the trial court quickly admonished the jury that "the attorneys are obligated to represent their clients" and that "I caution you, as I have before, statements of attorneys are not evidence[.]" *Vaccaro*, 115 F.3d at 1218. That, the court found, was enough. "[W]here such an excessive statement comes in the heat of a closing argument in a hard-fought case, is objected to and immediately sustained, and subjected to an instant cautionary instruction to disregard it, it does not warrant reversal." *Id.* Here, if the Appellant's objection was not "immediately sustained" and the cautionary instruction was not "instant[ly]" given, that is because trial counsel chose to delay. When the judge was given an opportunity to act on the objection, he did.

As a result, if there was a violation of *Fortune* here, and if it was in fact preserved for this Court's review, it was properly handled by the trial court's curative instruction. Appellant's conviction should be affirmed.

CONCLUSION

The trial court's limitations on Appellant's cross-examination of the officer were narrowly drawn to keep out unfairly prejudicial evidence, and its curative instruction in response to the deputy solicitor's arguments was appropriate. For all the above reasons, Appellant's conviction should be affirmed.

Respectfully Submitted,

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