STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK LADON CLARK,

APPELLANT

APPELLATE CASE NO. 2013-002643

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in allowing the prosecutor to waive opening on the law during closing argument in violation of Appellant's right to a fair trial pursuant to the South Carolina Constitution and the United States Constitution?

STATEMENT OF THE CASE

On January 16, 2013, a Berkeley County grand jury indicted Appellant for assault and battery in the first degree (2013 – GS – 08 – 0035), unlawful possession of burglary tools (2013 – GS – 08 – 0036), and burglary in the first degree (2013 – GS – 08 – 0037). R.170. The prosecution represented by Colleen Taylor and Kendra Wilson called the case for trial before the Honorable Kristi Harrington and a jury on December 4, 2013. David Schwacke and Keisha White represented Appellant. R. 1 – 2. The jury found Appellant guilty as charged. R. 157, lines 1 – 12. Judge Harrington sentenced Appellant to ten years' imprisonment for assault and battery in the first degree, five years' imprisonment for unlawful possession of burglary tools, and seventeen years' imprisonment for burglary in the first degree. R. 167, lines 5 – 15; R. 172.

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

On October 20, 2012, Marion Whetsell's fiancée bleached one of the bathrooms in their mobile home. Having used the open window during the day to allow the fumes to escape, she decided to leave the window open overnight to further ventilate the room. R. 76, lines 15-19; R. 78, lines 9-12. During the night, Whetsell went to his kitchen to get medicine for a headache. While reaching for the medicine bottle, he saw movement out of the corner of his eye. Upon realizing that a stranger was in his house, he began screaming. R. 51, line 13 – R. 52, line 2; R. 54, lines 3-9; R. 63, lines 13-19; R. 74, lines 2-5. Whetsell and the stranger, who was later identified as Appellant, then fought. R. 54, line 10 – R. 55, line 3; R. 55, lines 19-25; R. 57, lines 12-19. While the two were fighting, Whetsell's fiancée awoke and entered the room where the struggle was ongoing. R. 55, lines 6-18; R. 73, lines 3-9. Whetsell's dog attacked Appellant while Whetsell's fiancée called 911. R. 57, lines 1-11; R. 73, lines 17-24; R. 74, lines 10-23. When Appellant freed himself from Whetsell's grasp, Whetsell's fiancée grabbed him by the pants. R. 58 R. 57, line 20 – R. 58, line 12. However, Appellant managed to escape the house by removing his pants. R. 70, lines 8 - R. 71, line 20; R. 75, line 4 – R. 76, line 9. Whetsell, armed with a knife, chased Appellant into the night. R. 58, line 21 – R. 59, line 5. Whetsell flagged down an approaching police officer. R. 59, lines 6-12; R. 88, lines 18-22. Eventually, the officer detained and arrested Appellant, who had on no pants or shoes. R. 59, lines 6-12; R. 70, line 21 – R. 71, line 20; R. 89, lines 1-10; R. 93, lines 14-16.

Appellant testified in his defense. Appellant admitted to being in Whetsell's home without permission. R. 117, lines 1-3. However, Appellant was unaware of how he entered the home or why he was there. R. 117, lines 4-23; R. 120, lines 19-21; R. 121, lines 22-24.

Importantly, Appellant denied any intention of committing a crime inside Whetsell's home. R. 117, line 24 – R. 118, line 2; R. 118, lines 14-17. Appellant explained that he had been drinking alcohol and smoking marijuana earlier that evening.[1] Unbeknownst to Appellant, his marijuana had been laced with a white crystal substance. This intake of drugs and alcohol resulted in his irrational and unusual behavior. R. 114, line 13 – R. 116, line 10.

[1] According to the arresting office, Appellant was clearly under the influence of drugs and/or alcohol. R. 94; lines 8-18.

ARGUMENT

The trial court erred in allowing the prosecutor to waive opening on the law during closing argument violating Appellant's right to a fair trial as guaranteed by the South Carolina Constitution and the United States Constitution.

Relevant facts

At the conclusion of the presentation of evidence, the prosecutor indicated her intention to waive opening on the law during closing argument. Appellant objected and requested the prosecution "be required to open on the law for closing." R. 130, lines 12 – 15. Ruling on Appellant's motion, the trial judge referred to Rule 43(j) of the Rules of Civil Procedure, but made provided no further explanation of the impact of Rule 43(j). Then, without further elaboration, the judge denied Appellant's request that the solicitor be required to open on the law for closing. R. 131, lines 7 – 12. Thereafter, Appellant delivered his closing argument to the jury. R. 131, line 25 – R. 136, line 16. Following Appellant's closing argument, the prosecutor closed on the law and the facts in a single argument. R. 136, lines 17 – R. 142, line 17.

Discussion

The Rules governing procedures in South Carolina's courts, the customs and practices, and relevant case law support Appellant's request to require the prosecutor to open on the law prior to the defendant's closing argument. First, an examination of the evolution of the governing rules lends support to Appellant's contention. In State v. Atterberry, 129 S.C. 464, 124 S.E. 648, 651 (1924), the South Carolina Supreme Court interpreted Circuit Court Rule 59, which provided: "the party having the opening in argument shall disclose his entire case and on his closing shall be confined strictly to a

reply to the points made, and authorities cited by the opposite party." Based upon the clear language of Rule 59, the Court held the trial judge erred in failing to require the solicitor to make the opening speech to the jury before the defendant's attorney was required to make his argument. Id. The Court explained that "[t]he wisdom of this rule is seen most clearly in a case in which the state relies upon circumstantial evidence. It may be that the circumstances are to all appearances disconnected, and yet an able prosecuting attorney, but for this rule, would be able to present a connection, little suspected by the defendant or his counsel." Id. Allowing the prosecutor to reserve his argument for the closing speech would prevent a defendant from showing any defect in the chain of evidence. Id. According to the Court, the Rule was "clear and mandatory and a departure from it reversible error." Id.

In State v. Lee, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971), overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), the South Carolina Supreme Court noted that subsequent to Atterberry, supra, Rule 59 had been changed to Rule 58 and read as follows: "'the party having the opening in an argument shall disclose fully the law upon which he relies if demanded by the opposite party.'" Therefore, the trial judge was correct in holding that a solicitor was no longer required to make an opening argument to the jury on issues of fact based on the change in the plain language of the rule. Id.

Subsequently, the Supreme Court addressed a solicitor's closing argument in State v. Rodgers, 269 S.C. 22, 235 S.E.2d 808 (1977). Specifically, the Court held that a solicitor "is entitled to open the closing arguments to the jury unless the defendant has offered no evidence." Id. at 24, 235 S.E.2d at 809 (citing State v. Gellis, 158 S.C. 471,

155 S.E. 849 (1930)). The Court further noted that "[t]he right to open and close the argument to the jury is a substantial right, the denial of which is reversible error." Id. at 24-25, 235 S.E.2d at 809. Thus, the Court held "that such right cannot be limited solely by custom or practice." Id. at 25, 235 S.E.2d at 809. Nothing in Rule 58 limited the initial closing argument to the law of the case; rather, the rule simply required a discussion of the law to be included in such argument if demanded by the defendant. Additionally, the Court affirmed the holding of Lee, supra, that a solicitor is not required to make an opening argument to the jury on issues of fact, but may do so in his discretion. Id.

South Carolina's Rules of Court have changed since the 1970s. Now, South Carolina's Rules of Criminal Procedure provide little guidance regarding the mode of trial. However, the Rules of Criminal Procedure provide that where no provision is made by statute or the Rules of Criminal Procedure, "the procedure shall be according to the practice as it has heretofore existed in the courts of the state." Rule 37, SCRCrimP. Thus, it is necessary to look beyond the criminal rules to answer the question presented.

Pursuant to the South Carolina Rules of Civil Procedure,

> [t]he moving party upon a motion shall have the right to open and close argument, and the plaintiff shall have the right to open and close upon the trial; except that a party admitting the adverse party's claim in his pleading, and taking upon himself the burden of proof, shall have the like privilege. The party having the right shall be required to open in full, and in reply may respond in full but may not introduce any new matter.

Rule 43(j), SCRCP. The Rule appears to embody the requirements of prior Rules 58 and 59 of the Circuit Court Rules. Based upon a reading of the plain language of the rule, the state had the right to open and close upon the trial and in doing so, the state was required to open in full and close only in reply to Appellant's argument.

An examination of South Carolina's customs and practices as revealed through the case law also supports Appellant's argument. In State v. Huckie, 22 S.C. 298, 299-300, 1885 WL 3590 (1885), the South Carolina Supreme Court recognized the long-standing practice in this state that the defendant in a criminal case was entitled to last argument when the defendant presented no evidence. See also, Gellis, supra. The Gellis Court held that "if a defendant offers any evidence on trial of the case, the state is not deprived of its general right to the opening and concluding arguments." Id. at __, 155 S.E. at 855. In State v. Garlington, 90 S.C. 138, 72 S.E. 564, 566 (1911), the Court held that where a defendant has the right to open and reply in argument, the defendant may waive either or both of those rights. Thus, South Carolina's long-standing practice and custom for the mode of criminal trials is that when the defendant presents evidence, the state must present two closing arguments.

The applicable rule its evolution further demonstrate that the state must open on the law because the plain language requires the party having the right to open and close, as the state did at Appellant's trial, to open in full and reply only during the closing. Combining the practice and customs of South Carolina's criminal trials with the applicable rule amply supports Appellant's argument that the state could not waive opening during the closing argument. The trial judge violated Appellant's rights to a fair trial by not requiring the state to open on the law, which would have permitted Appellant an opportunity to learn of the law under which the prosecutor sought Appellant's conviction.

CONCLUSION

Appellant respectfully requests this court reverse his convictions and sentences due to the trial court's error in permitting the prosecutor to waive opening on the law during closing argument.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of July, 2014.

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JUL 17 2014
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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Derrick Ladon Clark states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge Kristi Lea Harrington, which was held on December 4, 2013, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Derrick Ladon Clark.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of July, 2014.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Entire trial transcript;
(2) True-billed indictments;
(3) Sentence sheets

I certify that this designation contains no matter which is irrelevant to this appeal.

July 17th, 2014

Susan B. Hackett

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

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

July 17, 2014

Susan B. Hackett

Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and ROA in the above referenced case has been served upon Salley Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Derrick Ladon Clark, #358043, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 17th day of July, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of July, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.